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:26
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Parliamentary Joint Committee on
Native Title and the Aboriginal and Torres Strait Islander Land Fund
The Senate
Parliament House
Canberra
ACT 2600

Att: Maureen Weeks

Dear Ms Weeks,

Submission to Inquiry into Effectiveness of the National Native Title Tribunal

Please find ***enclosed*** *a paper that was presented to the Native Title Conference, Geraldton, September 2002, by way of submission to the Parliamentary Joint Committee. The paper examines the interpretation and application of section 237 of the* Native Title Act *and the role and approach of the National Native Title Tribunal therein.*

I wish to present this submission in my personal capacity.

Yours faithfully,

Simon Choo
Encl.

"How High Can You Jump? Raising the Bar for Expedited Procedure Matters: recent developments in the interpretation of section 237 Native Title Act"

By Simon Choo, Senior Regional Legal Officer, Yamatji Land and Sea Council[1]

The implementation and interpretation of section 237 of the Native Title Act ("NTA") and the "expedited procedure" has significant impact on native title claimants. In recent times there have been an increasing number of determinations of the National Native Title Tribunal and decisions of the Federal Court in relation to the expedited procedure.

The paper is focused towards native title practitioners acting for claimants and aims to assist them in the preparation and execution of expedited procedure matters by elucidating and critically examining some of the principles applied in the application and interpretation of the expedited procedure.

The purpose of this paper is to examine recent judicial interpretation of the expedited procedure provisions and to pay specific attention to the salient issues, elements and legal principles, with a specific focus on the situation in Western Australia. The paper distils some of the issues and approaches relevant to the interpretation of s.237 of the NTA.

1 Introduction

In typical legal fashion, this paper starts with a disclaimer, and that is that the paper is targeted at native title practitioners acting for native title claimants in future act matters. I have aimed to set out the relevant legal principles and issues that govern the interpretation of the "expedited procedure" by the National Native Title Tribunal ("the Tribunal"). I have sought to set this out clearly in lay person's terms and not to be overly technical, if I do not succeed in this then I give my apologies in advance. The "right to negotiate" under the Native Title Act ("the NTA") is an important and valuable right[2], which provides native title claims with important tools under the NTA to assist them to control access to their traditional country and have a meaningful say over "future acts" within their claim area. A Government Party can give notice that it considers that an act

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[1] Simon Choo has represented native title parties in numerous expedited procedure matters, including, *Violet Drury & Ors/Western Australia/Giralia Resources NL ("Drury/WA/Giralia")*, NNTT WO00/93, unreported, Hon E M Franklyn QC, 18 May 2001; *Kevin Peter Walley & Ors and Robin Boddington & Ors /Western Australia/Giralia Resources NL ("Walley & Boddington & Ors/WA/Giralia")*, NNTT WO01/180, unreported, Hon C J Sumner, 8 March 2002; and *Kevin Peter Walley & Ors and Boddington & Ors /Western Australia/Hampton Hill Mining NL ("Walley & Boddington & Ors/WA/Hampton Hill")*, NNTT WO01/486, unreported, Hon C J Sumner, 11 April 2002; *Violet Drury & Ors/Western Australia/Bywood Holdings ("Bywood Holdings")*, NNTT, WO01/111, unreported, Hon E M Franklyn QC, 20 August 2002. The views expressed in this paper are those of the author alone and do not necessarily reflect the views of the Yamatji Land and Sea Council

attracts what is known as the "expedited procedure"[3], which is in effect a bypass to the right to negotiate provisions. This sets in train a process where the native title party must lodge an objection to the application of the expedited procedure and establish the merits of the objection before the Tribunal, in order to prevent the Government Party from bypassing the right to negotiate and doing the act without any consultation with native title parties. Section 237 of the NTA sets out circumstances where the expedited procedure is attracted.

> **237 Act attracting the expedited procedure**
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> A future act is an act attracting the expedited procedure if:
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> (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 native title* in relation to the land or waters concerned; and
>
> (c) the act is not *likely* to involve a *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.
>
> [emphasis added]

Section 237 NTA was amended, with effect from 30 September 1998, to include reference to the likelihood of interference or disturbance and to refer to "community or social activities" rather than "community life". Since the 1998 NTA amendments there have been a significant number of Tribunal determinations and several Federal Court decisions in relation to the interpretation and implementation of section 237 NTA. This paper examines recent judicial and Tribunal interpretation of the expedited procedure provisions and to pays specific attention to the salient issues, elements and legal principles relevant to section 237 NTA. Whilst there have been numerous recent

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[2] *North Gaanalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595
[3] section 32 NTA

Tribunal decisions interpreting the post 1998 amendment, section 237 NTA provisions, there have been few Federal Court decisions on the matter[4].

2 The Position in Western Australia

The State of Western Australia applies the expedited procedure to all exploration and prospecting leases[5]. The onus then falls upon native title claimants to lodge objections within four months of the notification day, pursuant to section 32 NTA in order to contest the application of the expedited procedure. The Federal Court has found that the decision to apply the expedited procedure to all exploration and prospecting leases without a consideration of the matters listed under section 237 NTA was not a decision reviewable under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and that the only remedies are those contained within the NTA[6]. As a result of the inadequate heritage protection provisions of the *Aboriginal Heritage Act* 1972 (WA), it is common practice for native title claimants in Western Australia to seek to protect their cultural heritage and to control access to their traditional country by lodging objections to the application of the expedited procedure. During the 2001-2002 financial year, in the Yamatji representative body region alone there were 333 objections to the application of the expedited procedure[7]. Of these objections, 182 objections were finalised, mainly by agreement to conduct a heritage survey or agreement that the right to negotiate provisions applied. The remaining 151 objections remained active.

3 General/Preliminary Issues

In making objections under section 32 NTA a number of general and preliminary issues need to be considered.

3.1 Form of objection

The objections must be in the prescribed form[8]. Following the Tribunal decision of *Roy Dixon/Ashton Mining Ltd/Northern Territory*[9] *("Roy Dixon")* the Tribunal issued

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[4] see *Little v Western Australia [2001] FCA 1706 ("Little")*; *Smith v State of Western Australia* (2001) 108 FCR 442 ("*Smith*").

[5] This practice of the blanket application of the expedited procedure to all exploration and prospecting grants has been criticised by the Human Rights and Equal Opportunity Commission ("HREOC") as being inconsistent with the NTA and a breach of human rights standards. See Aboriginal and Torres Strait Islander Social Justice Commissioner (2002) ***Native Title Report:2001***, Sydney: Human Rights and Equal Opportunities Commission, pp. 16-17.

[6] *Holt v The Hon. Daryl Manzie* [2001] FCA 627 ("*Holt*")

[7] personal communication, Alison Llewellyn, Case Manager, Future Act Unit, National Native Title Tribunal.

[8] section 76 NTA

"Guidelines on Acceptance of Expedited Procedure Applications" in May 2001, which required detailed information of the substance of the objections before the Tribunal would accept them. The Guidelines were roundly criticised by native title representative bodies in Western Australia as going beyond the terms of the NTA. These guidelines were subsequently amended with the Tribunal issuing revised *Guidelines on Acceptance of Expedited Procedure Applications* in October 2001, which reduced the level of detail required. Notwithstanding the revision of these guidelines the Aboriginal and Torres Strait Islander Social Justice Commissioner was highly critical in his review of the Tribunal's guidelines which he labelled as "inconsistent with human rights norms that protect Indigenous peoples' rights to effective participation in the development of their lands"[10]. He then went further to say "[t]he NNTT's approach is not required by, and arguably is contrary to, the terms of the NTA."[11]

3.2 Jurisdictional Issue

A number of jurisdictional issues need to be considered at the initial stages of the objection process. Where a party raises the issue of jurisdiction of the Tribunal to hear a matter, the Tribunal will consider and satisfy itself as to whether it has jurisdiction[12]. Challenges to jurisdiction have included the following bases: extinguishment of native title by "enclosed and improved" pastoral leases[13], validity of section 29 notice[14], nature of the "Form 4" objection[15], and timing of the section 35 application[16].

3.3 Predictive Assessment

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[9] NNTT, DO 01/1-7, unreported, the Hon E M Franklyn, 23 April 2001.
[10] *Native Title Report 2001*, ibid at page 21.
[11] *Native Title Report 2001*, ibid at page 21.
[12] *Mineralogy Pty Ltd v National Native Title Tribunal & Ors* (1997) 150 ALR 467 ("*Mineralogy*") at 473; *Anaconda Nickel & Ors/The State of Western Australia/ Ron Harrington-Smith & Ors*, NNTT, WF00/2-5 ("*Anaconda 3*"), unreported, Hon CJ Sumner, Deputy President, Mr J Sosso and Ms J Stuckey Clarke, Members, 8 December 2000; *Violet Drury & Ors/The State of Western Australia/Giralia Resources N.L. – Reasons for Decision on Preliminary Issue Going to Jurisdiction ("Drury/WA/Giralia – Jurisdiction Determination")*, NNTT, WO00/93, Hon EM Franklyn QC, 27 April 2001; see also *Walley v Western Australia* (1996) 137 ALR 561; cf *North Gaanalanja* at 623.
[13] *Anaconda 3*; *Drury/WA/Giralia – Jurisdiction Determination*; cf *North Gaanalanja* at 623.
[14] *Walley v Western Australia* at 574; *Roy Dixon*.
[15] *Andy Andrews & Ors/Exploration and Resource Development Pty Ltd/Northern Territory*, NNTT, DO 01/123-125, unreported, Member Sosso, 19 August 2002.
[16] *Walley v Western Australia* at 571.

Section 237 NTA requires the Tribunal to make a predictive assessment of the likelihood of the act in question having the consequences set out in section 237(a), (b) or (c) of the NTA. French J summarised the approach the Tribunal is required to take in *Smith*[17]:

> The Tribunal is therefore required to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in pars (a), (b) and (c) of s.237. That involves a predictive assessment not confined to a consideration of the legal rights conferred by the grant of the proposed tenement

This approach has been subsequently endorsed by Federal Court[18] and Tribunal[19]. The approach taken by the Tribunal is an evaluative approach that considers the context of the circumstances, including the conduct of third parties, physical environment, previous activities within the area in question and so on[20].

3.4 Standard of Proof

It is now well established that the relevant standard of proof in expedited procedure matters is whether there is a real or not remote chance or possibility of the matters under consideration occurring, regardless of whether that chance or possibility is greater than 50 per cent[21]. This was succinctly put by French J in *Smith*[22]:

> Consistently with the objects of the Act, the word "likely" requires a risk assessment by the Tribunal that will exclude from the expedited procedure any proposed act which would involve a real chance or risk of interference or major disturbance of the kind contemplated by s.237.

The Tribunal is required to take a "commonsense" approach to evidence adduced, but if facts are peculiarly within the knowledge of a party to an issue, and no evidence is adduced, then the Tribunal has often formed an adverse inference[23]. In some determinations it appears that the Tribunal has taken anything but a "commonsense" approach to evidence and a standard of proof that extends beyond a "real chance or risk" of interference. Take for example the recent determination of *Violet Drury & Ors/Western Australia/Bywood Holdings ("Bywood Holdings")*[24], where the Deputy

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[17] at 450, paragraph 23.
[18] *Little*
[19] *Moses Silver & Ors/Ashton Exploration Pty Ltd/Northern Territory ("Moses Silver")*, NNTT, DO01/13, unreported, Member Sosso, 1 February 2002 at [21]; *Walley & Boddington & Ors /WA/Hampton Hill* at [8].
[20] *Little*
[21] *Smith*; *Little*; *Moses Silver*
[22] at 450, paragraph 23
[23] per Carr J in *Ward v Western Australia* (1996) 69 FCR 208, at 217; as applied in *Moses Silve*r at [23]
[24] *, NNTT, WO01/111, unreported, Hon E M Franklyn QC, 20 August 2002.*

President Franklyn observes, when referring to the evidence of an elder from the Nanda group:

> Mrs Ryder testifies that Mr Randall "sometimes" brings her bush tucker which he collects "from within the area of the proposed tenements". How she knows from what area the bush tucker is brought to her is not explained. Assuming that the "sometimes" to which she refers in her affidavit (sworn 18 December 2001) extends back beyond 21 March 2001 (the date of the s29 notice), the "area of the proposed tenements" did not then exist[25].

I am not sure how the Tribunal then requires the area to be described. Given that it requires specific evidence of activities occurring within the tenement area, it seems anything but a commonsense approach to then dismiss evidence so tendered on the basis that the tenements do not exist as they have not yet been granted.

3.5 Intention of Grantee Party

In making an assessment of whether an act is an act attracting the expedited procedure, it is relevant to take into account the intention of the grantee party. The relevance and weight that is given to the evidence will depend upon the circumstances of the case[26]. In the absence of evidence of intention of grantee party, it will be assumed that the legal rights created by the grant of the exploration licence will be exercised to their full extent[27]. The evidence of intention of the grantee party that it will conduct activities in such a way as to minimise disturbance to sites or activities, has often been taken into account in recent decisions of the Tribunal[28]. Native title parties should consider issues such as whether the grantee has refused in the past to conduct Aboriginal heritage surveys over the proposed tenement area. If it has, then evidence of this refusal should be led, as it will be relevant to establishing whether the requirements of section 237(b) NTA are met.

3.6 Activities Outside the Tenement Area

A consideration of the impact of the act upon the social and communal activities of, and sites and areas of importance to, the native title party should not be limited to the

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[25] at [18]
[26] *Walley & Boddington & Ors/WA/Hampton Hill* at [9]; *Moses Silver* at [25] – [32].
[27] *Walley & Boddington & Ors/WA/Hampton Hill* at [9]; *Michael Page/Michael Teelow/Northern Territory ("Page/Teelow/NT")*, NNTT, DO01/22, unreported, Member Sosso, 1 February 2002 at [58]; .
[28] see for example *Harry Lansen/Biddlecombe Pty Ltd/Northern Territory ("Lansen/Biddlecombe/NT")*, NNTT, DO01/113, unreported, Member Stuckey-Clarke, 2 August 2002.

activities carried out within the tenement area itself. The Tribunal is not limited to considering solely the activities of the grantee party within the tenement area, as activities outside the tenement area may be relevant to a consideration of the section 237 NTA requirements. For example, there may be impacts caused by ancillary activities that occur outside the tenement area, such as travel to and from the tenement area, drilling for water and so on. However, in order for off-site activities to be taken into account, there must be a clear connection between those activities and the issues under consideration under section 237 NTA[29].

3.7 Hearings

There a number of issues that need to be considered in relation to the conduct of expedited procedure hearings.

(a) Hearing or Determination "on the papers"

There is no requirement for the Tribunal to hold a hearing in relation to expedited procedure matters. The Tribunal has the discretion to hold hearings, however, where it appears to the Tribunal that the issues for determination cannot be adequately dealt with in the absence of the parties, the Tribunal must hold a hearing[30]. For example, where the credibility of a witness is at issue or there are discrepancies in the evidence.

(b) On country hearings

The NTA provides for expedited procedure matters to be heard 'on country', with evidence taken on country, or on the papers, with evidence being taken in the form of witness statements[31]. In preparing for expedited procedure matters it is important to consider the most appropriate forum for the hearing to be conducted. The evidence of Aboriginal people is the best evidence in native title proceedings[32]. The process of giving evidence within the formal confines of the Tribunal process is often a daunting task for native title parties. On-site evidence is more conducive to accurate and comprehensible evidence especially where, as is often the case, the physical features of the area in

[29] *Moses Silver* at [35]
[30] section 151 NTA; *Page/ Teelow/NT* at [23]
[31] section 151 NTA
[32] *Ejai v Commonwealth*, Owen J, No 1744/93, Supreme Court of Western Australia, 18 March 1994 (unreported)

question form an integral part of the evidence. Physically visiting the area enhances evidence in that it facilitates important non-verbal evidence[33]. The Tribunal must pursue the objective of carrying out its functions in, among other things, a fair and just way and taking into account the cultural and customary concerns of Aboriginal and Torres Strait Islanders[34].

(c) Right to cross examine

The process of cross-examination is an intrusive one, which may be offensive to native title claimants and therefore needs to be handled sensitively, particularly where such evidence relates to sites and areas of cultural significance. In expedited procedure matters it is important to bear in mind that there is no automatic presumption of the right to cross-examine and leave must be granted. The onus is thus on the party wishing to cross-examine to demonstrate why leave should be granted[35]. Leave to cross-examine must be exercised taking into account the cultural and customary concerns of Aboriginal peoples[36].

(d) Calling of witnesses

Usually it will be the parties who call their own witnesses in expedited procedure matters, however, the Tribunal has power to summons witnesses. Generally, the Tribunal will not do so unless there is insufficient information for the inquiry to be dealt with on the papers[37]. If a party deliberately chooses not to call a witness it risks the Tribunal making a determination on the evidence before it and drawing inferences from the failure to give this evidence[38].

3.8 *Suitability of Witnesses and form of evidence*

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[33] Native Title Service [1764]; Neal, T "The Forensic Challenge of Native Title", *Law Institute Journal*, September 1995, Vol 69, No 9, 880 at 883.
[34] section 109 NTA; *Moses Silver* at [10] – [13];
[35] s.156(5) NTA; *Western Australia/Goolburthunoo(Waljen) People/Acacia Resources*, NNTT WO96/12, unreported, Member Wilson, 13 June 1996; *Northern Territory/Risk/Phillips Oil Company*, NNTT, DF97/1, Member Williamson, 9 February 1998; see also protocols for hearings on country as set out in *Moses Silver* at [12].
[36] *Irrutyi–Papulankutja/ Broadmeadows Pty Ltd/Western Australia*, NNTT, WO 95/7, unreported, Hon P Seaman QC, 6 October 1995
[37] ***Page/ Teelow/NT*** at [33]; *Risk v Williamson* (1998) 87 FCR 202 at 227
[38] *Page/ Teelow/NT* at [33] – [42];

Evidence must establish that the witness is properly qualified to speak about and on behalf of the native title party[39]. The weight given to the evidence depends upon the person's qualifications and authority to speak for the area[40]. Whilst the Tribunal is not bound by technicalities, legal forms or rules of evidence[41], it will generally prefer sworn affidavit evidence as the best form of evidence, especially where the matters or assertions contained therein are in dispute[42].

3.9 Compliance with Directions

If the party does not comply with directions, for example, to file evidence or contentions before a certain date, the native title party risks having their objection struck out by the Tribunal on the grounds of non-compliance with directions[43]. As an example, in the matter of *Trevor Willy/Northern Territory/Rodney Johnson, Megamin*[44], the Tribunal refused to grant an extension of time of two and a half weeks for compliance with directions and then dismissed the objection, where the Objectors had requested an extension of time to file contentions and evidence on the grounds of the objector's witness' "undertakings of certain ceremonial functions out bush".

4 Section 237(a) NTA – Social and Communal Activities

The first arm of section 237 that needs to be examined is whether:

> (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.
>
> [emphasis added]

This can be broken down into a number of discrete elements and issues:

- likelihood;

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[39] *Little* at [78]
[40] *Little*
[41] section 109(3) NTA
[42] *The State of Western Australia & West Australia Petroleum Pty Ltd & Shell Development (Australia) Pty Ltd v Leslie Hayes & Ors, ("Western Australia Petroleum v Hayes")*, NNTT, WF00/07, unreported, Hon CJ Sumner, 1 June 2001, at [32]; see also *Kevin Peter Walley and others on behalf of the Ngoonooru Wadjari People v The State of Western Australia and Allan Neville Brosnan ("Walley/WA/Brosnan")*, NNTT, WO00/427,unreported, Member Sosso, 17 August 2001 at [9]; ***Page/Teelow/NT*** at [17].
[43] see for example *Roy Dixon & Ors/Northern Territory/Ashton Mining Ltd/North Mining Ltd*, NNTT, DO01/140, DO02/16-17, DO02/20, DO02/27, unreported, Member Sosso, 15 April 2002**, cf** *Judy Hughes & Ors/Western Australia/Adelaide Prospecting Pty Ltd*, NNTT, WO01/443, Hon C J Sumner, 8 March 2002
[44] NNTT, DO 02/32, unreported, Deputy President Hon EM Franklyn QC, 10 July 2002

- direct interference;
- community and social activities;

4.2 Likelihood

The assessment of likelihood involves a predictive assessment of whether there is a real or not remote chance or possibility of the matters under consideration occurring, regardless of whether that chance or possibility is greater than 50 per cent[45].

4.3 Interference

(a) Substantial Interference

The interference with community or social activities must be substantial and trivial impacts or impacts that are not relevant to the carrying out of community or social activities are outside the scope of contemplated by section 237(a) NTA[46]. Establishing this before the Tribunal will require leading specific evidence on the extent of the interference upon social and community activities of the native title holding community, rather than just the individuals within the native title community[47].

(b) Direct Interference

French, J in *Smith*[48], examined what constitutes direct interference. The Tribunal should make an evaluative judgment, rather than a definitional one and should examine whether the act is likely to be a proximate cause of the apprehended interference. This evaluation is required to be contextual and the connection between the act and the interference should not be considered in isolation, but should take into account other factors affecting the community or social activities. This could include restrictions already placed upon the community of native title holders. Where there have been mining or pastoral activities in the area, which have affected community or social activities then the

[45] *Smith*; *Little*; *Moses Silver*.
[46] *Smith* at 451; as applied in *Moses Silver* at [49] – [58].
[47] see *Moses Silver* at [57].
[48] at 451.

Tribunal has taken these into account in assessing whether there has been a direct interference[49].

The Tribunal has reached negative inferences in relation to areas that have previously been covered by mining tenements. It has drawn the inference, for example, that where the area has previously been covered by a mining tenement, and the native title party does not lead evidence as to the previous impact of this tenement, that there was no substantial interference and therefore the grant of the new tenement is not likely to involve substantial interference. As such, if there has been previous mining or pastoral activity, it is important to lead evidence on what, if any, impact this has had on the social and communal activities of the native title party to avert any negative inferences being drawn from these activities. The proposed conduct of the grantee party and the rights exercisable by the grantee party are also relevant, as the nature of these activities will effect the extent of the impact upon the activities of the native title party. For example, an extensive exploratory drilling program is likely to have a more substantial impact on the activities of a native title party, than an exploration program involving hand held tools sampling small amounts of soil. As I have discussed earlier, in the absence of evidence of intention of grantee party, it will be assumed that the legal rights created by the grant of the licence will be exercised to their full extent[50]. Therefore, it is important to look at what activities are specifically allowable under the grant of the tenement in question.

4.4 Community and Social Activities

(a) Location of Communities and nature of the tenement area

The location of Aboriginal communities to tenement areas is relevant to the potential impact upon the social and communal activities of the native title parties. Generally, the closer the community to the tenement the higher the likelihood that there will be a substantial interference, as the tenement area is more likely to be used more frequently for these activities. The specific characteristics of the tenement area such as ease of

[49] *Walley & Boddington & Ors/WA/Giralia* at [12] ; *Leonne Velickovic/Western Australia/Glen Allen Sinclair*, NNTT, WO00/299, unreported, Hon E M Franklyn QC, 31 January 2001 at [13]; *George Huddleston & Ors/Stephen Darryl Moffat/Northern Territory*, NNTT, DO01/19, unreported, Member Sosso, 1 February 2002.
[50] *Walley & Boddington & Ors/WA/Hampton Hill* at [9]; *Page/ Teelow/NT* at [58]; .

access to the tenement area, abundance of wildlife and the suitability of the tenement area for the activities are relevant[51]. These specifics should be led in evidence.

(b) Spiritual vs Physical activities

It is well recognised at law that the relationship between Aboriginal people and their country is essentially a spiritual relationship[52]. Despite this, the Tribunal has been divided in its approach as to whether the section 237(a) NTA covers both physical and spiritual activities. Deputy President Franklyn[53] and Member Stuckey-Clarke[54] have expressed the view that the interference must be with physical activities and not spiritual activities. This approach has not been followed by Deputy President Sumner[55] or Member Sosso[56], who have found that spiritual aspects of social and communal activities are covered by section 237(a) NTA. In *Moses Silver,* Member Sosso examines the legislative history of the amendments to section 237(a) NTA and includes spiritual activities within the scope of section 237(a) NTA. It is clear that spiritual activities of the native title parties ought to be protected by section 237(a) NTA, and to not recognise spiritual activities as an integral part of social and community activities is to fundamentally misconstrue the nature and importance of the spiritual relationship that native title parties have with their land.

4.5 Nature, type and frequency of activities

As noted earlier, the interference upon the social and communal activities of the native title party must be substantial and not merely trivial[57]. One effect of this interpretation of section 237(a) NTA is that it becomes important to lead evidence about the frequency of the social and communal activities carried out. It is also important that the evidence led

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[51] see *Walley & Boddington & Ors/WA/Giralia*
[52] *The State of Western Australia v Ben Ward & Ors* [2002] HCA 28, per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [14]; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167.
[53] *Smith* at 450, paragraphs [21]-[22].
[54] *Western Australia/Roebuck Resources NL/Kim Aldus & Ors*, NNTT, WO99/831, unreported, Member Jennifer Stuckey-Clarke, 13 June 2001 at [21]-[23]; *Wilma Freddie/Western Australia/Stephen Grant Povey ("Wilma Freddie")*, NNTT, W)99/882, Member Jennifer Stuckey-Clarke, 19 December 2001 at para [32].
[55] *Walley & Boddington & Ors/WA/Giralia* at [13]–[19];
[56] *Moses Silver* at [50]-[56]
[57] *Smith* at 451; as applied in *Moses Silver* at [49] – [58].

sets out the activities currently practiced and does not refer merely to activities carried out in the past[58]. The Tribunal's approach is quite onerous on the level of information required to establish substantial interference, therefore, this evidence should include the frequency and nature of the social and communal activities, as a manifestation of their native title rights, and information establishing how, when, where and why a substantial interference on community and social activities will be likely to occur[59]. As an example of the high level of information required I refer again to the *Bywood Holdings* determination. In this matter, Deputy President Franklyn, discounts the evidence of one of the witnesses, who provided evidence about hunting kangaroos and turkeys and collecting banksia gum, types of bush carrots, potatoes and onions, and medicines. He explains:

> Her evidence that she does not go to the Station on her own, but always with a car load of 4 to 5 people is inadequate, in my opinion, to establish a community or social activity of the holders of native title. There is no indication as to whom the 4 or 5 people might be, whether they are members of the claim group or merely friends. As she says "we just go to have a look and collect whatever bush tucker is in season"… she does not depose to or even suggest that the respective activities of which she speaks are limited to the areas of or to any particular area or areas within the proposed tenements, or that these areas are, in any significant way, better or more suited for the activities than any other part of the Station[60].

It is clear that a great deal of information that is highly fact specific is being required.

5 Section 237(b) – Sites and Areas of Particular Significance

Section 237(b) relates to interference with sites or areas of significance, more specifically it requires an analysis of whether:

> (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 native title* in relation to the land or waters concerned.
>
> [emphasis added]

5.1 Level of Interference

[58] *Roy Dixon/Plenty River Corporation/Northern Territory*, NNTT, DO01/51, unreported, Member Jennifer Stuckey-Clarke, 19 April 2002 at [18]; *William Risk and Kathleen Mary Mill-McGinness/Corporate Developments Pty Ltd/Northern Territory ("Risk/Corporate Developments/NT")*, DO 01/77, unreported, Member Sosso, 15 April 2002 at [35]-[38]
[59] *Moses Silver* at [70].
[60] at [16.1]

The test for the level of interference required by section 237 (b) NTA is different from the substantial interference required in relation to social and communal activities under section 237(a) NTA. Member Sosso makes this distinction in *Moses Silver*[61] where he points out:

> It would be not be correct to assume the nature and level of interference in paragraph (b) is equivalent to the direct interference in paragraph (a) … [88] In this context to suggest that the nature or quality of interference applicable in section 237(a) can be transposed to section 237(b) is incorrect. When conducting an inquiry, the Tribunal is required to analyse very carefully any material on potential interference with a site of particular significance, because of the importance that area or site has to the native title holders. Even very slight interference possibly in the context of paragraph (a), that could be characterised as "trivial" may be unacceptable.

5.2 Significance to whom?

The sites or areas of significance must be of particular and more than ordinary significance to the members of the native title claim group[62]. Further to this, the particularity of the significance needs to be 'capable of identification'[63]. That is to say, native title parties are required to state what the specific significance of the site or area is. It is necessary to establish that the area or site is of significance to members of the native title party in accordance with their traditions and not just to Aboriginal people generally or to non-native title holders[64]. Because of this, it becomes important to establish whether the witnesses are members of the native title claimant group. Membership of a native title claim group is not an essential pre-condition to giving evidence, however, it will effect the weight to be accorded to that evidence[65].

5.3 Location of Sites or Areas of Significance

The approach of the Tribunal has been to require the precise location of sites or areas of particular significance[66]. This requires witnesses to provide evidence of the specific

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[61] at [87]-[88]
[62] *Chienmora v Striker* (1996) 142 ALR 21 at 34-35; *Walley & Boddington & Ors/WA/Giralia* at [22]; *Wilma Freddie* at [46]. *Gabriel Hazelbane & Ors/Northern Territory/Rodney Johnston*, NNTT, DO 01/40-41, unreported, Hon E M Franklyn QC, 27 March 2002 at [11].
[63] *Western Australia/Winnie McHenry(Noongar People)*, NNTT, WO98/125, unreported, Hon E M Franklyn QC, 28 July 1999.
[64] *Wilma Freddie* at [46]
[65] *Moses Silver* at [115]-[118]
[66] for an example of the extent to which this is taken, see *Bywood Holdings*

location of sites, including the extent and size of areas. It is not necessary for sites or areas of significance to be located entirely within the tenement area so long as there is a sufficient connection between the site and the activities on the tenement area[67]. It is generally very difficult to identify the specific location of sites or areas based upon basic maps alone. This difficulty is exacerbated by the fact that the witnesses are often elders who will have varying degrees of literacy and levels of comfort in dealing with their country on pieces of paper. Because of this it is often necessary to physically visit the areas to identify areas and sites significance. This has huge resource implications for native title representative bodies because of the time and costs involved. As an example, as at 1 July 2002, the Yamatji Land and Sea Council, had 151 active objections, and a further 182 objections had been resolved in the year preceding[68]. If all of these matters went to inquiry the resources and workload required would be immense.

The burden of proof to establish the existence of sites or areas of significance required by the Tribunal is extremely high. As an example, in the matter of *Angus Riley & Ors/Northern Territory/Rodney Johnston and Motoo Sakurai*[69], Deputy President Franklyn states:

> In respect of ELA [Exploration Licence] 9975, Mr Foster's evidence is that the rain dreaming 'goes over that ELA' and in respect of ELA 9998, that it goes 'near' the ELA.. That evidence, in my opinion, does not translate to a Rain Dreaming track.

In the *Bywood Holdings*[70] matter, the native title party led evidence that there were 53 Aboriginal sites recorded under the Aboriginal Heritage Act and many other unrecorded sites, within the tenement areas. The native title party's witnesses also stated that the general area of the tenement areas was of great significance to the native title party and recounted numerous dreaming stories associated with the tenement areas. Notwithstanding this, the Tribunal held that much of the evidence of the native title party's witnesses was not helpful as it was not specific enough in relation to the exact location of the sites and for its purposes[71] and ultimately held that it was not likely that any sites or areas of significance would be interfered with.

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[67] *Moses Silver* at [89], [118]; *Risk/Corporate Developments/NT* at [59].
[68] personal communication, Alison Llewellyn, Case Manager, Future Act Unit, National Native Title Tribunal.
[69] NNTT DO01/70-71, Hon E M Franklyn QC, 17 April 2002 at [15]
[70] NNTT, WO01/111, Hon E M Franklyn, 20 August 2002
[71] at [14]

5.4 Effect of heritage protection legislation and conditions of licence

The Tribunal will examine the nature of the heritage protection legislation in place and the conditions on the licence in its examination of whether it is likely that sites will be interfered with. The *Aboriginal Heritage Act 1972 (WA)* makes it an offence to disturb an Aboriginal site, however, the Act is inadequate to provide meaningful protection of Aboriginal sites, as it does not require or set out any consultative process with traditional owners nor compel any heritage assessment process and the punitive provisions are woeful. Section 57 of the *Aboriginal Heritage Act 1972 (WA)* provides for a fine of the princely sum of $500 for a first offender, and that is only if they do not have the defence available to them under section 62 of the *Aboriginal Heritage Act 1972 (WA)* that they did not know or could not be expected to know that the place was a site.

(a) Presumption of Regularity

Notwithstanding my comments above, the Tribunal has generally found that the *Aboriginal Heritage Act 1972 (WA)* is adequate to ensure that it is not likely that there will be interference with sites of particular significance[72].

(b) Site Rich Areas

In areas that are demonstrated to be site rich it cannot be automatically assumed that the protective effect of the sections in the *Aboriginal Heritage Act* 1972 (WA) will lead to the inference that it is unlikely that there will be interference with a site of particular significance. This is a matter to be assessed on the facts of each case as, notwithstanding the *Aboriginal Heritage Act* 1972 (WA), the right to negotiate may still be required to ensure that sites are not interfered with[73].

5.5 Intentions of Grantee Parties

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[72] *Walley & Boddington & Ors/WA/Giralia Resources* at [51]; *Little* at [77]

[73] *Wilma Freddie* at [49]; *Maureen Young/Western Australia/South Coast Metals Pty Ltd ("Maureen Young")*, NNTT, WO00/402, Member John Sosso, 7 June 2001; *Walley & Boddington & Ors/ WA/Giralia Resources* at [51], *Neowarra & Ors/Western Australia /Gary Same* ("Neowarra/WA/Same"), NNTT, WO 01/461, unreported, Hon C J Sumner, 2 August 2002 at [29]

The intention of the grantee party to conduct a heritage assessment or survey and as to what rights under their licence they will exercise is relevant to the question of the likelihood of sites being interfered with. Where the proposed tenement has been demonstrated to be site rich, it is incumbent upon the grantee party to lead evidence to provide a basis upon which the Tribunal might be assured that interference, intentional or otherwise, is not likely, given the practical difficulties in avoiding interference with these sites. If the grantee party does not tender such evidence, then the presumption will be that it is likely that there will be such interference[74]. The Tribunal will examine what the grantee party's intentions are in relation to the exercise of its rights under the licence to assist in ascertaining the likelihood of interference. In the absence of any stated intention by the grantee, the Tribunal will assume that all of the rights exercisable under the grant of the licence will be exercised[75].

6 Section 237(c) NTA - Major Disturbance to Land

The most difficult limb of section 237 to succeed on is section 237(c) NTA which states:

> (c) the act is not *likely* to involve a *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.
>
> [emphasis added]

The Tribunal is required to determine whether the exercise of rights conferred by the proposed tenement are likely to involve a major disturbance from the viewpoint of the community generally, taking into account the concerns of the Aboriginal community[76]. As with the subsections 237(a) and (b), this requires tenement specific evidence and in the absence of contrary intention of the grantee, the rights under the licence can be assumed to be exercised to their full extent[77].

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[74] *Wilma Freddie* at [49]; *Maureen Young* at [20]; *Walley & Boddington & Ors/WA/Giralia* at [51]; *Western Australia/Glen Money/Jack Britten* ("*WA/Money/Britten*"), NNTT, WO99/800, unreported, Member Jennifer Stuckey-Clarke, 25 June 2001; *Ben Ward & Ors/Aquest Limited/Northern Territory ("Ward/Aquest/NT")*, NNTT, DO 01/63, unreported, Member John Sosso, 8 April 2002; *Walley & Boddington & Ors/ WA/Hampton Hill*; *Neowarra/WA/Same* at [30]
[75] *Western Australia v Smith* (2000) 163 FLR 32 at 51-52 per Deputy President Franklyn; *Moses Silver* at [25] – [32]
[76] *Dann v Western Australia* (1997) 74 FCR 391
[77] *Moses Silver* at [25] – [32]

In the case of *Kevin Walley & Ors/Western Australia/Allen Neville Brosnan*[78] the native title party contended that the grant of an exploration licence which provided for, among other things:

(a) reverse circulation drilling in areas of hypersaline groundwater;

(b) diamond (core) drilling; and

(c) the excavation of up to 1,000 tonnes of material.

would amount to a major disturbance. The native title party led evidence from a qualified geologist as to the effect of exploratory drilling and annexed photographs showing the disturbance caused by such activities in a nearby tenement.

The Tribunal found that the requirements of section 237(c) NTA were not made out, and stated that more specific evidence relating to the area of the proposed tenement such as whether there are any geological, environmental or other factors that could be said pose a real risk of major disturbance should exploration activities occur, or Aboriginal communities in the vicinity of the proposed tenement or the specific concerns of native title holders themselves on how the exploration activity will impact on their life, customs or traditions was required[79]. In instances where such further evidence and contentions have been provided the Tribunal has declined to rule on section 237(c) NTA, on the grounds that the objection had been upheld on section 237(a) and/or 237(b) NTA[80]. Unfortunately this has not aided in developing an understanding of what is meant by "a major ground disturbance".

Remedial action by the grantee party can be taken into account, but will not necessarily rebut the allegation of major disturbance[81]. Major disturbance is not limited to solely physical disturbances, but can include other non-physical disturbance in light of the cultural concerns of the native title party[82]. The Tribunal will also look at the effect of previous disturbing activity and the disturbing activity in neighbouring tenements to assess whether the act is likely to involve a major disturbance[83].

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[78] NNTT, WO00/427, unreported, Member John Sosso, 17 August 2001.
[79] At [57]
[80] *Lungunan & Ors/Western Australia/Conquest Mining NL,* NNTT, WO01/453, unreported, Deputy President C J Sumner, 23 August 2002; *Walley & Boddington & Ors/WA/Hampton Hill*.
[81] Moses Silver at [138]
[82] Mses Silver at [139]
[83] *Risk/Corporate Developments/NT* at [72]

7 Resourcing Implications

The specificity of evidence required to uphold these objections is such that large amounts of time and resources are required to compile the evidence and prepare the contentions. To put this into context, during the 2001-2002 financial year there were 1001 objections to the expedited procedure in Western Australia and 333 objections were in the Yamatji representative body region alone[84]. The direct consequence of the burden placed upon native title parties is that in numerous instances they have been unable to satisfy the onus of proof being placed upon them are not able to satisfactorily protect their native title interests. Matters have been dismissed for failure to comply with directions, where the native title party's representatives have advised the Tribunal that they do not have the resources to progress matters[85]. Further to this, the Tribunal's *Explanation of Guidelines on Acceptance of Expedited Procedure Objection Applications*[86] state:

> Some submissions refer to a lack of resources to comply with the requirements of the Act and regulations. That is not, however, an issue for the Tribunal in applying the expedited procedure provisions of the Act.

The failure to take into account the serious resourcing issues that native title representative bodies face has the direct consequence of prejudicing the rights and interests of native title parties.

8 Conclusion

The bar being set for expedited procedure matters is getting progressively higher and higher. The level of information and evidence required of native title parties is almost prohibitive in some instances and belies the nature of the NTA as beneficial legislation and the overriding imperative of the NTA and the bodies established under it to recognise and protect native title. It is apparent that successful expedited procedure objections require extensive evidence and contentions specific to the tenement in question, dealing with previous and proposed mining activity and specific evidence as to the potential interference with activities and sites of the native title party. The application and interpretation of the expedited procedure makes you wonder: What exactly is beneficial legislation meant to mean?

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[84] personal communication, Alison Llewellyn, Case Manager, Future Act Unit, National Native Title Tribunal.
[85] *Roy Dixon/The Northern Territory of Australia/De Beers Australia Exploration Ltd*, NNTT, DO02/41-44, unreported, Member Williamson, 19 June 2002
[86] *Issued 16 October 2001, see point 9*

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