NATIONAL NATIVE TITLE TRIBUNAL

***Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/Globe Uranium Ltd*, [2007] NNTTA 37 (14 May 2007)**

Application No: WO06/338

IN THE MATTER of the *Native Title Act* 1993 (Cth)

- and -

IN THE MATTER of an inquiry into an expedited procedure objection application

Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants (WC99/24) (native title party)

- and -

The State of Western Australia (Government party)

- and -

Globe Uranium Ltd (grantee party)

DETERMINATION THAT THE ACT IS AN ACT ATTRACTING THE EXPEDITED PROCEDURE

Tribunal: Hon C J Sumner, Deputy President
Place: Perth
Date: 14 May 2007

Catchwords: Native title – future act – proposed grant of exploration licence – exploration for uranium – expedited procedure objection application – whether act is likely to interfere directly with the carrying on of community or social activities – whether act is likely to interfere with sites of particular significance – whether act is likely to cause major disturbance to land or waters – whether the fact that the exploration is for uranium affects consideration of s 237 – expedited procedure attracted.

Legislation: *Native Title Act* 1993 (Cth), ss 24MB(1), 24 MD(6A), 26(1)(c), 29, 151(2), 237
Aboriginal Heritage Act 1972 (WA), ss 5, 16, 17, 18, 62
Mining Act 1978 (WA), ss 8, 20(5), 57A(1), 57(2aa), 63, 66
Mining Regulations 1981 (WA), 21A
Mines Safety and Inspection Act 1994 (WA) s 4
Mines Safety and Inspection Regulations 1995 (WA), Part 16 – 16.7, 16.8, 16.9, 16.12, 16.16, 16.18, 16.19, 16.33

Cases:	*Banjo Wurrunmurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Monte Ling, Kevin Peter Sibraa,* NNTT WO05/756, [2007] NNTTA 21 (16 March 2007), Hon C J Sumner
	Champion v Western Australia [2005] NNTTA 1; (2005) 190 FLR 362
	Cheinmora and Others v Heron Resources Ltd and Another [2005] NNTTA 99; (2005) 196 FLR 250
	Dann v Western Australia [1997] FCA 332; (1997) 74 FCR 391
	Little v Western Australia [2001] FCA 1706; [2001] AILR 50; 6(4) p 67
	Little & Others v Oriole Resources Pty Ltd [2005] FCAFC 243
	Maggie John and Others on behalf of Malarngowem/Western Australia/Ord Resources Pty Ltd, NNTT WO06/103 and WO06/197, [2007] NNTTA 29 (29 March 2007), Hon C J Sumner
	Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner
	Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd, NNTT WO02/369, [2003] NNTTA 62 (9 April 2003), J Sosso
	Smith v Western Australia [2001] FCA 19; (2001) 108 FCR 442
	Walley v Western Australia [2002] NNTTA 24; (2002) 169 FLR 437
	Wilma Freddie and Others on behalf of the Wiluna Native Title Claimants/Western Australia/Asia Investment Corporation Pty Ltd, NNTT WO03/498, [2004] NNTTA 30 (21 April 2004), Hon C J Sumner
	Young v Western Australia [2001] NNTTA 42; (2001) 164 FLR 1
Hearing dates:	27 October 2006, 8 December 2006, 25 January 2007
Counsel for the native title party:	Mr Malcolm O'Dell, Ngaanyatjarra Council (Aboriginal Corporation)
Representatives of the Government party:	Mr Trevor Creewel, State Solicitor's Office Mr Phil Mirabella, Department of Industry and Resources
Representative of the grantee party:	Mr Shannon McMahon, McMahon Mining Title Services Pty Ltd

REASONS FOR DETERMINATION

[1] On 29 March 2006, the Government party gave notice under s 29 of the *Native Title Act* 1993 (Cth) ('the Act') of its intention to grant exploration licence E69/2119 ('the proposed licence') to Globe Uranium Ltd ('the grantee party') and included in the notice a statement that it considered that the grant attracted the expedited procedure.

[2] The proposed licence comprises an area of some 30.9 square kilometres, and is located 124 kilometres north easterly of Wiluna in the Shire of Wiluna. The registered native title claim of the Wiluna People (WC99/24 – registered from 24 September 1999) entirely overlaps the proposed licence.

[3] On 1 August 2006, Wilma Freddie, Kenny Farmer, Alan Ashwin, Judy Ashwin, Barry Abbott, Norman Thompson, Mickey Wongowol, Dusty Stevens, Friday Jones, Les Tullock, Joyce Tullock, Billy Patch, (Name withheld for cultural reasons), Jimmy Morgan and Kitty Richards representing the Wiluna Native Title Claimants ('the native title party') made an expedited procedure objection application to the Tribunal.

[4] In accordance with standard practice in expedited procedure objection matters, the Tribunal gave directions to the parties to provide contentions and documents for an inquiry to determine whether or not the expedited procedure is attracted. These directions allow a four month period, after the s 29 closing date for the lodgement of objections, for parties to discuss the possibility of reaching an agreement which could lead to disposal of the objection by consent. At the directions hearing of 8 December 2006 it became apparent that resolution via agreement was not a possibility and with the consent of all parties directions were subsequently amended to enable contentions from all parties to be provided.

[5] On 25 January 2007, a Listing Hearing was conducted at which contentions and evidence submitted by the parties were considered. Directions were made for the filing of additional contentions, evidence and replies. I determined that unless the parties so requested, or further clarification of the contentions or evidence was required, no further hearings would be conducted and I would determine the matter 'on the papers'. I am satisfied that the objection can be adequately determined in this manner (s 151(2) NTA). The filing of additional contentions, evidence and replies, required by the directions, was completed on 13 March 2007. Further submissions were sought from the Government party on 13 April 2007, which were provided on 20 April 2007.

Legal principles

[6] Section 237 of the Act provides:

> ***'237 Act attracting the expedited procedure***
>
> A future act is an ***act attracting the expedited procedure*** if:
>
> (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
>
> (b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and
>
> (c) the act is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.'

[7] In *Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437 ('*Walley*'), the Tribunal considered the applicable legal principles (at [7]–[23]) and the nature of exploration and prospecting licences and conditions to be imposed including what activities are permitted by it and what limits are placed on those activities (at [24]–[35]). I adopt those findings for the purposes of this inquiry with the modification referred to below. With respect to issues arising under s 237(b) I also adopt the findings of the Tribunal in *Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon*, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner ('*Maitland Parker*') at [31–[41].

[8] Since the determination in *Walley* the *Mining Act* has been amended. I note that the maximum size of an exploration licence may be increased beyond 70 blocks to not more than 200 blocks in areas designated by the Minister (ss 57A(1), 57(2aa)). More significantly for present purposes s 63 has been amended by the addition of a new sub-section 63(aa). That section relevantly now reads:

> **'63. Condition attached to exploration licence**
> Every exploration licence shall be deemed to be granted subject to the condition that the holder thereof will explore for minerals and —
>
> …
>
> (aa) will not use ground disturbing equipment when exploring for minerals on the land the subject of the exploration licence unless —
>
> (i) the holder has lodged in the prescribed manner a programme of work in respect of that use; and
>
> (ii) the programme of work has been approved in writing by the Minister or a prescribed official;

> (b) will fill in or otherwise make safe to the satisfaction of a prescribed official all holes, pits, trenches and other disturbances to the surface of the land the subject of the exploration licence which are —
>
> (i) made while exploring for minerals; and
>
> (ii) in the opinion of the prescribed official, likely to endanger the safety of any person or animal; and
>
> (c) will take all necessary steps to prevent fire, damage to trees or other property and to prevent damage to any property or damage to livestock by the presence of dogs, the discharge of firearms, the use of vehicles or otherwise.'

[9] Section 8 of the *Mining Act* defines 'ground disturbing equipment' as:

> (a) mechanical drilling equipment;
> (b) a backhoe, bulldozer, grader or scraper; or
> (c) any other machinery of a kind prescribed for the purposes of this definition;'

[10] The office of the Environmental Officer in the Environment Division of the Department of Industry and Resources ('DoIR') is the prescribed official for the purposes of s 63 of the *Mining Act* (Regulation 21A, *Mining Regulation* 1981).

[11] Standard Condition (4) referred to in *Walley* (and which is imposed on the grant of all exploration licences) has been modified slightly and now reads:

> '4. Unless the written approval of the Environmental Officer, DoIR is first obtained, the use of drilling rigs, scrapers, graders, bulldozers, backhoes or other mechanised equipment for surface disturbance or the excavation of consteans is prohibited. Following approval, all topsoil being removed ahead of mining operations and separately stockpiled for replacement after backfilling and/or completion of operations.'

[12] Standard Condition (2) now contains an additional requirement that backfilling and rehabilitation of the land must now be carried out no later than six months after excavation unless otherwise approved by the Environmental Officer, DoIR.

Evidence in relation to the proposed act

[13] Government party documentation establishes the underlying land tenure of proposed licence E69/2119 to be entirely pastoral lease 3114/1049, held by K A Shaw and D M Martin. There are no Aboriginal communities within the vicinity of the proposed licence.

[14] As of 27 March 2007, DoIR's Quick Appraisal documentation reveals 14 'dead' mining tenements overlapping the proposed licence, active variously between 1959 and 1998. There are no current or pending tenements recorded as overlapping the subject area but

Tengraph mapping provided by the Government party reveals a number of pending and granted exploration licences immediately adjacent the proposed licence.

[15] The grant of the proposed licence will be subject to the standard conditions, as modified since the determination in *Walley*, imposed on the grant of all exploration licences in Western Australia (see *Maitland Parker* at [21] Conditions 1–4). Additional conditions require that the grantee provide notification to the pastoral lessee prior to undertaking airborne geophysical surveys or ground disturbing activities, and notification of the grant of the licence or registration of a transfer of ownership of it (Conditions 5–6). The endorsements (which differ from conditions in that a breach of them does not render the grantee liable to forfeiture of the licence) also draw the grantee party's attention to the provisions of the *Aboriginal Heritage Act* 1972 (WA) ('AHA'), the *Environmental Protection Act* 1986 and the *Environmental Protection (Clearing of Native Vegetation) Regulations* 2004.

[16] The Government party will also impose the following additional condition on the grant of the licence.

> 'In respect of the area covered by the licence the Licensee, if so requested in writing by the Wiluna People, the applicants in Federal Court application no. WAD 6164 of 1998 (WC99/24), such request being sent by pre-paid post to reach the Licensee's address McMahon Mining Title Services Pty Ltd, PO Box 8638, Perth Business Centre, PERTH WA 6849 not more than ninety days after the grant of this licence, shall within thirty days of the request execute in favour of the Wiluna People, the Regional Standard Heritage Agreement ("RSHA") endorsed by peak industry groups and the Ngaanyatjarra Land and Sea Council (sic).'

[17] Searches of the Department of Indigenous Affairs' Register of Aboriginal Heritage Sites provided by the Government party reveal no registered Aboriginal sites under the AHA located within the area of the proposed licence.

Uranium exploration and s 237

Native title party's contentions

[18] One of the principal issues which arises in this inquiry is whether the fact that the exploration is for uranium makes any difference to the consideration of s 237(c) in particular and to some extent s 237(a). The native title party contends (Statement of Contentions – 2 January 2007) in respect of s 237(c) that there are no regulations or guidelines that directly regulate the exploration for uranium including the increased risk of radioactive contamination. The native title party relies on the grantee party's admission (para 16 –

Statement of Contentions, 16 December 2006) that the major health issue associated with exploring for low grade uranium ore is ingestion of dust contaminated with radioactive material. The native title party then says that dust contaminated with radioactive material remains radioactive for a considerable period of time (in excess of 100,000 years) and that contamination for this period would constitute major disturbance to the land from the view point of the general community.

Grantee party's contentions

[19] The grantee party has appended to its Statement of Contentions copies of the First Year Work Programme, a sample of the Radiation Safety Manual which it says is complied with during all uranium exploration by the grantee party and Uranium Guidelines which either in this or a similar form are complied with. Exploration for calcrete hosted uranium will take place on the proposed licence, and the work programme for the first year of exploration indicates that the following activities, some of which are ground disturbing will take place:

- Geological activities – sampling;
- Geochemical activities – sampling; and
- Non-core drilling – RAB drilling.

On the basis of the first year work programme it is to reasonable to infer that subsequent activities will also involve ground disturbing activities as permitted under s 66 the *Mining Act* 1978 (WA). As previously observed (para [7]) the nature of rights and activities permitted on the grant of an exploration licence have been fully dealt with in *Walley* at [24]-[35]. These findings include a general description of what may be involved in exploration activities (at [29]).

[20] The grantee party contends that uranium exploration is heavily regulated and that compliance with the following Acts and Guidelines is required when exploring for uranium in Western Australia:

- *Radiation Safety Act* 1975 (WA);
- *Atomic Energy Act* 1953 (Cth);
- *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth);

- Code of Practice and Safety Guide – Radiation Protection and Radioactive Waste Management in Mining and Mineral Processing (2005), Radiation Protection Series No 9;
- Code of Practice Safe Transport of Radioactive Material, Radiation Protection Series No 2; and
- Code of Practice for the Near-Surface Disposal of Radioactive Waste in Australia (1992), Radiation Health Series No 35.

[21] The grantee party further contends that it complies with all 'governmental requirements' and conducts it's 'exploration in accepted best practices', including complying with the Radiation Safety Manual and Uranium Guidelines. In it's contentions the grantee party undertakes:

- to be bound by relevant legislation and to work according to relevant guidelines regarding radioactive substances as defined by authorities such as the Australian Radiation Protection and Nuclear Safety Agency.;
- to have a trained Radiation Safety Officer (as defined by the Australian Nuclear Science and Technology Organisation training standards) on site at all times;
- that all employees on site will receive general radiation safety training and that it will maintain a safe working environment for all employees;
- to establish procedures that ensure there is as little exposure as possible of the workforce and of the public to dust contaminated with radioactive material during exploration; and
- to return any site of ground disturbance to a condition prescribed by relevant regulatory guidelines for environmental rehabilitation to its original state or so that it poses no radiation threat to the public.

[22] I can say at the outset that on the evidence provided there is no basis to rebut the normal presumption of regularity or doubt the grantee party's undertaking to be bound by relevant legislation and to work according to relevant guidelines regarding radioactive substances. Its contentions and evidence demonstrate a knowledge of the requirements although not all the legislation it refers to is directly relevant to this case. The most relevant document is the Code of Practice and Safety Guide – Radiation Protection and Radioactive

Waste Management in Mining and Mineral Processing (2005), Radiation Protection Series No 9 which appears to provide a basis for the Government and grantee parties' uranium mining procedures and guidelines referred to below.

Government party's contentions

[23] The Government party's contentions relevant to the regulatory regime as applied to uranium mining and exploration can be summarised as follows. They are based on affidavits of Andrew Bartleet, Acting General Manager, Minerals Branch of the Environment Division of DoIR and Michael Rowe, Director of Health Management, Resources Safety Division ('RSD') of the Department of Consumer and Employment Protection ('DoCEP') in Western Australia.

[24] Condition 4 of the standard conditions referred to above provides that mechanised equipment with which to undertake ground disturbing activities may not be utilised without the written approval of the Environmental Officer, DoIR, and is given effect to by completion of a 'Program of Work' ('POW') by the grantee party, as required under s 63(aa) of the *Mining Act*. Amongst the questions posed in the POW is one pertaining to the likelihood of encountering 'Radioactive Material' during the exploration programme. If the response is yes, the following requirement is detailed:

> 'If yes; A Radiation Management Plan is required that address (i) the identification and monitoring of radioactive material, (ii) management to minimize potential radioactive contamination, and (iii) management to minimize human exposure to radioactive material. Please consult with Department of Consumer and Employment Protection (Occupational Health Group, 9222 3376) and the Radiological Council (9346 2260) in preparation of this plan.'

[25] The RSD of the DoCEP is the regulator of occupational health and safety for the mining industry in Western Australia pursuant to the provisions of the *Mines Safety and Inspection Act* 1994 (WA) ('MSI Act'). The Director of Health Management employed by the RSD is the officer delegated with the authority to approve a Radiation Management Plan ('RMP'). RSD publishes a Guideline entitled 'Preparation of a Radiation Management Plan' ('Guideline'). A copy of the 'current' version (December 1997) of the Guideline, which appears to be released under the authority of DoIR, is attached to Mr Rowe's affidavit

[26] Mr Rowe says that for a RMP to be approved it must demonstrate that there are adequate measures taken to control the exposure of employees and members of the public to radioactive materials generated through mining operations (which is defined in s 4 of the

MSI Act as including exploration operations) and which must be below the dose level set by *Mines Safety and Inspection Regulations* 1995 (WA) ('MSI Regulations') and as low as reasonably practicable. Mr Rowe deposes in his affidavit that the radiation dose limit for members of the public as a consequence of exploration activities would be no more than one millisievert a year (Reg 16.19 MSI Regulations) in addition to what is termed 'background radiation'. Mr Rowe further deposes that the 'Report of the United Nations Scientific Committee on the Effects of Atomic Radiation to the General Assembly' (1994) says that the level of natural exposure to radiation varies around the globe and the average radiation dose from natural sources (annual effective dose) is 2.4 millisieverts and the naturally occurring 'background radiation' typically varies between one and ten millisieverts globally on an annual basis.

Community or social activities (s 237(a))

[27] The Tribunal is required to make a predictive assessment of whether the grant of the proposed licence and activities undertaken pursuant to it is likely to (in the sense of there being a real risk) interfere with the community or social activities of the native title party (see *Smith v Western Australia* [2001] FCA 19; (2001) 108 FCR 442 ('*Smith*') at 449-450, ([23])). Direct interference involves an evaluative judgement that the future act is likely to be the proximate cause of the interference and must be substantial and not trivial in its impact on community or social activities (*Smith* at 451, ([26])). The assessment is also contextual taking account other factors which may already have had an impact on a native title party's community or social activities (such as mining or pastoral activity) (*Smith* at 451, ([27])).

[28] As indicated above, the evidence establishes that some mining and exploration activity has occurred in the vicinity of E69/2119, although the most recent activity in the area overlapping the proposed licence appears to have ceased in or around 1998. The historical nature and extent of this activity, which is not of a large scale, does not suggest that it will have interfered with the community or social activities of the native title party to any appreciable extent and no evidence is provided to indicate that it did.

[29] The Government party relies on relevant aspects of its regulatory regime under the *Mining Act* 1978 (WA), including the provisions of s 63 and conditions to be imposed on exploration licences, s 20(5) in relation to pastoral leasehold areas and the additional conditions/endorsements outlined above, to contend that there is not likely to be direct interference with the carrying on of community or social activities by the native title party in

relation to the area of land concerned. I have previously found and confirm that s 20(5) in relation to pastoral leases is of little assistance to the Government party (*Walley* at [37]).

[30] The native title party has only provided limited evidence to substantiate its contentions that there is a community of native title holders who conduct activities in accordance with their native title rights to do so. The evidence in the video referred to below provides some evidence of activity in hunting and preparation of wildlife for cooking but there is no evidence of the nature and frequency of this or other community or social activities that occur in this area. The evidence of contemporary social and community activities in the subject area is very limited and certainly much less than was found to exist in *Maggie John and Others on behalf of Malarngowem/Western Australia/Ord Resources Pty Ltd*, NNTT WO06/103 and WO06/197, [2007] NNTTA 29 (29 March 2007), Hon C J Sumner ('*Malarngowem*') (at [19]-[24]). The native title party's Form 4 objection application says that the objectors conduct social and community activities over the area of the proposed licence including hunting, gathering and cultural activities. The native title party further says that 'there is a community of native title holders who conduct activities in accordance with their native title right to do so in the tenement area and the totality of that community of native title holders are more fully described in the Wiluna Claim', but the native title party concedes that there is 'no physical Aboriginal community at or in the vicinity of the Tenement Area in the sense that no Aboriginal community lives there permanently'. The list of registered native title rights and interests include rights which may manifest themselves in social and community activities but it is established law that the Tribunal does not assume that such activities occur uniformly across the whole claim area. In objection matters there needs to be evidence of what community or social activities are carried out which may be affected by exploration. There is virtually no evidence of that kind in this matter which substantiate the contentions made.

[31] The native title party also has asserted (Objector's Statement of Contentions in Reply - para 25) that the native title party comprises 'members of the public who will be particularly exposed to radiation, especially the ingestion of particles, because of both where they live and aspects of their traditional way of life, such as cooking in the ground, camping on the ground, allowing their children to play in the dirt and consuming animals and plants from the area of the proposed exploration'. In its Statement of Contentions (para 16), the grantee party has accepted 'that the major health issue associated with exploring for low grade uranium ore is

ingestion of dust contaminated with radioactive material', and in acknowledging this undertakes to 'establish procedures that ensure there is as little exposure of the workforce and of the public to dust produced during exploration for uranium as possible'. These procedures appear to be largely contained within the company's own Radiation Safety Manual, a draft copy of which is appended to Globe Uranium's Statement of Contentions. The contents of the Radiation Safety Manual are principally focused on the safety of employees but the work procedures relating to 'environmental contamination control' and 'site departure clearance checks' provide insight into the methods to be employed by the grantee to ensure public exposure is also minimal; for example, all 'excess loose mineralized material' to be buried to avoid dispersion of contamination, and 'personal tools, heavy equipment, vehicles, drill rigs' and personnel not to go off site without being washed and then cleared for contamination and formally recorded as such.

[32] I repeat that I am satisfied that the grantee party is aware of its responsibilities to ensure that uranium exploration is carried out in accordance with practices which minimise the exposure of its employees and members of the public to health risks from radioactive substances and within acceptable levels. Again, while the native title party has contended that its traditional way of life will be affected by exposure to radiation, it has not provided any evidence of the frequency or nature of such activities in or around the area where exploration will take place. Even if it did, it could not automatically be said that these activities would be interfered with by the proposed exploration activities.

[33] The native title party also contends that there is an absence of information regarding the enforcement of any regulatory regime governing radioactive contamination and cites as one example the difficulties inherent in identifying 'critical groups'. The RMP Guideline say:

> '**2.5 Critical Group Information**
>
> The likely critical groups of the public within a 5 km radius of the mine should be indicated and the location of these groups shown on a suitable location plan. The size and demographics of the critical groups should also be briefly described. If there are no actual groups within 5 km, indicate the location of the closest group'.

[34] The native title party contends that the Wiluna People are 'nomadic and transient' which means that there would be difficulties for the grantee party to identify which of the Wiluna claim group would be included in the 'critical group'. It then says that negotiations with the native title party would be necessary to ensure that the Guidelines are complied with

and the RMP properly prepared. I accept that there are Aboriginal people who have a lifestyle which is nomadic and transient but again there is no specific evidence to support the native title party's contention in this case. It can be said that the requirement to ascertain the critical groups within 5 kilometres does not sit easily with groups or families of native title holders who may be travelling through the area in the exercise of their native title rights and interests but are more permanently located at say Wiluna. However, the native title party has provided very limited evidence of how their nomadic or transient lifestyle manifests itself in the carrying out of their community or social activities in and around the area of the proposed exploration licence such as the frequency of visits and number of people involved. It is perhaps conceivable that if there were members of the claim group living nearby to the proposed exploration area, then the additional measures needed for uranium exploration to ensure that they were protected from radioactive contamination might have a greater impact on their community or social activities than in ordinary exploration. But there is no evidence to suggest that this is the case here. Again, I accept that the grantee party is aware of the issues germane to radiation exposure and has stated that it will put into place appropriate procedures to deal with potential contamination, including submitting (and gaining approval for) it's RMP. Furthermore, the uncontradicted evidence of Mr Rowe is that radiation dose limits for uranium exploration would be within acceptable limits given the level of background radiation which can vary substantially.

[35] The native title party's contentions disclose that the objector has genuine concerns about radiation exposure, but in the absence of anything but very scant evidence as to the native title party's activities in the subject area and in the face of details of the Government party's regulatory regime and grantee party's intentions I am unable to make a finding that the community or social activities would be interfered with whether or not uranium was the exploration target. This finding conforms with most recent cases (*Malarngowem* is an exception) where the evidence of the nature and extent of community or social activities has not been sufficient to substantiate a finding that mineral exploration would interfere with them.

[36] The Tribunal must also have regard to the fact that access to the area would be limited to the area in which exploration is taking place and would be temporary. While the total area of the proposed licence is 30.9 square kilometres ground disturbing exploration is likely to occur over a smaller area at any one time. Further, the area of the Wiluna claim is

approximately 47,596 square kilometres, much larger than the proposed licence area, thus making it less likely that exploration on the licence area will impact on any community and social activities which are carried out (*Cheinmora and Others v Heron Resources Ltd and Another* [2005] NNTTA 99; (2005) 196 FLR 250 (‘*Cheinmora*’) at [31] citing *Robin Boddington & Ors (Wajarri)/Western Australia/Bacome Pty Ltd*, NNTT WO02/369, [2003] NNTTA 62 (9 April 2003), J Sosso (at [43]-[44])).

Sites of particular significance (s 237(b))

[37] The issue the Tribunal is required to determine is whether there is likely to be (in the sense of a real risk of) interference with areas or sites of particular (i.e. more than ordinary) significance to the native title party in accordance with their traditions. There are no sites recorded on the Register kept under the AHA within or overlapping the proposed licence, but this does not mean there may not be other sites or areas of particular significance over the area of the proposed licence or in the vicinity. The Register does not purport to be a record of all Aboriginal sites in Western Australia and the Tribunal will consider whether there is evidence to support the existence of relevant sites in particular matters. The AHA, subject to its terms, protects all Aboriginal sites, whether on the Register or not.

[38] The map produced by the Tribunal’s Geospatial Unit and provided to parties records a number of sites on the Register but all are some distance away from the proposed licence area. The nearest registered sites are identified as follows:

- Site ID 2116 - Windich Springs – mythological, man-made structure, artefact/scatters, plant resource and camp – Permanent Register, Open access, no restrictions – located some 10 kilometres north-north-west of E69/2119
- Site ID 2862 – Windich Rock Wall – man-made structure – Interim Register, Open access, no restrictions – located adjacent Windich Springs, approximately 11 kilometres north-north-west of E69/2119.

[39] The native title party contends that there is a site of particular significance to them in accordance with their traditions within the proposed licence area. This site of particular significance is identified as the Tjukurrpa (dreaming track) of a mythical being. The evidence in support of its contentions was provided in a CD video in which members of the native title party describe the nature of the site and two affidavits of Doctor William Henry Kruse (dated 9 February 2007). The Tjukurrpa is a men’s only story and to facilitate the

receipt of this gender restricted evidence the Tribunal made directions pursuant to section 155 of the Act that documents relating to this issue be kept confidential by the Tribunal, the grantee party and the Government party; not be disclosed by them to any other person; and not be disclosed to any female staff of the Tribunal, the grantee party or the Government party, but may be disclosed where necessary to male staff of the Tribunal, the grantee party or the Government party. The evidence was to be provided in a way that maintained the confidentiality provided for in the directions.

[40] Dr Kruse has a doctor of Philosophy Degree in Social Anthropology and has since January 2004 been employed by the Ngaanyatjarra Council (Aboriginal Corporation) ('Ngaanyatjarra Council') as a Senior Anthropologist. During this time he has been involved in the supervision or the undertaking of a considerable number of heritage surveys in the Wiluna area and has been involved in conducting native title research with the Wiluna claimants (and others) for the past three years. I am satisfied that Dr Kruse has the relevant expertise to give the evidence contained in his affidavits including evidence about the Tjukurrpa story and its relationship to the native title party's traditional law and custom.

[41] The Government party queried the quality of the video produced and the corroborative evidence given by Dr Kruse. However no evidence was produced to directly contradict the evidence of Dr Kruse and the members of native title party claim group and I am satisfied that I can rely upon it.

[42] Dr Kruse deposes that on 15 November 2006 he undertook a field trip to Windich Springs and the proposed licence area with persons he describes as senior initiated male Wiluna claimants. The persons who accompanied him were Billy Atkins, Stewart West, Friday Jones, Eddie Redmond, Forkey Wongowol, Jimmy Morgan and Cyril Bingham. Malcolm O'Dell and Katherine Hill, solicitors from the Ngaanyatjarra Council, and Andrew Bowden, an independent consultant, were also in attendance.

[43] Mr Friday Jones and Mr Jimmy Morgan are two of the named persons comprising the applicant for native title, registered native title claimant and native title party. I am satisfied that they and the other senior men who accompanied Dr Kruse are part of the Wiluna native title party claim group and have the relevant authority in accordance with their traditional law and customs to provide the evidence in relation to the issues the subject of this inquiry. In particular the evidence establishes that Mr Cyril Bingham is the senior man who can speak

for Windich Springs and the surrounding area. The north western corner of the proposed licence area is approximately 10 kilometres south east of Windich Springs.

[44] At Windich Springs and subsequently in the north western corner of the proposed licence area the senior men spoke of the Tjukurrpa associated with the area and of its significance to them. Only the male members of the field trip were present during these discussions. Because of the gender restricted nature of the evidence provided it is not appropriate in these reasons for full details of the Tjukurrpa story to be recounted. The following findings of fact can be made which do not involve disclosure of details of the restricted evidence.

[45] I am satisfied that a Tjukurrpa or dreaming track extends from well to the west of the proposed licence area through Windich Springs (AHA – site ID 2116) then through the proposed licence area and extending further to the east from it. Dreaming tracks connect named sites and are country traversed by supernatural beings in the dreamtime. The native title party considers that such country is of greater significance to them than country which is not traversed by dreaming beings. According to traditional law and custom certain persons have responsibility for particular dreaming stories including a responsibility to protect them from interference and to hold and pass on dreaming stories and law learnt during ceremonies related to them. The native title party says such areas should be protected from ground disturbing activity due to their significance.

[46] The Government party contends that the evidence relating to the Tjukurrpa and the sites which form part of it are quite specific in terms of the sites to the west and east of the proposed licence area but are not so identified within the proposed tenement area. Whilst I accept this to be the case I remain satisfied that the evidence of the native title party claim group and Dr Kruse adequately establishes that the Tjukurrpa passes through the proposed licence area. In the video evidence the claimants explain that the mythical being stops at various places along the Tjukurrpa and ground disturbing activities in relation to it such as exploration drilling would be of particular concern to them. In terms of disturbance to the Tjukurrpa and sites associated with it the native title party says that exploration activity because it involves drilling and other ground distributing activities is of greater concern than ordinary pastoral activity.

[47] My finding is that the Tjurkrrpa (dreaming track),or at least parts of it, which passes through the proposed licence area, is a site of particular significance to the native title party in accordance with their traditions.

Native title party's contentions on the *Aboriginal Heritage Act* 1972 (WA)

[48] The contentions of the native title party challenge whether the AHA and its associated regulatory regime is sufficient to make interference with sites of particular significance to the native title party unlikely. They accept that the AHA applies to sites and areas within the proposed licence area that are covered by s 5 of the AHA but contend that the nature of the AHA means that it is of '*very limited relevance*' to the matters in s 237(b) and its existence should therefore be given limited weight in determining the objection. The reasons for the contention can be summarised as follows.

- The scheme of the AHA is to provide limited protection for certain areas on behalf of the general community such as the Western Australian public and is not designed to uphold the rights of common law native title holders to protect sites of significance in accordance with their traditional law and customs.
- The AHA does not refer to native title rights and interests and the decision on whether a site can be interfered with is not made by the relevant native title holders nor necessarily on the basis of the applicable traditional law and custom.
- The public interest nature of the AHA is reflected in the Act in that the Long Title talks of the preservation of Aboriginal places and objects '*on behalf of the community*' and that the Aboriginal Cultural Material Committee is directed to consider whether anything should be preserved '*because of its importance and significance to the cultural heritage of the State*' (s 5(c)).
- The AHA is not designed to provide protection for any interference with areas or sites of particular significance in accordance with traditions of native title holders which is the intention of s 237(b) of the Act.
- Any protection provided by the AHA to sites of particular significance is at best incidental to the AHA's intended purpose.

- The scheme of the AHA allows for application to be made to the Registrar of Aboriginal Sites and the Minister under ss 16 and 18 to permit interference with a site governed by the Act.
- If the Government party wishes to rely on the AHA as a mechanism to protect sites of particular significance to a native title party in accordance with their traditions then it should provide information which supports the contention including the methodology under the AHA to protect sites of particular significance and methods of ensuring compliance with the AHA including the level of monitoring prosecutions and the level of funding provided for investigating breaches of the AHA. The Government Party should provide any associated information such as reports commissioned into the effectiveness of the AHA and the agency empowered to enforce it and how applications under ss 16 and 18 are dealt with in relation to sites of particular significance and how those sections work to protect those sites. These matters are all peculiarly within the knowledge of the Government party and the failure of the Government party to lead such evidence should lead to an unfavourable inference being drawn that the AHA is of limited use in protecting sites of particular significance to the native title party.
- With respect to the contention that there is a presumption of regularity which means that it may be presumed that the grantee party will act lawfully in exercising rights given under an exploration licence unless there is evidence to suggest the contrary, the native title party contends that this presumption should not be accepted in circumstances where the law is unclear or processes under a law are unclear or where the primary purpose of a law is clear but matters that are incidental to the primary purpose of a law are unclear.
- The Tribunal has no information before it on how any protective sections of the AHA may work to reduce the likelihood of interference to a site of particular significance within the meaning of s 237(b) of the NTA and that the AHA is not of any real relevance to the issue without such information.
- The definition of Aboriginal place as defined in s 5 of the AHA does not include all areas and sites defined in s 237(b) of the Act. For this reason it says that reliance can not be placed on the AHA as an effective means of ensuring that sites of particular significance will not be interfered with.

[49] The native title party's contentions take issue with the approach of the Tribunal (and Federal Court) on whether the AHA and its regulatory regime can provide a sufficient basis for finding that there is unlikely to be interference with sites of particular significance to the native title party in accordance with its traditions by the grant of an exploration or prospecting licence. The jurisprudence in relation to this matter is well established and dates back to the initial 'test' cases that were conducted by the Tribunal in 1996, which remain relevant. Although the Tribunal's interpretation of the task under s 237 (that is, to look at the likelihood of whether the interference and disturbance referred to therein based on a predictive assessment of what is likely to occur) was overturned in the case of *Dann v Western Australia* [1997] FCA 332; (1997) 74 FCR 391 the Tribunal's original interpretation was reinstated by amendments to the *Native Title Act* in 1998. It is not necessary to again set out in detail the reasons for the previous decisions. They are covered adequately in the following cases and I adopt the findings from them which have a direct bearing on the present case, namely:

- *Walley v Western Australia* [2002] NNTTA 24; (2002) 169 FLR 437 at [22] and [50]-[51];
- *Champion v Western Australia* [2005] NNTTA 1; (2005) 190 FLR 362 (*'Champion'*) at [15]-[35]; [68]-[72].
- *Maitland Parker and Others on behalf of Martu Idja Banyjima/Western Australia/Derek Noel Ammon*, NNTT WO05/753, [2006] NNTTA 65 (2 June 2006), Hon C J Sumner (*'Maitland Parker'*) at [32] -[41]**.**

[50] It is also important to note that the Federal Court has dealt with some of the arguments advanced by the native title party about the effectiveness of the AHA and in particular the discretions given under that Act for the Registrar or Minister to authorise interference with a site. It is worth repeating that after considering these provisions (ss 16, 17,18 AHA) the Federal Court said (in *Little v Western Australia* [2001] FCA 1706 (6 December 2001); [2001] AILR 50; 6(4) (*'Little'*) (per Nicholson J at p 67 [77]):

> '77 For the applicants it is submitted therefore that the *Aboriginal Heritage Act* does not provide unqualified protection in these provisions but merely makes it an offence to damage sites contrary to the Act. Furthermore, the power of the Minister under s 18 to permit a breach of s 17 may occur in circumstances where a native title party has no right under the Act to make submissions to the Minister. Nevertheless, I do not consider it can be said it is likely such interference would occur given the protective effect of the sections in the

> *Aboriginal Heritage Act*. In other words the chance of such interference is not real and is remote in those circumstances.'

[51] The Government party consistently contends (it makes this contention in every objection case) that the Tribunal is bound by the Federal Court decision (in *Little* at [75] – [77]) to find that the chance of interference is unlikely because of the protective effect of the AHA. The Tribunal does not accept this contention if in fact the Government party is saying that the AHA provides sufficient protection in every case to make interference with sites unlikely irrespective of the particular facts. The Tribunal has consistently reiterated its position in relation to this issue and considers the facts of each case to decide whether the AHA and associated protective regime will operate to make it unlikely that there will be interference with sites of particular significance. In carrying out this exercise significant weight is given to the fact that the Federal Court found, in the circumstances of *Little*, that it was effective in making it unlikely that sites of significance would be interfered with. On the Tribunal's approach which has not been challenged on appeal by the Government party a finding that interference is unlikely is not inevitable. (see for example the recent case *Banjo Wurrunmurra & Others on behalf of the Bunuba Native Title Claimants/Western Australia/Monte Ling, Kevin Peter Sibraa*, NNTT WO05/756, [2007] NNTTA 21 (16 March 2007), Hon C J Sumner ('*Banjo Wurrunmurra*') at [24]-[34]). In summary the Tribunal's position is that:

- the AHA and its protective regime will normally be sufficient to ensure that s 237(b) interference is unlikely to occur but there will be circumstances where this is not the case taking into account the nature of any sites, whether the area is 'site rich', whether there is an area of particular significance, the nature and size of such an area and the intentions of the grantee party with respect to the protection of sites (*Banjo Wurrunmurra* at [34]); and

- the intentions of the grantee including whether it is willing to enter into an agreement which provides for a site survey to be carried out are a relevant consideration (*Champion* at [29]-[32]).

[52] The native title party's contentions directed to establishing that the AHA is of little relevance to the Tribunal's task must be rejected. The contention that it is not appropriate to rely on the presumption of regularity because the law or practice in relation to the AHA is unclear must also be rejected. It is now well established that in the absence of evidence to the

contrary the Tribunal is entitled to rely on the presumption that a grantee party will act in accordance with the law.

[53] Similar contentions to those made by the native title party which assert that the definition of place in s 5 of the AHA does not include all the areas and sites defined in s 237(b) of the Act have been dealt with in part by the Tribunal in *Young v Western Australia* [2001] NNTTA 42; (2001) 164 FLR 1 at 14-16, [58] – [62]. In that matter the Tribunal found that the AHA regulatory regime was not sufficient to ensure that interference with the area or site was unlikely. The area of significance contained a lake which covered a large area. Member Sosso said that the grantee party may not be in breach of s 17 of the AHA (which sets out the various offences for disturbing an Aboriginal site) with respect to some activities which might interfere with the site. He was of the view that the concept of 'interference' in s 237(b) is of potentially wider import than the proscribed activities in s 17. Member Sosso also observed that there was no evidence of the grantee party's intentions and that a different result may have been reached 'if the grantee party and the Government party had submitted material of the type considered by the Tribunal in many previous inquiries.' Despite this decision suggesting there is not complete coincidence between the coverage of the AHA and s 237(b) the Tribunal has in most cases held that that the coverage is sufficiently adequate to ensure that the interference referred to in s 237(b) is not likely to occur and the Federal Court has endorsed this position. In particular I am satisfied that the coverage of the AHA extends to dreaming tracks of the type found to exist in this matter.

The Wiluna Standard Heritage Agreement ('WSHA')

[54] The native title party's original contentions were that the Wiluna Standard Heritage Agreement (WSHA) was not adequate to make it unlikely that the identified site of particular significance would be interfered with and that it had not been executed by the Wiluna claimants. Subsequently the native title party clarified this position by advising that a WSHA had in fact been executed by representatives of the native title party and by the grantee party and retracting any statements and reliance on them to that effect. However, I do not interpret that retraction as extending to withdrawing the contentions that the WSHA was inadequate to ensure that interference with sites of particular significance was unlikely to occur from the grant of the exploration licence. I understand the position to be that the native title party executed a WSHA but now says it is inadequate to protect any sites of particular significance.

[55] Paragraph 2.1 of the WSHA says that the native title party agrees to withdraw any existing objections to the grant of the licence which is the subject of it and not make any further objection to its grant once the grantee party has executed the agreement. No explanation has been given as to why the native title party is pursing the objection application despite what appears to be a valid agreement which requires it to be withdrawn. No submissions were forthcoming from either the Government or the grantee parties on the implication of what appears to be a valid agreement on the conduct of these proceedings and none were sought by the Tribunal. In *Maitland Parker* (WO05/753) the Tribunal dealt with a similar situation in which there was a Regional Standard Heritage Agreement for the Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation ('Yamatji') native title representative body area which had been executed on behalf of the native title party. In that matter there was a change of legal representation at about the time the agreement was signed and questions were raised by the new legal representative about whether Yamatji had been properly authorised to sign the agreement. There was a dispute about whether the agreement had been properly entered into and the Tribunal considered it was obliged to conduct an inquiry and make a determination based on the factors in s 237 notwithstanding the existence of an executed agreement. In the present matter it has not been suggested that the agreement is invalid. Even so, in the absence of any submissions suggesting that another course of action is open to the Tribunal based on the existence of a valid agreement, the Tribunal will deal with the matter in the normal way and make a determination based on the evidence provided in relation to the s 237 factors. Nevertheless, it is of some concern that the Tribunal has been obliged to embark upon a full inquiry into this objection when on the face of it the native title party has agreed that it should be withdrawn.

Likelihood of interference with sites of particular significance

[56] The task before the Tribunal taking account of the established law and practice described above is to determine whether on the facts of this case there is likely to be (in the sense of a real risk of) interference with sites of particular (ie more than ordinary) significance to the native title party in accordance with their traditions. More specifically, is the protective regime associated with the AHA adequate to make interference with the Tjukurppa site or dreaming track unlikely.

[57] The Government party contends that the WSHA is substantially similar in all the material aspects to the regional standard heritage agreement (RSHA) referred to in *Champion* at [21]. These contentions were made before it was known that the native title party had executed the WSHA. The Government party provided a copy of the template WSHA agreement and contends that it is adequate to meet the concerns of the native title party with respect to any potential interference with a site of particular significance. In particular, the Government party says the WSHA covers ground disturbing activities which embrace '*subsurface matters and objects*' which the native title party has identified is of particular concern. The agreement also provides for the grantee party to give notice to the native title party of a proposed work program which is followed by consultation between the parties to determine whether a survey is required. Notification must be given by the grantee party to the native title party prior to the commencement of ground disturbing activities. The purpose of any survey is to identify any known or potential Aboriginal sites. I note that 'Aboriginal Site' is defined to include any Aboriginal site as defined in the AHA, any 'significant Aboriginal area' defined in the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) or an 'area or site of particular significance' under s 237(b) of the Act.

[58] The Government party has undertaken to place a condition (see above) on the granting of the licence similar to that referred to in *Champion* at [24]. This condition is designed to give the native tile party the option of entering into a WSHA within 90 days of the grant of the exploration licence. Again this contention was made before it was known that there was already a WSHA signed by both parties in existence. It therefore seems that little may be achieved by the condition but I am acting on the basis that it will be imposed anyhow.

[59] The native title party contends that the WSHA is defective in a number of respects in that it does not provide for adequate consultation prior to the grant of the proposed licence, and there is no provision for consultation about the use of heritage monitors or other methods to deal with concerns about sub-surface matters or objects or about practical methods of implementing a site avoidance regime. It says that the minimum standard set out by the WSHA is not appropriate in this case to ensure that s 237(b) interference is unlikely to occur.

[60] My finding is that there is nothing about the site or sites of particular significance identified in this case which would render the Government party's regulatory regime ineffective. The native title party has relied on *Wilma Freddie and Others on behalf of the*

Wiluna Native Title Claimants/Western Australia/Asia Investment Corporation Pty Ltd, NNTT WO03/498, [2004] NNTTA 30 (21 April 2004), Hon C J Sumner to say that the Tribunal has found where dreaming tracks are in existence that the regulatory regime for Aboriginal sites is inadequate. That case is distinguished from the present one particularly as the finding involved an area of particular significance the parameters of which were uncertain and there was no evidence of the grantee party's intentions regarding site protection. In the present case, given the cooperative attitude of the grantee party and the consultation which will occur with the native title party, I can see no reason why it would be likely that the dreaming track identified in the evidence would be interfered with.

[61] Dr Kruse says that he has undertaken several heritage surveys in the Wiluna area with the claimants including the senior law men who visited the proposed licence area on the 15 November 2006. He says that claimants regularly participate in heritage surveys so that they can speak for the country and protect and manage significant sites. This must be done to ensure that the country is protected and managed as required by traditional law and custom. It is apparent that a considerable number of the surveys have been carried out in the Wiluna claim area. There are some 171 sites on the Register on the whole of the claim area and it is reasonable to infer that the Wiluna claimants have been the informants in relation to the majority of them. I can see no impediment, given the grantee party's attitude to heritage protection and the existence of a WSHA, to a properly conducted site survey being carried out which should ensure that interference with the identified site is unlikely.

[62] In accordance with the Government party's practice described in *Champion* the grantee party signed a WSHA before the s 29 notice asserting the expedited procedure was given. It is now clear that this agreement was also executed on behalf of the native title party. While the native title party is now critical of the agreement I am entitled to infer that it has in the past regarded the WSHA as satisfactory to ensure site protection in most cases. The nature of the site identified in this matter does not suggest that it will be ineffective here. Further, as pointed in the cases referred to above the grantee party is now on notice as to the site's existence and, therefore, cannot avail itself of the defence available under the AHA in the event that it were to interfere with the site.

Contentions based on interference authorised by s 18 of the AHA being a future act

[63] On 2 March 2007 the objector made an additional contention as to why the Government party '*can not rely on the existence of the AHA to limit the likelihood of interference with sites of s 237 of the NTA'*. This argument is based on the assertion that approval of the Minister to interfere with a site given under s 18 of the AHA is a future act. The contention made is:

> 'Ministerial Consent
>
> 7. The Government Party must comply with the appropriate future act process set out in Division 3 of Part 2 of the NTA in relation to any future act.
>
> 8. The Government Party does not give notice of proposed decisions by the Minister under section 18 of the AHA to allow interference with an Aboriginal site as defined in the AHA ['Ministerial Consent'] as future acts or otherwise deal with Ministerial Consents in accordance with Division 3 of Part 2 of the NTA, even where the site concerned is both an "Aboriginal site" as defined in the AHA and a site of particular significance to the relevant registered native title claim group in accordance with their traditions. (If the Government Party does give notice of Ministerial Consents as future acts and otherwise deals with them in accordance with Division 3 of Part 2 of the NTA, that is something peculiarly within the Government Party's knowledge and so the onus is on the Government Party to provide evidence of that.)
>
> 9. If Ministerial Consents are future acts then the Government Party must be acting unlawfully and past Ministerial Consents are invalid because of the Government Party's failure to notify the Ministerial Consent and otherwise follow the future act process set out in the NTA.
>
> 10. However, the presumption of regularity applies. Therefore, it must be presumed that the Government Party does not consider Ministerial Consent to be a future act.
>
> Aboriginal Heritage Act
>
> 11. In order for Ministerial Consent to not be a future act, Ministerial Consent must not apply to allow interference with 237(b) Sites. The Government Party is therefore estopped from contending that section 18 of the AHA applies to 237(b) sites.
>
> 12. Ministerial Consent allows interference with the same sites that the Government Party contends are protected by other provisions of the AHA. Both the provisions of the AHA that the Government Party contends are protective, such as section 17 (see paragraph 5(b) of the Government Party's Amended Statement of Contentions), and section 18 of the AHA apply to "Aboriginal Sites" as defined in the AHA.
>
> 13. Therefore, in order for Ministerial Consent to not be a future act, the protective provisions of the AHA must not apply (to any extent) to interference with 237(b) Sites. The Government Party is therefore estopped from contending that the AHA provides for protection of 237(b) Sites (to any extent) so as to make it not likely that they will be interfered with.'

[64] Whether interference authorised by s 18 is a future act has not been determined by the Tribunal or, as far as I am aware, the Federal Court. A case can be made that consent to interfere with an Aboriginal site or place where there is a native title right to protect and maintain sites and places of significance to the native title holders would, prima facie, be a future act because it 'affects' that right either by extinguishing it (if the consent involved

physical destruction of that site) or by permitting interference that is wholly or partly inconsistent with the enjoyment or exercise of that right.

[65] However, if it is a future act it is not covered by the right to negotiate provisions of the Act (Subdivision P) because it is not the creation of a right to mine or any other act covered by these provisions (s 26(1)(c) NTA). If s 18 interference is a future act the Government party contends that it is one to which Subdivision M applies and is covered by the 'ordinary title' or freehold test in s 24MB(1) . That would appear to be the case. In these circumstances the Government party says a native title party has no procedural rights because those holding 'ordinary title' have no such rights (ss 24MB(1), 24MD(6A)).

[66] In my view the native title party's contentions are irrelevant to the task of the Tribunal in this inquiry. There is nothing before the Tribunal to suggest that s 18 interference is likely to occur. It is not necessary to come to a concluded view on whether s 18 interference is a future act or what procedural requirements are attracted by it. What can be said is that if it is a future act, it is separate one from the proposal to grant the proposed licence and will only arise if in the course of exploration the grantee party makes a s 18 application to the Minister. It will be at that point that any procedural rights which exist will be activated and which the Government party or grantee party will need to consider.

[67] I reiterate that the Federal Court has accepted that the AHA and its protective regime are relevant to a consideration of s 237(b). There is nothing in the native title party's contentions to suggest that the Tribunal's approach to s 237(b) should be changed.

Major disturbance to land and waters (s 237(c))

[68] The Full Federal Court has confirmed that the predictive approach also applies to the issue of major disturbance to land (*Little & Others v Oriole Resources Pty Ltd*, [2005] FCAFC 243 (5 December 2005) at [41]-[51].

[69] With respect to the meaning of major disturbance the Tribunal applies the law as enunciated by the Full Federal Court in *Dann* and in *Little* (Full Federal Court) at [52]-[57]. The Tribunal must consider whether major disturbance is likely to occur (in the sense that there is a real risk of it) from the view point of the entire Australian country, including the Aboriginal community, as well as taking into account the concerns of the native title party.

[70] The Tribunal has always had regard to the overall circumstances of each case including in particular the locality in which the exploration will take place as well as the remedial regulatory regime in place. It will consider whether there are any special topographical, geological or environmental factors which would lead members of the Australian community generally to think that exploration activities would result in any major disturbance to land. In most cases the Tribunal has held that exploration activity does not cause major disturbance to land or create rights whose exercise is likely to do so but there have been exceptions (*Champion* at [77] and the cases cited therein). Aside from the native title party's contentions relating to the special circumstances of uranium exploration there is nothing in this case to suggest that the proposed exploration would cause major disturbance to land.

[71] The Government party relies on s 63 of the *Mining Act* and Condition 4 of the standard conditions to contend that the proposed licence is not likely to involve major disturbance to land. As outlined in para [18] above, under s 63(aa) of the *Mining Act* the grantee party is required to complete a Program of Work prior to the use of ground disturbing equipment and, in the event that radioactive material is likely to be encountered, must submit a RMP.

[72] As noted previously (para [18]), the native title party contends that radioactive contamination, unless remedied, can pose a health risk for in excess of 100,000 years, and that such contamination would constitute major disturbance to the land from the viewpoint of the general community. It is further contended that absent regulations or guidelines that directly regulate exploration for uranium, there exists an increased risk of contamination of the land. The native title party contends that no such demonstrated regulations or guidelines exist, and that there is no evidence that any peripheral regulations or guidelines are enforced.

[73] With respect to this contention Regulation 16.7 of the MSI Regulations specifies the requirement for a RMP and provides:

> '16.7(1) Each responsible person at a mine must ensure that a plan for the safe management of radiation at the mine that complies with subregulation (2) is prepared –
>
> (a) in the case of an exisiting mine, as soon as is practicable after the commencement day; or
>
> (b) in any other case, before mining operations (other than exploration operations) commence at the mine.'

[74] It is apparent that the MSI Regulations contemplate preparation of a radiation management plan in the case of actual mining and not for 'exploration operations'. However, and as identified previously, the Government party contends that under DoIR's administrative processes a RMP is required for any exploration program that may 'encounter Radioactive Material'. The Resources Safety Division ('RSD') of the DoCEP and DoIR publishes the Guideline 'Preparation of a Radiation Management Plan' - which is available on DoCEP's website. In assessing a plan RSD also refers to the principles outlined in another guideline jointly developed by RSD and the Chamber of Minerals & Energy in Western Australian entitled 'Applying the System of Radiation Protection to Mining Operations'. Both documents were provided as part of Mr Rowe's affidavit and the RMP Guideline attached to Mr Rowe's affidavit carries DoIR's logo, confirming that it is a document used by both Departments. Mr Rowe says that to qualify for approval a RMP must demonstrate that there are adequate measures taken to control the exposure of employees and members of the public to radiation at or from a mine and that the radiation exposure of persons affected by the mine must be below the relevant dose levels set by the MSI Regulations and as low as reasonably practicable.

[75] Mr Bartleet's evidence is that the POW would only be approved by DoIR once it is satisfied that the DoCEP Radiation Officer has approved it and all other environmental matters have been addressed. Despite the native title party's contentions to the contrary no evidence has been provided which calls into question the administrative procedures described by Messrs Rowe and Bartleet which requires that the POW (within which lies the requirement for a RMP) will not be approved by the Environmental Officer from DoIR unless the RMP has first been submitted and considered by that officer. Assessment of the RMP is not made in isolation by any one officer or department, but rather following consultation between DoIR's environmental department and DoCEP's Radiation Officer, and the grantee party and its uranium expert, and the RMP is unlikely to be approved unless sufficient measures are specified to control radiation exposure, not only to exploration personnel and members of the public, but also by way of environmental monitoring and waste management.

[76] The MSI Act (s 4) applies to a 'mine' which means a place at which 'mining operations' are carried on and mining operations include 'exploration operations'. Exploration operations are defined to include any exploration activity which is undertaken on a mining tenement with some exceptions not presently relevant. It follows that unless

specifically exempted the MSI Regulations also apply to exploration operations. Part 16 – 'Radiation Safety' is the Part of these Regulations of principal relevance. They appear generally to provide an extensive regulatory regime supporting the administrative procedures already referred to, and backed by penalties for their breach.

[77] Nevertheless, there is no requirement under Regulation 16.7 for the preparation of a radiation management plan before the commencement of mining operations which are confined to exploration operations (Regulation 16.7(1)). Regulation 16.8(1) provides that each responsible person at a mine must ensure that 'the radiation management plan' for the mine is complied with but the management plan referred to in these Regulations is not a RMP prepared for the purposes of gaining approval for a POW under s 63(aa) of the *Mining Act*. Other specific Regulations such as 16.8(2) (an obligation to ensure adequate resources to give effect to the plan) and 16.12 (the designation of supervised or controlled areas) which impose obligations in respect of the radiation management plan are likewise not applicable to the *Mining Act* approval. However, many of the other Regulations do not contain an exemption for exploration operations and impose legal obligations in relation to actions the breach of which is subject to penalties. Examples of this category of Regulation are the appointment of a Radiation Safety Officer (16.9(1)) (which the grantee party has undertaken to do); the obligation on a mine manager to limit the exposure of employees and members of the public to radiation (16.16); and dose limits for employees (16.18) and members of the public (16.19).

[78] In summary the situation with respect to a radiation management plan is that:

- under DoIR's approval processes an RMP must be approved as part of a POW and that approval will have regard to the provisions of the MSI Act and MSI Regulations. However, that approval is not given under the MSI Act and Regulations because there is no obligation to prepare a radiation management plan only for exploration under that Act. This means that the penalties available under the MSI Regulations relating to a radiation management plan are not applicable to a RMP (POW) prepared for the purposes of the *Mining Act*; and

- other provisions of the MSI Regulations apply to exploration operations and penalties can be imposed for their breach.

[79] I can find no basis for the native title party's assertion that there are no established criteria against which to assess any RMP. The Government party contends that the RMP will incorporate all applicable State and Commonwealth radiation protection regimes and will comply with international standards. Further Regulation 16.7(2) of the MSI Regulations makes provision for the contents of a RMP:

> '(2) The plan must -
>
> (a) consider measures that can be taken to control the exposure of employees and members of the public to radiation at or from the mine including the following -
>
> (i) the use of appropriate equipment, facilities and operational procedures at the mine;
>
> (ii) monitoring programs;
>
> (iii) procedures for the assessment of dose;
>
> (iv) procedures for reporting incidents; and
>
> (v) instruction and training programs;
>
> (b) designate any controlled or supervised areas; and
>
> (c) include a waste management system for the mine, details of which must include -
>
> (i) restricted release zones;
>
> (ii) facilities and procedures involved in the handling, treatment, storage and disposal of radioactive waste; and
>
> (iii) an outline of the proposal for the eventual decommissioning and rehabilitation of the mine.'

[80] The RMP Guideline contains details of matters which should be covered in a RMP some of which are specifically related to disturbance to land. Summarised, some of these are:

- all process inputs, outputs and wastes that require specific consideration from a radiological perspective identified, including accumulated radioactive scales and/or sludges (Para 2.6);
- the nature of all radioactive waste summarised, including substances which are not 'radioactive' from a transport perspective but which may still require consideration from an exposure and waste management perspective, and the management strategy for transport, treatment and/or disposal of waste provided (Para 2.6, 2.13 and 2.14);
- elements of plant and equipment design which assist in minimising radiation exposure (Para 2.7);
- measures for controlling access to significantly radioactive areas (including procedures relating to visitor access) (Para 2.7 and 2.8);
- emergency planning and response capabilities for radiation accidents (Para 2.8);

- requirements relating to movement, storage, processing and packaging of radioactive materials to prevent exposure to and dispersion of radioactive materials (Para 2.8);
- a radiation monitoring plan, addressing the type, duration and frequency of sampling, the equipment and analysis method to be used, and the associated quality assurance program (Para 2.10);
- records evaluating the radiological impact of the environment, workers and members of the public, and a commitment made to providing comprehensive annual occupational and environmental radiation reports to the State Mining Engineer (Para 2.11);
- the design and location of containment, storage or disposal facilities, with a description of the intended future use of the land and projected long term integrity of the sites (Para 2.13); and
- details of the waste management system to be employed, relevantly directed towards the control of radon emanation and dust dispersion given the arid conditions in the area of the proposed licence (Para 2.13).

[81] While it is apparent that many of these guidelines have been formulated for actual mining I am satisfied that they would be used as required to deal with exploration. With respect to one of the main contentions made by the native title party (ie the potential exposure to radioactive contaminated dust) there is provision for an estimate of radiation doses to be received by workers and critical groups to be made. Records which include evaluation of radiation exposure of workers and members of the public may be kept.

[82] The Guideline (para 1) also draws attention to the need for 'best practicable technology' to be incorporated into the design and operation of the mine and that the radiation exposure of persons employed at, or affected by, the mine is below the relevant dose limit and as low as practicable (or As Low As Reasonably Achievable). This is consistent with the MSI Regulations (16.33) which provides that each responsible person at the mine must ensure that the waste management system utilises the best practical technology and is designed to minimise the release of radioactivity. Penalties are imposed for a breach of the Regulations and exploration operations are not excluded from it. The Regulation relating to dose limits have already been referred too. Although the MSI Act and Regulations do not technically cover a RMP prepared for the purposes of the *Mining Act*, I am satisfied on

the evidence of Mr Bartleet and Mr Rowe, referred to above, that the RMP prepared for uranium exploration will deal with the issues which would have been dealt with under the MSI Act as if the proposed tenement had been a mining lease. In other words, I am satisfied on the evidence of the Government party that if the topics normally covered for uranium exploration or mining were not adequately addressed in the RMP then the POW would not be approved by the DoIR's Environmental Officer.

[83] Overall, my finding is that, despite the fact that there can be no penalties imposed under the *Mining Act* for a grantee party's failure to comply with a RMP prepared under that Act as part of a POW unless that failure also involves a breach of any conditions imposed on the grant, there is no evidence to suggest that the Government party's regulatory regime will be ineffective, taking account of other administrative procedures and the requirements of the MSI Regulations, many of which are applicable to exploration for uranium.

[84] With respect to the native title party's contention that the State of Western Australia's current 'no mining for uranium' policy is relevant in this case, I find that the contention is misconceived. It could be said that a policy which allows exploration for uranium but not subsequent mining is somewhat curious in that presumably a government which permits uranium exploration will have in contemplation that at some point uranium mining may occur. However, I do not accept that this policy is relevant to the Tribunal's inquiry.

[85] The native title party's contentions are that the Government party has not provided the Tribunal with information as to why the Government party has a policy which prohibits mining but permits exploration for uranium. It then says that in the absence of such information which is peculiarly within the Government party's knowledge the Tribunal should find that the Government party has a view that mining (including exploration) for uranium is generally unacceptable from the view point of the general community, that the risks associated with it including radioactive contamination are unacceptable to the general community and would therefore constitute major disturbance to land. The existence of what appears to be a contradictory Government policy does not permit the inference sought by the native title party to be drawn. There may be a range of concerns about the use of uranium such as the increased risk of nuclear proliferation and nuclear war or the problem of nuclear waste disposal which might dictate a no mining uranium policy. It is impossible to say that the no uranium mining policy has been adopted because of concerns about the adverse health effects of uranium mining or exploration.

[86] In making a finding on s 237(c) I have also had regard to the fact that there are no Aboriginal communities in the vicinity; the proposed licence area is over pastoral lease where ground disturbance will already have been carried out; and there is history of mining and exploration in the vicinity. There is no evidence of any special topographical or environmental factors which would cause the general Australian community to think that exploration would involve major disturbance to the land. There is no evidence that there will not be compliance with the Government party's regulatory regime governing exploration activities and the conditions imposed on the exploration licence dealing with ground disturbing activities, including requirement for rehabilitation of the land (esp. standard conditions 1-4 and the endorsement in relation to the *Environmental Protection Act and Environmental Protection (Clearing of Native Vegetation) Regulations).* The grantee party has undertaken 'to return any site of ground disturbance to a state which complies with relevant regulatory guidelines for environmental rehabilitation and which poses no radiation threat to the public, or to the state in which Globe encountered it'. With respect to Standard Condition 2, I reiterate that an additional requirement has been added to this condition since that considered in *Walley* (at [34]) for the backfilling and rehabilitation (including for access tracks) to be carried out no later than six months after excavation unless otherwise approved by the Environmental Officer, DoIR. Taking all these factors into account including the evidence of concern from the native title party I find that there is not likely to be major disturbance to land in this case. If at the end of exploration the land was left in an un-rehabilitated state and there were radioactive waste products which were not properly attended to then this may well constitute a major disturbance to land in the eyes of the general Australian community. However, there is simply no evidence that under modern regulatory practices (which I can safely accept are more stringent than those of the past) this will occur.

Conclusion

[87] The Tribunal for the first time has been confronted with an argument that exploration for uranium as opposed to other material means there is a greater likelihood that the native title party's community or social activities will be directly interfered with and that there will be major disturbance to land. When considering this issue it is important to bear in mind that the inquiry conducted by the Tribunal is confined to assessing whether the interference and disturbance in s 237 is likely to occur. The Tribunal is not mandated to conduct a wide ranging inquiry into the Government party's regulatory regime for uranium exploration unless it is relevant to its central purpose of deciding whether the interference and disturbance

referred to in s 237 is likely to occur. The evidence demonstrates that the native title party's contention that there is no regulatory regime in place is not correct. However, the evidence does show that the regulatory regime dealing with uranium exploration has fewer sanctions available to the regulatory authorities in the event of non-compliance with provisions relating to the preparation of a radiation management plan when compared with uranium mining. It also appears that the protection relating to the 'critical groups' of the general public is based on the existence of such persons in permanent communities in the vicinity of the exploration activity and not persons who may exercise their native title rights and interests by travelling through the area for the purposes of camping, hunting or gathering bush tucker for instance. There is no mechanism or requirement to consult with native title claimants who may visit the area where exploration is taking place. In the circumstances of this case, these issues have not been of sufficient relevance or seriousness to affect the central and relatively narrow focus of an expedited procedure objection inquiry.

Determination

[88] The determination of the Tribunal is that the grant of exploration licence E69/2119 to Globe Uranium Ltd is an act attracting the expedited procedure.

Hon C J Sumner
Deputy President
14 May 2007