Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

OPERATION OF THE NATIVE TITLE ACT

Inquiry Into The Effectiveness Of The National Native Title Tribunal

Submission No:13

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The Secretary
Parliamentary Joint Committee on Native Title and
Aboriginal & Torres Strait Islander Land Fund
Parliament House
Canberra
ACT 2600

18 October, 2002

Dear Sir/Madam,

Review of the effectiveness of the National Native Title Tribunal

I refer to the above Review and enclose a submission. It comprises a paper delivered to the Native Title Conference in Geraldton in September 2002. The paper has since been circulated to conference delegates and to the National Native Title Tribunal. It has also been submitted to the conference organisers for possible publication. As yet no decision has been made by the organisers about whether it will be published, and if it is published, the form of that publication.

I wish to be heard by the Committee about the matters raised by this submission.

Yours Faithfully

Angus Frith

The expedited procedure inquiry process in the N.T.: technicalities and evidence

Angus Frith, Barrister *

Introduction: the exploration licence application backlog

The expedited procedure inquiry process for minerals exploration

The right to negotiate under the *Native Title Act 1993* (Commonwealth) ("NTA") applies to future acts including the creation of a right to mine by a government[1]. A right to mine includes an exploration licence[2]. Summarising the procedure, the government must give notice of its intention to grant an exploration licence to any registered native title claimant and to any representative Aboriginal/Torres Strait Islander body ("representative body") in relation to the land and waters that will be affected by the grant[3]. Any person who is a registered native title claimant 4 months after the notification day, subject to certain conditions, is a native title party entitled, in the normal negotiation procedure, to the right to negotiate in respect of the proposal to grant the right to mine[4].

However the native title party does not gain the right to negotiate if the expedited procedure applies under s32 of the NTA. The procedure set out in s32 applies if the notice given under s29 includes a statement that the Government party[5] considers that the act is an act attracting the expedited procedure[6]. If the expedited procedure is attracted, there is no right to negotiate over the proposed future act. A native title party can object to the inclusion of the statement within 4 months after the notification date[7]. The act does not attract the expedited procedure if the criteria set out in s237 of the NTA apply. The arbitral body[8] determines whether the s237 criteria apply, and, therefore, whether the expedited procedure applies.

A future act is an act attracting the expedited procedure if:

> (a) the act is not likely to interfere directly with the carrying out of the community or social activities of the persons who are holders...of native title in relation to the land or waters concerned; and

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*Angus Frith has appeared as counsel, briefed by Ron Levy of the Northern Land Council, on behalf of the native title parties in a number of expedited procedure inquiries in the N.T.

[1] Subsection 26(1) NTA.
[2] Section 253 NTA.
[3] Par 29(2)(b) NTA. The notice is to contain specific information and specify a notification day (ss29(4)).
[4] Subsection 30(1) NTA.
[5] "Government party" is defined as the Commonwealth, a State, or a Territory that does a future act (see ss26(1) NTA). In this paper, the relevant Government party is the Northern Territory Government.
[6] See ss31(1), ss 32(1) NTA, generally, for the procedure.
[7] The NNTT has determined that it has a discretion whether to accept the objection Form 4. There is some controversy over the existence, nature and extent of such a discretion. For the view of the NNTT, see generally the decision of the Hon. E.M. Franklyn QC in *Roy Dixon on behalf of the Garawa and Gurdanji Peoples/Ashton Mining Ltd/Northern Territory* NNTT DO 01/1-7 (23/4/01); *Guidelines on Acceptance of Expedited Procedure Objection Applications*, NNTT, (issued 8/5/01); revised *Guidelines on Acceptance of Expedited Procedure Objection Applications*, NNTT, (issued 16/10/01).
[8] In the case of the Northern Territory ("the N.T."), the National Native Title Tribunal ("NNTT") is the arbitral body.

(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 holders... of the native title in relation to the 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[9].

If the expedited procedure applies, the right to mine can be granted immediately. If it does not apply, the native title party is entitled to the right to negotiate about the future act.

The expedited procedure in the Northern Territory

These procedures apply in the N.T. as elsewhere. However, they do not apply where there is no native title party. Thus, they do not apply where native title has been extinguished. In addition, they do not apply on Aboriginal freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth) ("ALRA")[10]. On Aboriginal freehold traditional Aboriginal owners have a veto over mining and exploration[11]. Thus, in the N.T., the right to negotiate, and the expedited procedure inquiry process, apply largely on pastoral leases[12].

The bulk of mining tenements sought in the Territory are exploration licences.

The backlog

After the High Court's decision in *Wik Peoples v Queensland*[13] on 23 December 1996, the N.T. stopped granting exploration licences on pastoral leases. It did not notify potential registered native title claimants of its intention to grant exploration licences. Then, the Commonwealth undertook its process of amending the NTA. These amendments took effect from 30 September 1998.

The effect of some of these amendments was to empower the N.T. to substitute its own future act regime for that in the NTA in respect of future acts on land subject to pastoral leases. Such a substituted scheme could contain substantially lower level of protection for native title rights and interests[14]. The scheme the N.T. proposed in substitution for the future act regime on pastoral lease land was rejected by the Senate on 31 August 1999[15]. Therefore, as the NTA future act regime applied in the N.T., the N.T. Government it had to decide how it was to comply with it.

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[9] Section 237 NTA.

[10] Subsection 233(1) NTA: any act affecting Aboriginal land is not a future act.

[11] See ALRA.

[12] The pastoral estate of the N.T. covers 621 757 km^2 of the N.T.'s total area of 1 346 200 km^2, or 46% of the area of the N.T. There are 217 pastoral leases (see Northern Territory Pastoral Map, Lands Planning & Environment, Northern Territory of Australia, April 2001). At present approximately 43% of the Territory is owned as Aboriginal freehold (with at least a further 8% subject to claim under the ALRA).

[13] (1996) 187 CLR 1.

[14] See s43A NTA.

[15] Any proposed State or Territory s43A scheme is itself subject to various procedural requirements, one of which is that a determination by the Commonwealth Minister that the provisions of the scheme comply with s43A (see par 43A(1)(b) NTA) can be disallowed by either House of the Commonwealth Parliament (see par 214(a) NTA).

Eventually, in September 2000, the N.T. began to roll out the backlog it had created, by issuing s29 notices, each notifying registered native title claimants of its intention to grant an exploration licence. It continues to clear the backlog by issuing fortnightly batches of notices[16]. The vast majority of the s29 notices have had a statement attached that the Government party believes that the expedited procedure is attracted by the proposed grant of the licence.

The Northern Land Council ("NLC") is the representative body[17] for the Top End of the N.T. Where notification has occurred, in general, the NLC has assisted Aboriginal people asserting native title rights and interests in its representative body area to file native title determination applications and to have them registered within the relevant statutory time periods. Registered native title claimants in the NLC representative body area have objected to the inclusion of the great majority of expedited procedure statements in the s29 notices.

The areas of land or water subject to notification in any one batch of notices are scattered across the N.T. They do not fall within the country of any one native title claim group, but rather are scattered across the countries of several claim groups. Generally, the inquiries are dealt with by the NNTT in the same order as that of notification of the proposed future acts. Therefore, responses to the notifications, and the consequent objection inquiry process cannot be organised coherently by the representatives of the native title parties.

From November 2001, the NNTT began conducting hearings in expedited procedure objection inquiries concerning the proposed grant of exploration licences in the NLC representative body area. In each of these inquiries, the NLC has performed its facilitation and assistance functions by providing legal and other services to the native title parties directly.

NNTT Process

Once the NNTT accepts the native title party's objection application, it notifies the Government party and the grantee party (the applicant for the exploration licence) that the objection has been made, and commences its inquiry process. Each of the Government and the grantee is a party to the inquiry, as well as the objector.

In each inquiry, the NNTT sets directions for the parties to provide material to it[18]. The directions differ from matter to matter only in the various compliance dates[19]. Each party is to provide a statement of contentions and a copy of each relevant document, including statements of evidence to be given by any witness, verified where possible by affidavit. There is provision for dealing with confidential documents. Each party must state where a hearing is to be heard if it is not to be heard on the papers.

Specific directions include:

- The Government party is to provide:

[16] Up to 20 at a time.
[17] As a representative body, the NLC has the facilitation and assistance functions set out in s203BB NTA
[18] See National Native Title Tribunal, Expedited Procedure Objection Application Directions, undated, but circulated in August 2002.
[19] It appears that the directions in the N.T. differ from those used in Western Australia.

- A topographical map of scale 1:100 000 marked with:
  - The areas of the licence/s and location of registered and recorded sites under the *Northern Territory Aboriginal Sacred Sites Act* 1989 ("Sacred Sites Act"); and
  - boundaries of various tenures of land within and overlapping the boundaries of the tenement with details of the nature of each such tenure.
- the details of any Aboriginal community within and in the vicinity of the licence/s; and
- tenement documents including:
  - copies of the application for the licence/s;
  - copies of proposed Schedules of Endorsement and Schedule of Conditions;
  - details of current mining tenements; and
  - available details of prior mining tenements granted over the same area.

- The native title party is to provide:
  - a statement of the nature and location of sites or areas of significance on or adjacent to the proposed exploration licence ("the licence area"), identifying in each case the particular significance of the site or area;
  - a statement of the community or social activities of the native title party that it is contended is likely to be interfered with directly by the grant of the tenement; and
  - the details of the registered and recorded sites under the Sacred Sites Act as released from the Aboriginal Affairs Protection Authority.

It should be noted that these directions are made in a context, so far as the NLC and the Government party are concerned, of a large number of other NNTT expedited procedure inquiries being conducted at the same time. Largely, the directions have been complied with by the native title and the Government parties. Many of the grantee parties have also complied.

In each inquiry, the native title party and the Government party have made contentions on the law that have largely been identical from matter to matter. Primary evidence from members of the native title claim group has been provided in each matter, mostly in affidavit form.

NNTT decisions

There is now a series of NNTT decisions regarding the application of the s237 criteria in the context of the regime governing the grant of exploration licences in the N.T.

General findings of law

Each of the members of the NNTT conducting inquiries in the N.T. has made substantially the same findings concerning the effect of the regime in the N.T. Each has largely adopted general findings of law made by Member Sosso in the earliest set of

inquiries conducted. As particular issues have arisen, various NNTT members have made specific findings concerning them. Some particular examples follow.

Paragraph 237 (a) example: ALRA Reports

Paragraph 237(a) deals with the likelihood of interference with community or social activities. The most common class of such activities in the evidence presented to the NNTT by the native title party is hunting, gathering and fishing.

Evidence of such activities is generally provided to the NNTT in the form of direct evidence from members of the native title claim group. However, in addition, evidence that comes from other sources can be provided. In the course of an inquiry, the NNTT may, in its discretion adopt any report, findings, decision, determination or judgment of any court or other person or body that may be relevant to the inquiry[20].

It has become the practice in matters conducted by the NLC for native title parties to submit to the NNTT that specific parts of particular reports of the Land Commissioners made under the ALRA are relevant to inquiries before the NNTT. The native title parties refer the NNTT to relevant parts of the reports, including findings that can be adopted as evidence in support of their contentions, and submit that it should adopt them.

It might be that, in future, similar use might be made of transcripts of evidence, or judgments, in native title determination hearings[21]. If such a use can be made of pre-existing material, potentially, less direct evidence, specific to the inquiry, would be required. In this way, the resources needed to obtain direct evidence might be reduced. Those resources are required to identify appropriate witnesses, locate them, obtain instructions specific to the inquiry, draft an affidavit (or affidavits) based on those instructions, and arrange execution of the affidavit(s). Some guidance as to the manner in which the NNTT might approach such material can be gained from its decisions in the N.T. regarding use of the ALRA Reports.

The ALRA requires Aboriginal Land Commissioners[22] to determine whether there are traditional Aboriginal owners for the land claimed. "Traditional Aboriginal owners", in relation to land, are defined[23] as a

> "local descent group of Aboriginals who:
>
> (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and
>
> (b) are entitled by Aboriginal tradition to forage as of right over that land".

The process that has developed to assist in determining traditional Aboriginal ownership includes the Land Commissioner taking evidence from Aboriginal people as to these

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[20] Paragraph 146(b) NTA.

[21] In one inquiry, the native title party sought to rely on parts of Lee J's decision in *Ward v Western Australia* (1998) 159 ALR 483 (see *Ben Ward & Ors/Swiftel Ltd/Northern Territory* DO 01/83, unreported, Member Sosso, 12 June 2002 ("Ben Ward (DO 01/83")). The native title claim group in the inquiry was similar to that in the native title determination. The area subject to the inquiry was outside the area subject to the determination.

[22] Land Commissioners have, in most cases, been Federal Court judges.

[23] Section 3 *Aboriginal Land Rights (Northern Territory) Act 1976* (Commonwealth).

matters. The Commissioner is to report his or her findings, and, where he or she finds that there are traditional Aboriginal owners of the land, to make recommendations for the granting of the land[24]. In the course of those findings the Commissioners make findings about the evidence relevant to their inquiry. Often, they make observations about sites, areas or activities outside the area subject to the land claim, which may be directly relevant to the NNTT's inquiry.

Generally, the final findings as to traditional Aboriginal ownership are expressed by listing people who are traditional Aboriginal owners. In many Reports there is a description of the basis for the conclusion that these people are traditional Aboriginal owners; a description of the various subgroups of the local descent group; their descent, and their relationships, rights and responsibilities to each other and to the claim area.

Particularly, a finding of an entitlement by Aboriginal tradition to forage as of right over the land claim area is a necessary prerequisite to a finding of traditional Aboriginal ownership. The native title party argues that evidence supporting a finding of an entitlement by Aboriginal tradition to forage as of right also supports a NNTT finding in a s237 inquiry of the carrying on of a community or social activity. On its face, foraging includes the community or social activities of hunting, gathering and fishing. Findings concerning these activities on land of which the land claimants are found to be traditional Aboriginal owners, allow an inference to be drawn that the same people do the same things on other parts of their traditional country, including the licence area.

It should be noted that findings about foraging are not generally directly applicable to the licence area. If as a result of the land claim, the claim area is Aboriginal freehold, the proposed grant of the exploration licence is not a future act[25], and the right to negotiate cannot apply. In some cases, the area of subject to a Land Commissioner's recommendation for grant has not been granted as Aboriginal freehold. Therefore, the land claim area and the licence area might be co-extensive. The Land Commissioner's findings might have been made about foraging in the licence area. These situations are rare.

In most instances, the land claim area and the licence area are not co-extensive. The objection inquiry generally applies to land that has not been the subject of a finding of a right to forage in an ALRA Report. Therefore, the native title party asks the NNTT to draw inferences from the ALRA Report that are based on facts that:

(a) The licence area and the area subject to the ALRA Report are relatively close to each other; and

(b) Rights under traditional law and custom are held in respect of both areas by groups of Aboriginal people that are substantially the same. Such a contention requires some analysis and comparison of the composition of the native title claim group and of the land claim group.

In many cases, the NNTT has been reluctant to make such findings, and to draw the inference sought.

[24] Paragraph 50(a)(ii) ALRA.
[25] Subsection 233(1) NTA.

In one case, the NNTT declined to draw any such inference, and therefore, declined to adopt a particular Report or its findings[26]. It did not address these issues specifically. It appears that the major basis for this decision was that the Land Commissioner's inquiry is directed to claims of traditional ownership, which is quite different to the concept of native title under the NTA. Therefore, the Land Commissioner's inquiry was of no assistance in determining the issues raised by s237. The issues involved in an expedited procedure objection application are so different from those involved in Land Claim Reports that such Reports were of no value in, and indeed if relied upon, might distort the validity of the determination of an expedited procedure application[27].

The question becomes whether this is a reasonable exercise of the NNTT's discretion to adopt relevant material[28]. Arguably, such an exercise of the discretion allows the NNTT to adopt only reports, findings, decisions, determinations or judgments produced by persons or bodies specifically dealing with native title issues, including those empowered by the NTA, and State or Territory Supreme Courts. On its face, the discretion allows the adoption of material produced by any person or body as well as by the NNTT, a court, or a recognised State/Territory body[29]. Use of the phrase "any other person or body"[30] indicates that there can be a broad range of sources for such material; it need not be limited to material produced by persons or bodies dealing specifically with native title issues. Many types of information from a range of sources might be relevant to the NNTT's inquiry. Arguably the discretion cannot be limited in such a way.

Other members of the NNTT have not declined to adopt findings in the ALRA Reports on this basis. In general, factors governing the relevance of the ALRA Report have included:

- The distance from the land claim area to the licence area that is the subject of the NNTT's inquiry.
- The time since the ALRA Report was made[31].
- The extent to which there is overlap between the native title claim group, and those people found to be traditional Aboriginal owners by the Land Commissioner.
- Whether the findings in the ALRA Report regarding foraging are of a specific and detailled nature, or are more general.

Thus, for instance, the NNTT has stated that the evidential value of extracts from particular ALRA Reports was extremely slight[32] given a combination of these factors. In that particular inquiry, the relevant factors included the time which had elapsed since the Report was written; the fact that the land the subject of the Land Claim was not within or

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[26] See, for example, the decision of Deputy President The Hon EM Franklyn QC, in *Don Rory & Roy Dixon /NTG/Astro Mining NL* DO 01/107 & 108, unreported, 12 September 2002 ("Don Rory"), at [10].
[27] Ibid.
[28] See s 146 NTA.
[29] Ibid.
[30] Subparagraph 146(a)(iv) NTA.
[31] The first ALRA Report – Borroloola Land Claim (No. 1) (1978) – was completed in 1978. The Reports have been produced during the whole of the 24 years since.
[32] See for example, *Dixon/Plenty River Corp Ltd/Northern Territory* DO 01/51, Member Stuckey-Clarke 19 April 2002, at [18].

coextensive with the proposed tenement; and the somewhat vague relationship between the objectors and the traditional owners.

Findings with respect to foraging may relate to activities that were taking place more than 20 years ago. The NNTT has acknowledged that that does not mean that such foraging does not continue, but stated that it required contemporary primary evidence that gives credence to the proposition that there are current and ongoing community or social activities occurring on the proposed tenement. The NNTT warns that it should view ALRA Reports with a degree of caution, and to have regard to their age, their statutory background and to the whole scheme of the Report[33].

On the other hand, the NNTT has found that, given a finding of foraging in an ALRA Report, it is reasonable to infer that such foraging activities would be likely to continue to be practised in the land claim area. However, it also drew attention to the fact that the finding was not made in respect of the tenement area. In the particular case, the Report was relevant in illustrating that traditional hunting and gathering activities were still an important and ongoing part of the life of the native title holders in the general area at the time of the Report[34]. The NNTT felt that it would be wholly artificial for it to ignore the graphic accounts of community or social activities contained in the Report[35]. However, in that particular case, the NNTT decided that the evidence as a whole was insufficient to persuade it that there was any real chance or likelihood of any significant interference with community or social activities.

The nature of findings about foraging varies. Some ALRA Reports contain a detailed description of what foraging involves, and who is involved in it[36]. In other Reports, there is a mere statement that a right to forage is held by members of the group[37].

The NNTT makes limited use of ALRA Reports. They are not likely to be sufficient on their own to satisfy the requirements of par 237(a), but they may assist by supplementing the primary evidence of members of the native title claim group.

In recognition of the potential for use of ALRA Reports, the NNTT has recently issued a draft practice direction governing the circumstances in which such reports may be adopted, which includes specific reference to the need to establish the specific overlap between the two groups[38].

The NNTT has adopted the findings in ALRA Reports more broadly in matters relevant to the application of the criterion under par 237(b). Such findings have been adopted by

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[33] Hazelbane/*McCleary/Northern Territory* DO 01/70-81, Member Sosso 26 April 2002, at [26], [28].

[34] Ten years ago, in that case.

[35] *May Rosas/NTG/BHP Billiton Minerals Pty Ltd* DO 01/98, unreported, Member Sosso, 25 June 2002 ("May Rosas (DO 01/98)"), at [53], [64, [65].

[36] See, for example, the Mataranka Land Claim Report No. 29 (1988), at [7.1.1]-[7.2.6].

[37] For instance, in the Stokes Range Land Claim Report No. 36 (1990), Olney J states that

> "In so far as the definition requires a finding to be made as to the entitlement by Aboriginal tradition to forage as of right over the claim area, I am satisfied that there is overwhelming evidence from which such a finding can be made in respect of all persons advanced as claimants and accordingly that fact can be taken to be adequately proved and will not hereafter be specifically referred to" (at [5.3]).

[38] National Native Title Tribunal, Right to Negotiate Inquiries: Practice Direction No. 2 of 2002 (Northern Territory Only - Land Claim Reports).

the NNTT in determining the authority of deponents identified in the Report to speak for areas or sites of particular significance in accordance with their traditions to the persons who are the native title holders[39]. Similarly, such findings have been adopted to assist in identifying the location and significance of sites.

Paragraph 237 (b) example: legislative regime and "site rich" areas

Paragraph 237(b) deals with the likelihood of interference with areas or sites of particular significance.

Generally[40], the NNTT deals with this issue in two stages:

1. It decides whether there are any areas or sites are of particular significance. If it finds that there are no such areas or sites, that is the end of its inquiry.
2. If it finds that there are any such areas or sites, it decides whether the future act is likely to interfere with them.

Thus, the NNTT only considers the issue of interference after it has decided that there is evidence sufficient to establish that:

(i) The deponents have authority to speak for areas or sites according the laws and customs of the group of native title holders[41];

(ii) Such areas or sites exist and are capable of being interfered with by the proposed act[42];

(iii) The location of the areas or sites can be identified[43];

(iv) The relevant particular significance of the areas or sites can be identified[44]; and

(v) The significance to native title holders in accordance with their traditions is special or more than ordinary. It is not enough that the site simply be of significance to native title holders[45]. This requirement can lead to the drawing of arbitrary distinctions as to the significance of areas or sites.

Determination of these issues depends on an assessment of evidence, which has been obtained in the context of a relatively low level of representative body resources. The NNTT subjects the evidence to this series of sieves. Evidence discarded as a result of its assessment according to these requirements seems not thereafter to be considered for any other purpose. The NNTT seems not to consider the evidence, or its effects, as a whole.

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[39] See, for example, May Rosas (DO 01/98), at [21]; *Daniel Lane & Ors/NTG/Biddlecombe Pty Ltd* DO 01/122, unreported, Member Sosso, 29 July 2002.

[40] However, contrast this approach with that undertaken in Ben Ward (DO 01/83: see below).

[41] See, for example, *Gabriel Hazelbane & Ors/McCleary/Northern Territory* DO 01/79-81, unreported, Member Sosso, 26 April 2002, at [11], citing RD Nicholson J, in *Little v Western Australia* [2001] FCA 1706.

[42] *Ben Ward & Ors/Swiftel Ltd/Northern Territory* DO 01/83, unreported, Member Sosso, 12 June 2002 ("Ben Ward (DO 01/83)"), citing Deputy President Franklyn in *Wilfred Hicks/Western Australia/Legend Mining NL* WO 99/71, unreported, 25 September 2000.

[43] *Angus Riley and May Foster/Northern Territory/Rodney Johnston and Motoo Sakurai* DO 01/70-71, unreported, Deputy President Franklyn, 17 April 2002 ("Angus Riley DO 01/70-71"), at [17].

[44] Ibid.

[45] Ibid. See Carr J in *Cheinmora v Striker Resources NL* (1996) 142 ALR 21 (at 34).

Once the evidence is put through these sieves, in many cases the NNTT finds that there are no areas or sites of particular significance. Therefore, it does not make any further inquiry as to the likelihood of interference.

When it does address the interference issue, the NNTT, in many cases, finds that the regulatory regime in force in the Northern Territory is sufficiently extensive and sensitive to native title issues, that it would be effective in minimising the risk of any interference to sites of particular significance[46]. However, the effect of the regulatory regime is not decisive. If it were, there would be no need for an inquiry under par 237(b). However, it is an important factor to be taken into account in the inquiry[47].

Other factors in a decision whether the future act is likely to interfere with areas or sites of particular significance have included[48]:

- Whether there is evidence that previous exploration activity has resulted in any damage to sites on the area of the proposed tenement.
- Whether there is a blanket opposition to exploration per se with respect to sites, or whether exploration is contemplated by the members of the native title claim group, subject to proper protocols being adopted. If the evidence is that the native title holders want to be consulted and want to have a say in where exploration will take place and under what conditions, the NNTT generally finds that these needs can and should be met by the regulatory regime in place.
- The presumption of regularity of behaviour by the grantee party, whereby it is presumed, by the NNTT, that it will comply with the law. This presumption applies unless evidence is brought of previous behaviour of the grantee such that the presumption should be overturned.

In some cases, the NNTT has found that an area is so "site rich" that the regulatory regime is not sufficient to render interference with areas or sites of particular significance unlikely.

The NNTT has indicated[49] that an area is site rich if

> "... the whole fabric of the country is imbued with a pervasive spirituality such that any exploration activity would be likely to result in interference".

In another decision[50], it stated that an area is site rich if:

> "... the number and nature of sites is such that the Tribunal is put on notice that, even applying the presumption of regularity, there is often a real chance or risk that the act in question will interfere with the spiritual fabric of the locality. In short a site rich area can be understood not only as an area where the number of

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[46] See, for example, *Peggy Mawson and Roy Dixon/Minorco Australia Limited/Northern Territory* DO 01/18, unreported, Member Stuckey-Clarke, 1 May 2002, at [28];
Daniel Lane & Ors/Biddlecombe Pty Ltd/N.T. DO 01/122, unreported, Member Sosso, 29 July 2002, [46].
[47] Ibid.
[48] See, for example, May Rosas (DO 01/98), [80].
[49] May Rosas (DO 01/98), at [80].
[50] Ben Ward (DO 01/83), at [82].

sites is large, but also that the number of sites is itself sometimes a manifestation of the overall spiritual importance of the land and waters in the relevant locality".

The NNTT's requirement that, before an area can be considered site rich, the whole fabric of the country must be imbued with a pervasive spirituality, or be spiritually important is reflected in many statements in the anthropological literature. An example is Stanner's statement, when discussing the links between an Aboriginal group and its homeland, that[51]:

> "A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call "land" we took what to them meant hearth, home, the source and focus of life, and everlastingness of spirit. ... What I describe as 'homelessness', then, means that the Aborigines faced a kind of vertigo in living. They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left".

This must be describing a relationship whereby the whole fabric of the country is imbued with a pervasive spirituality.

Further, in my experience of taking instructions from members of native title claim groups in the N.T. about the particular significance of areas or sites, in most cases there is no marked difference between people's attitudes to their country, such that it is possible to say that the fabric of some localities is imbued with a pervasive spirituality, and that of others is not.

The question, therefore, becomes: what evidence is sufficient to establish that a particular tenement area has a fabric that is imbued with such a pervasive spirituality, or is spiritually important? The decisions of the NNTT in the N.T. do not provide much guidance.

In one inquiry[52], the NNTT decided that the area was site rich, on the basis that:

- The proposed tenement is traversed by important dreaming tracks;
- There are sites on or near the proposed tenement that are considered to be extremely dangerous (and of significance);
- A particular creek and an area of black soil are important;
- There was evidence to show that the whole area is afforded great significance by the native title party;
- There are sites of particular significance, which were located within wider areas of particular significance.

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[51] Stanner, W.E.H. (1979) White man got no Dreaming: essays 1938-73, ANU Press, Canberra, at p. 230.
[52] Ben Ward (DO 01/83), at [86]-[88]. It should be noted that in Ben Ward (DO 01/83), the evidence did not go to particular sites. The NNTT was prepared to find that the area in and immediately around the proposed tenement, contains sites of particular importance to members of the claim group. Factors in this decision included the quite unusual level of site recording/registration by the AAPA and the other factors outlined (see [77] & [79]).

In another matter[53], the NNTT also decided that the area was site rich; this time on the basis that:

- The area is one of complex interlocking sites;
- The land and waters in question comprise many areas of deep spiritual significance and importance to native title holders;
- It is not possible to quarantine these areas to a particular geographical portion of the proposed tenement, or indeed to isolated and geographically discrete areas. Dreaming sites dot the landscape. Dreaming tracks criss-cross the tenement.
- This particular area of the Northern Territory is of high cultural and spiritual importance to the traditional owners.

In this inquiry, other factors included that the sites were widespread, and that they were of such particular significance that there was a real likelihood of interference[54].

A major factor in both decisions that there was a likelihood of interference was the absence of any evidence from the grantee party. In Ben Ward (DO 01/83) it was the determining factor[55]. The NNTT was entitled to assume that each grantee would exercise all its entitlements under the proposed exploration licence to the fullest lawful extent[56].

In other cases, where there have been findings that there are areas or sites of particular significance in the area of a proposed tenement, there have not been findings of "site richness"[57]. It appears that a necessary pre-requisite to such a finding is a lack of evidence of the intentions of the grantee party regarding the exercise of the rights available to it under the exploration licence.

A factor in deciding whether an area is site rich may be that the native title holders do not regard exploration as per se unacceptable. This may indicate that the whole fabric of the country is not imbued with a pervasive spirituality such that any exploration activity would be likely to result in interference[58]. The application of this factor may ultimately depend on the manner in which the evidence of witnesses is expressed. A factor influencing the manner of expression of evidence may be that it is given in a context where, on a pastoral lease, the members of the native title claim group may never have had any recognition of either native title or their interests in protecting areas or sites, or capacity to exercise their native title rights and interests.

A finding of "site richness" requires evidence that an area is particularly sacred or important[59].

The NNTT has decided that three sites in a licence area are insufficient to mean that the area is site rich[60]. Two sites and Dreaming tracks and other places of importance to native title holders, similarly, has not been sufficient[61].

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[53] Ben Ward (DO 01/63), at [59].
[54] Ben Ward (DO 01/63), at [65].
[55] Ben Ward (DO 01/83), at [89].
[56] Ben Ward (DO 01/63), at [62] & Ben Ward (DO 01/83), at [89].
[57] See below.
[58] See May Rosas (DO 01/98) [80].
[59] *Allan Griffiths/NTG/BHP Billiton Minerals Pty Ltd* DO 01/100, unreported, member Sosso, 5 July 2002.

In some cases the question has not arisen, as the native title party has been unable to establish that there are relevant sites or areas of particular significance. This is certainly a necessary pre-requisite to any consideration of the question of site richness. In other inquiries, the NNTT has not appeared to address the issue.

The NNTT seems able to draw a distinction between one area of people's country that is site rich, and another that is not. In doing so, it is applying relatively ill-defined criteria in what appears to be an arbitrary fashion. It does not have evidence of great detail or at great depth before it. Further, it is only applying those criteria, after it has put the evidence of the existence and significance of sites through a series of sieves that have the effect of reducing, in a piecemeal way, any evidence of a pervasive spirituality that is available to it. It appears not to take account of the totality of the evidence that is relevant to that spirituality.

Paragraph 237 (c) example: Major Disturbance in National Parks

The criterion set out in par 237(c) deals with major disturbance to land or waters. The NNTT must address whether either the grant of the right to mine, or the exercise of rights created by it are likely to involve major disturbance to any land or waters concerned.

One of the relevant questions under paragraph 237(c) is whether the exercise of the rights conferred by the proposed tenement is likely to involve major disturbance from the viewpoint of the community generally, taking into account the concerns of the Aboriginal community[62]. Determination of that issue is not to be made solely or exclusively by reference to the standards of the broader non-indigenous community, but must also apply standards operating within the indigenous community.

Relevant factors in the NNTT's decisions under par 237(c) generally have included[63]:

- Evidence of previous exploration on the area of the proposed tenement;
- The regulatory regime governing exploration[64]; and
- Whether there is evidence that indicates that previous exploration activities have resulted in any deleterious impacts on the relevant land and waters[65].

An important factor is whether there are any physical peculiarities of the licence area. In certain circumstances the nature of such peculiarities could affect consideration of what activities involve major disturbance[66].

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[60] *Peggy Mawson and Roy Dixon/Minorco Australia Limited/Northern Territory* DO 01/18, unreported, Member Stuckey-Clarke, 1 May 2002, at [28].

[61] *Daniel Lane & Ors/Biddlecombe Pty Ltd/N.T.* DO 01/122, unreported, Member Sosso, 29 July 2002, [46].

[62] *Dann v Western Australia* (1997) 74 FCR 391.

[63] See, for example, *Sandy Limmen & Ors/BHP Minerals Pty Ltd /N.T.* DO 01/99, member Stuckey-Clarke, 24 July 2002, at [44].

[64] Generally the NNTT has made findings similar to a finding that the Northern Territory has in a place a well advanced, integrated and pro-active legal regime for mining exploration, that pays significant regard to the native title rights and interests of traditional owners and which to a very large degree has succeeded in dovetailing native title considerations in to the fabric of the decision-making process. See *Sandy Limmen & Ors/BHP Minerals Pty Ltd /N.T.* DO 01/99, member Stuckey-Clarke, 24 July 2002, at [44].

[65] See, for example, *Don Rory & Roy Dixon/NTG/Astro Mining NL*, DO 01/110, 111, unreported, Deputy President Franklyn, 10 May 2002, [17].

Potentially, the physical peculiarities of an area could be such that the exercise of the rights conferred by an exploration licence is likely to involve major disturbance from the point of view of the community generally. In such a case, arguably, the NNTT need not look to the standards operating within the relevant indigenous community. In theory, evidence of concerns of the community generally might include evidence of the creation, and the reasons for the creation, of a national park in respect of the area of land and waters subject to the proposed exploration licence. The reasons for the creation of a national park might include that the physical features and environment of the area meet the criteria for the creation of a national park. Potentially, given these criteria, the fact of the creation of the national park could be evidence of the standards assigned to the licence area by the broader community.

The NNTT has addressed the issue of whether minerals exploration in a national park can amount to major disturbance. In one matter[67], the evidence included the fact that the Gregory National Park ("the Park") had been declared under the *Territory Parks and Wildlife Conservation Act* ("the Parks Act").

The NNTT decided that the provisions of the Parks Act are so broadly stated that the declaration of a national park in the N.T. might be for any number of positive public policy reasons. The power to establish a park or reserve was couched in wide and non-specific language; it was not limited to areas which are environmentally significant. The mere fact of declaration could not raise a presumption that the land and waters in question had special features that would render any exploration activity likely to result in major disturbance[68].

It decided that the earmarking of land and waters as a national park under the Parks Act was relevant to an assessment of the likelihood of disturbance, but was not determinative; nor did it raise any presumptions. The NNTT decided that there must be evidence that[69]:

- the land or waters are in pristine condition, undisturbed, environmentally significant, or inevitably exhibit special physical circumstances; and
- the exploration (or previous exploration) has (or had) the potential to significantly disturb the vegetation and soil of the area.

In addition, in that inquiry, the evidence also included a Draft Management Plan. This draft plan was not accepted by the NNTT as evidence of these matters. It did provide some interesting information about the Park[70]. The draft plan contained information about the values of the area subject to the national park, including information about the significance of the environment and the special physical circumstances of the area[71]. The Park contains major ecosystems and has significant values including wilderness, threatened species and ecological communities, as well as Aboriginal cultural, European

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[66] See May Rosas (DO 01/98), at [93].
[67] May Rosas (DO 01/98).
[68] May Rosas (DO 01/98), [95].
[69] May Rosas (DO 01/98), at [96] & [101].
[70] See May Rosas (DO 01/98), at [97].
[71] See the extract from the native title party contentions cited at My Rosas (DO 01/98), at [93].

heritage, scientific, and tourism and recreational values. These assertions were supported by specific reference to rare and/or endangered, and introduced species [72].

However, the NNTT decided that the draft plan could not be sensibly or safely used as evidence for the purpose of the inquiry. It was only a draft document, which had been released for the purposes of public comment and input. When finalised the Plan was still subject to the approval of the Administrator and might be disallowed by the Legislative Assembly[73].

The NNTT then considered the regime directed to protecting the environment of the Park. In the event that there is no current Plan of Management for the Park, the Parks and Wildlife Commission is empowered[74] to perform its functions for the protection and preservation of the Park. In conjunction with the existing regulatory regime in connection with exploration, this power is sufficient for the Commission to prevent major disturbance. The capacity of the Commission to intervene is a protection in addition to those under the regime governing minerals exploration generally[75].

The specific aspects of the regime regulating exploration in national parks that were relevant included that:

- the Parks Act[76] specifically authorised mining exploration in national parks;
- The N.T.'s *Mining Act*[77] contained a number of provisions designed, cumulatively, to impose an added duty of care on explorers and to arm both the Minister responsible for mining and the Minister responsible for national parks, with the requisite power to impose directions on an explorer. Importantly, the empowering of the Minister responsible for national parks with a proactive role in setting directions aimed at protecting the environment of national parks, ensured that the decision making process involved more than one Minister and more than one government agency, and specifically inserted into this process a focus not just on the promotion of exploration but also on environmental protection[78].

Other factors included:

- there was no evidence that any previous exploration activity had impacted on the land or waters of the Park area, or had an adverse impact on any species or flora of the Park;
- the Park had been subject to fairly extensive low impact exploration over a number of years.

In this situation, the NNTT required that there be specific evidence addressing the particular environmental features of the tenement area. The mere implementation by one of the parties to the inquiry of a decision to call part of the area a national park, and to take some steps to put in place a management regime to care for and protect that area was

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[72] Ibid.
[73] May Rosas (DO 01/98), at [97], citing ss 18 & 19 Parks Act.
[74] Subsection 17(4) Parks Act. The Commission must have the approval of the Administrator to do so.
[75] May Rosas (DO 01/98), [97].
[76] Subsection 17(2).
[77] Section 176A.
[78] May Rosas (DO 01/98), at [98], [100] & [101].

insufficient. The scientific and descriptive information contained in the draft management plan was not evidence, because the draft was subject to public comment, and approval by the Administrator and the Legislative Assembly.

This limitation narrows the scope of evidence that is acceptable before the NNTT. In this case, it appears unlikely that major changes would be made to purely descriptive elements of the draft plan through the approval process. With no other sources of information as to the physical peculiarities of the licence area before the NNTT, this information might have been useful for its inquiry. None of the scientific and descriptive material was challenged before the NNTT.

In any event the management regime in the Parks Act, without a Management Plan, was sufficient to reduce the likelihood of major disturbance.

It may be that in some cases, there will be evidence of this sort accepted as evidence in an expedited procedure inquiry by the NNTT. However, the restrictions placed on the use of such material in this decision do not augur well for such material having a significant role in NNTT decisions on the issue of major disturbance to land or waters.

Agreements

At the same time as the NNTT inquiry process, negotiations have been occurring with several minerals exploration companies about the grant of exploration licences. Agreements have been reached between native title and grantee parties. Recently, several exploration companies, including the Rio Tinto group of companies, have entered a memorandum of understanding with the NLC, committing them to a particular form of agreement with native title parties. These companies hold over 60% of the tenement applications in the NLC area[79]. Agreements with native title parties have followed.

The NLC anticipates that members of native title claim groups for most of its representative body area will approve the model agreement[80]. The form of agreement provides for site protection and other benefits.

Conclusion

Ultimately, for the native title parties, the expedited procedure inquiry process is about gaining access to the right to negotiate. The inquiry process is directed to people's activities on country, their significant sites, and the country itself. The NNTT deals with the issues raised by these matters in the context of an expedited procedure inquiry in a manner characterised by complexity, evidentiary demands, and legal intricacy.

This approach is to be contrasted with the statutory requirements for the NNTT:

1. to pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way; and
2. in carrying out its functions, not to be bound by technicalities, legal forms or rules of evidence[81].

[79] Ron Levy, Principal Legal Officer, NLC, personal comment.
[80] Ibid.
[81] Section 109 NTA.