# Expedited procedure – jurisdiction, evidence, social & community activities

## *Parry/Buchanan Exploration Pty Ltd/Northern Territory* [2002] NNTTA 221

**Member Sosso, 21 October 2002**

**Issue**
The main issue before the National Native Title Tribunal was whether the expedited procedure should apply to the future act in question. It was found that it should not because there was a real chance or risk that the grant of the tenement would result in direct interference with community and social activities of the native title party.

**Jurisdictional issue**
The proposed tenement dealt with in this matter was almost entirely located on an area subject to Crown Lease Perpetual 435 (CLP). Tenure searches revealed that the perpetual lease was issued after the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) but before the commencement of the *Native Title Act 1993* (Cwlth) (NTA). The Tribunal was alert to the jurisdictional issue raised by the High Court decision on the effect of this type of lease in *Western Australia v Ward* [2002] HCA 28, i.e. in some cases a CLP may be an act that wholly extinguishes native title.

As a general principle, there is no onus on the Tribunal to ascertain, in the absence of parties making submissions, whether it has jurisdiction. However, when the Tribunal has material before it that suggests that it is, or may be, without jurisdiction, whether either party has raised the issue, the Tribunal cannot assume it has jurisdiction. The Tribunal gave the parties an opportunity to address this matter. The native title party made submissions in support of jurisdiction and jurisdiction was not challenged by either the government or grantee party. The Tribunal found, prima facie on the material before it, that it could proceed with the inquiry and make a determination—at [7].

**Evidential issue**
The Upper Daly River Land Claim Report, submitted by the native title party in this matter, reported on a site called Kalay that is situated 200 metres from the southern boundary of the proposed tenement and which was acknowledged in the report to be a very important site. There was no direct evidence about the site before the Tribunal. The Tribunal determined that the importance of this site 'is so manifest and so clear that it is appropriate in the circumstances to accept that Kalay is a site of particular significance' (without the need for any direct evidence from a native title holder) by drawing this inference from the Land Claim Report. Having found that there was a risk of direct interference in s. 237(a), the Tribunal held it was not necessary to make a predictive risk assessment regarding s. 237 (b) or (c)—at [37] and [67].

**Authority to speak for claim group challenged**
The government party challenged the authority of the deponent to speak for the claim group and argued that, ideally, authority should be objectively evidenced from those whom the witness purports to represent.

The Tribunal raised the distinction between the nature of authorisation of a native title holder to speak on behalf of sacred sites and of a 27 native title holder providing evidence of social or community activities. The requisite authority discussed in *Little v Western Australia* [2001] FCA 1706 applies to sacred site evidence. Evidence of community and social activities, or history or general environment of the particular land and waters can be given by any native title holder—at [18] to [21].

The Tribunal held that the core issue, apart from the nature of the evidence itself, is whether the deponent has the relevant knowledge and experience of the activities deposed to. The Tribunal also needs to ascertain that the deponent is a member of the claim group and that they are giving direct, rather than hearsay, evidence. If these issues are addressed, then the Tribunal need not inquire further as to the deponent's status within the community of native title holders that comprise the native title claim group—at [21].

The decision of O'Loughlin J in *Ward v Northern Territory* [2002] FCA 171, referred to by the government party, was distinguished as it related to a different type of authorisation, namely authorisation to replace a current applicant under s. 66B. The Tribunal referred to *Griffiths/BHP Billiton Minerals Pty Ltd/Northern Territory* [2002] NNTTA 131, in which the factors that are relevant to determining if a person has requisite authority to speak on behalf of a site of particular significance are discussed. The Tribunal held that authorisation for the purposes of ss. 61 or 66B of the NTA is conceptually different from the type of authorisation required for s. 237(b)—at [25] to [28].

With regard to sacred site evidence, as there was no evidence of the deponent's qualifications to speak for the sites, the Tribunal accepted, in the context of a s. 237(b) assessment, that the deponent's evidence of the sites had the weight of one member of the native title claim group—at [32].

**Interference with community and social activities – s. 237(a)**
For the purposes of s. 237(a), the native title holders provided detailed evidence of current social and community activities, which was unchallenged at the hearing. The Tribunal referred to some of its earlier decisions in Western Australia, where it was determined that the grant of the future act in question would be likely to result in direct interference with community and social activities. In those matters, there was evidence of regular camping, travelling and hunting on the relevant land and waters. Further, the evidence demonstrated that the activities 'were not isolated, were conducted on a frequent basis and played an important part in the life of the claim group in question'—at [49] to [58] and [62].

The Tribunal noted that the regulatory regime governing the grant of an exploration licence in the Northern Territory is quite different from that which applies in Western Australia in that 'it was ... specifically drafted with native title considerations in mind'. The Tribunal went on to say that:

> It would be incorrect to automatically apply these [Western Australian] determinations in Northern Territory expedited procedure objection inquiries. The regulatory regime governing the granting of exploration licences is quite different in Western Australia, and it is of critical importance to have regard to the overall protective regime in force in any jurisdiction when making a predictive risk assessment. Accordingly, even if there was evidence before the Tribunal of a type similar to that presented in the above Western Australian inquiries, one 28 should not work on the assumption that the same result would necessarily pertain in the Northern Territory—at [63].

The Tribunal referred *to Smith v Western Australia* (2001) 108 FCR 442; [2001] FCA 19, where French J held that, when assessing the risk of direct interference, the Tribunal is entitled to have regard to constraints already imposed on community or social activities by third parties. In the matter before the Tribunal, the native title party was not subject to the lawful activities of a pastoral lessee because the CLP in question is held by the Northern Territory Land Corporation and was not, apparently, used for pastoral purposes. There was no evidence from the grantee party about how it intended to carry out its exploration activities so as to minimise the risk of interfering with the native title holders' activities—at [64].

**Decision – expedited procedure does not apply**

The Tribunal was satisfied that, in these circumstances, there was a real chance or risk that the grant of the tenement would result in direct interference with community and social activities and, therefore, found that the expedited procedure did not apply to the grant of the exploration licence—at [66].