

CITATION: *Minister for Lands, Planning and Environment v Huddleston and others* NT LMT 38

PARTIES: MINISTER FOR LANDS, PLANNING AND ENVIRONMENT
v
PADDY HUDDLESTON AND OTHERS ON BEHALF OF THE WAGIMAN PEOPLE

TITLE OF COURT: Lands and Mining Tribunal

JURISDICTION: Lands and Mining Tribunal Act

FILE NO(s): LMT-38-2001-LA(N) (20108444)

DELIVERED ON: 6 August 2002

DELIVERED AT: Darwin

HEARING OF APPLICATION DATE(s): 5 July 2002

APPLICATION DECISION: David Loadman

CATCHWORDS:

COMPULSORY ACQUISITION OF LAND; LAND SUBJECT TO REGISTERED NATIVE TITLE CLAIM; ALLEGATIONS MADE BY WAY OF SUBMISSION CONTENDING AN ABSENCE OF JURISDICTION REPOSING IN THE TRIBUNAL – TRIBUNAL REQUESTED TO STAY THE DELIVERY OF ANY DECISION – JUDICIAL REVIEW OF UNRELATED DECISION ON JURISDICTION PENDING
Native Title Act 1993 (Cth), s26, s253
Lands Acquisition Act 1978 (NT), s38AA
Lands and Mining Tribunal Act 1998 (NT), s5

REPRESENTATION:

Counsel:

Applicant: Carolyn Walter
Objectors: Phillipa Heatherton

Solicitors:

Applicant: Ward Keller
Objectors: Northern Land Council

Judgment category classification: B
Judgment ID number: NTLMT 38 APPLICATION
Number of paragraphs: 43

IN THE LANDS AND MINING TRIBUNAL
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. LMT-38-2001-LA(N) (20108444)

BETWEEN:

**PADDY HUDDLESTON AND OTHERS
ON BEHALF OF THE WAGIMAN
PEOPLE**

Applicant

AND

**MINISTER FOR LANDS, PLANNING
AND ENVIRONMENT**

Respondent

DECISION ON APPLICATION

(Delivered 6 August 2002)

DAVID LOADMAN, CHAIRMAN

HISTORY

1. By the filing of Form 2 and attachments on 5 June 2001, the Minister has referred the issue of the compulsory acquisition of,

All interests, including native title rights and interests (if any), in all that piece or parcel of land comprising of part Lot 291 Town of Pine Creek in the Northern Territory of Australia containing an area of 19 hectares more or less and bounded by lines described as follows ...

Commencing at a point on the eastern boundary of the Town of Pine Creek and situated 92.25 meters northerly from the northeastern corner of Lot 305; thence northwesterly by a line parallel to and 80 metres northeasterly from the northeastern- boundary of Lot 305 to an eastern boundary of proposed Lot 307; thence northerly by part of an eastern boundary of the said Lot for 50 metres; thence easterly by a line parallel to the southern boundary of Lot 305 to the eastern boundary of the Town of Pine Creek; thence southerly by part of the eastern boundary of the said Town to the point of commencement.

("the land") to the Lands and Mining Tribunal, which in terms of section 4(1) of the *Lands Acquisition Act* 1998 ("LAA") is the Tribunal to which the matter has to be referred.

2. According to the Notice of Proposal dated 4 September 2000 the manner in which the Territory proposes to deal with the land if it is acquired is as follows:

(a) Grant a Crown Lease Term under the provisions of the *Crown Lands Act*, to Pine Creek Mango Plantation Pty Ltd or its nominee for the purpose of extending the existing Pine Creek Mango Plantation currently located on Lot 305 Town of Pine Creek. Upon completion of development, the Crown Lease Term may be surrendered in exchange for a freehold title and consolidated with Lot 305; and

(b) Provision of irrigation and additional planting of trees.

(c) Construction of improvements ancillary to the development including fencing, machinery shed etc.

(d) Any easements for the purpose of water supply, drainage, electricity supply, sewerage, access and general services as required by the Power and Water Authority and the Pine Creek Community Government Council.

3. The Objectors have by Notice of Objection dated 15 September 2000 objected to the proposed acquisition of the land. Attachment A of that document reads

1. All of the land proposed to be acquired is subject to an application ('the Application') for determination of native title filed in the Federal Court on 3 December 1999 (D6015/99), and was entered on the Register of Native Title Claims by the National Native Title Tribunal.

2. The native title holders are, traditionally, the owners of the land and waters subject to the Application ('the application area'). The native title rights and interests of the native title holders are set out in the Application. The rights and interests may be summarised as follows:

(a) to possess, occupy, use and enjoy the application area to the exclusion of all others;

(b) to speak for and to make decisions about the use and enjoyment of the application area;

(c) to reside upon and otherwise have access to and within the application area;

(d) to control the access of others to the application area;

- (e) to use, enjoy and manage the resources of the application area;
- (f) to control the use and enjoyment of others of the resources of the application area;
- (g) to share, exchange and/or trade resources derived on and from the application area;
- (h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;
- (i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area;
- (j) to determine and regulate membership of, and recruitment to, a landholding group.

3. The native title holders object to the acquisition and proposed development of the land included in the notice of proposal on the following grounds:

- (a) the acquisition will extinguish all native title rights and interests in the land proposed to be acquired;
- (b) native title holders will no longer be able to possess, occupy, use and enjoy the land in the exercise of their native title rights and interests;
- (c) the proposed development will or is likely to interfere with or otherwise affect:
 - (i) the freedom of access by any of the native title holders to the land concerned or adjacent land and their freedom to carry out activities of cultural significance on or adjacent to the land in accordance with their traditions;
 - (ii) sacred sites on or adjacent to the land and Dreamings which pass through or are adjacent to the land; and
 - (iii) prevent native title holders from:
 - (A) protecting and maintaining sites on or adjacent to the land;
 - (B) caring for the land in accordance with their spiritual obligations;
 - (C) protecting the land from harm by observing and engaging in their customs, laws, practices and usages in relation to the land;
 - (D) visiting and camping special or exclusive places; and
 - (E) maintaining and passing on their spiritual knowledge of the land and retaining their knowledge of the connection of individuals or groups to particular parts of the land.
- (d) the proposed development will permanently alter the topography of the land and the spiritual, environmental and ecological character of the land and adjacent land.

- (e) the acquisition and proposed development will or is likely to affect:
 - (i) the way of life, culture and traditions of the native title holders;
 - (ii) the development of the social, cultural and economic structures of the native title holders.
- (f) fundamentally, the acquisition and proposed development will deny native title holders, in the exercise of their native title rights and interests, the right to:
 - (i) manage, use or control the land;
 - (ii) use or develop the land or its resources for their own social, cultural or economic purposes; and
 - (iii) control the access of, or use by, others of the land.

4. The Objectors' Form 3, filed on 28 June 2001 at the Tribunal, states:

GROUNDS FOR OPPOSING APPLICATION

The grounds on which the respondent opposes the application to start a proceeding are as follows:

1. The Objector does not dispute the applicants position that the proposed compulsory acquisition is a future act which falls within the parameters of s24MB(1)but does not admit that s24MD(1) of the *Native Title Act 1993* ("the NTA") applies to the proposed compulsory acquisition.
2. The Objector admits that sub-division P of Division 3, Part 2 of the NTA does not apply.
3. There has been no agreement between the parties concerning the proposed compulsory acquisition.
4. The Objector makes no admission that the Applicant has complied with sections 36, 37 and 38 of the *Lands Acquisition Act /NT*).
5. The grounds for the Objector's objection to the proposed compulsory acquisition are set out in the objection lodged with the Minister in relation to this matter.

THE FORM 4 APPLICATION

5. On 24 May 2002 the Objectors delivered a Form 4 application seeking to amend the grounds of opposition to the application. On 4 June 2002 the

Tribunal convened and leave was granted for the amendment of the amended grounds of opposition as follows.

AMENDED GROUNDS FOR OPPOSING APPLICATION

File No: LMT 38-2001-LA(N): 20108444

The amended grounds on which the respondent opposes the application to start a proceeding are as follows:

1. The Objector does not dispute that it is the Applicant's position that s.24MB(1) and s.24MD(1) of the *Native Title Act* 1993 ("the NTA") are the provisions of the NTA that form the basis of the Application
2. The Objector makes no admission that the Applicant has complied with sections 36, 37 and 38 of the *Lands Acquisition Act* (NT).
3. The Objector does not dispute that it is the Applicant's position that sub-division i P of Division 3, Part 2 of the NTA does not apply, but only if the proposed compulsory acquisition is or would otherwise be a valid compulsory acquisition.
4. The proposed compulsory acquisition, being an acquisition of native title rights and interests in Crown land where there are no non-native title rights and interests in that land and being made for the purposes of granting leasehold and freehold interests in the land, would not have been made if the land were subject to freehold title and is invalid by virtue of sections 9-10 of the *Racial Discrimination Act* 1975 (Cth).
5. The acquisition and the extinguishment of all native title rights and interests in the land under the proposed compulsory acquisition is not required for any proposed use of the land.
6. The proposed compulsory acquisition is unnecessary because no valid use of the land is proposed or is unnecessary for any proposed use of the land for which the acquisition is intended
7. The purpose of the proposed compulsory acquisition or a substantial purpose of the proposed compulsory acquisition is to extinguish native title rights and interests in the land and thus the proposed compulsory acquisition is not for a purpose permitted by the *Lands Acquisition Act* (NT).
8. The grounds for the Objector's objection to the proposed compulsory acquisition are otherwise set out in the objection lodged with the Minister by it in relation to this matter.

6. As has already been set out the Form 2 and attachments to commence proceedings were lodged by the Minister on 5 June 2001. The Tribunal does not propose to set out every step which occurred thereafter, but is intent on specifying the obligations intermittently spelt out as incumbent on the

Objectors in relation to the pursuit of their objection, such particulars being as follows:

- 10 July 2001: the Objectors were required to file and serve material on or before 20 September 2001. They did not file the material by the prescribed date.
- 11 October 2001: the Objectors were given leave to file and serve material on or before 29 October 2001. The Objectors did not file material by the date specified.
- 15 November 2001: the Objectors were given leave to file and serve material on or before 14 December 2001. The Objectors did not file or serve any material by the prescribed date.
- 15 January 2002: the Objectors were given leave to file and serve material on or before 29 January 2002. The Objectors did not do so.
- 12 February 2002: the Objectors were given leave to file and serve material on or before 11 March 2002.
- 20 February 2002: an affidavit sworn by Kirsty Jean Gowans affirmed on 19 February 2002 was filed.

7. On 19 March 2002 the Tribunal wrote to the parties and on 25 March 2002 the Applicant responded to the queries raised by the Tribunal in that letter as follows:

- (a) There has been no agreement in relation to any of the issues;
- (b) The applicant does not wish to examine or cross examine any deponent to any Affidavit material filed;
- (c) the applicant wishes to file submissions in relation to the proposed recommendation.
- (d) the applicant does not wish to make oral submissions or otherwise require the Tribunal to convene; and
- (e) Subject to (c), the applicant request that the Tribunal makes its decision on the written material filed on behalf of the parties.

8. As a consequence of the Objectors not addressing the Tribunal's letter of 19 March 2002, the matter was listed for a directions hearing on 9 April 2002. At that directions hearing, the Objectors and the Applicants were directed to file any submissions on or before 10 May 2002. The Objectors mutatis mutandis adopted the position set out in the letter from the Applicant's solicitors dated 25 March 2002. Significantly the Tribunal highlights item (e) of that letter, that is there was an unequivocal adoption of the obligation by or on behalf of the Objectors that "the Tribunal make its decision on the written material filed on behalf of the parties".
9. Notwithstanding that position, the Objectors by the Northern Land Council, delivered a letter to the Tribunal on 10 May 2002 ("the NLC letter"). The text of that letter is in the following terms:

PROPOSED COMPULSORY ACQUISITION: MINISTER FOR LANDS PLANNING AND ENVIRONMENT V PADDY HUDDLESTON AND ORS

PROPOSED COMPULSORY ACQUISITION - PART OF LOT 291 OF PINE CREEK LMT-38-2001-LA(N); FILE NO 20108444

I refer to the above matter and to the materials filed on behalf of the Minister.

The Objector objects to the proposed compulsory acquisition in the terms of the notice of objection dated 15 September 2000, a copy of which is contained in Annexure 11 to the Affidavit of NA Blackley dated 5 July 2001.

Owing to a lack of resources, the Objector is not in a position to make detailed submissions and wishes the Tribunal to resolve this matter and make its recommendation on the basis of the materials without an oral hearing. In addition to previous materials filed with the Tribunal, the Objector wishes the Tribunal to take account of the matters detailed in this letter (below) and the matters stated in the attached affidavit. The following brief comments are made:

The subject area is covered by native title determination application D6015/99. Since the last directions hearing on 9 April 2002 we have become aware of certain matters requiring amendment to the native title claim application. In particular, it is necessary to amend the application to include further claimants. The amended claim will be lodged with the Federal Court this week. The attached affidavit detailing native title rights and interests in and around Lot 291 of Pine Creek is lodged on behalf of the Objector. The deponent, Ms Bessie Coleman, is a named claimant on the amended native title claim that will be lodged with the Federal Court this week.

I refer to the Respondents' Combined Submissions, Materials and Authorities filed in the Timber Creek matters on 13 November 2001 (File Nos 20102818, 2010844? and 20019145 ("the Timber Creek matters")). I also refer to the Form 4 and affidavit in support filed in the Timber Creek matters on 20 November

2001 seeking that certain questions listed in a schedule be answered prior to further hearing of those matters. Some of the questions raised in the Schedule of questions go to the validity of the *Lands Acquisition Act*, to the validity of all acquisitions purportedly carried out (or proposed to be) under that Act and the Tribunal's jurisdiction under section 38 of the Act. These questions are raised regardless of the purpose of any particular acquisition.

The arguments relied on in relation to the Timber Creek matters are relied upon in this matter.

The Tribunal published its reasons for dismissing the objections in the Timber Creek matters on 22 March 2002. The solicitor for the Objectors in the Timber Creek matters has recently advised the Northern Territory Government that the Objectors intend to seek review of the Tribunal's recommendations. This is likely to occur in the near future. It is submitted that no recommendation should be made by the Tribunal regarding the proposed acquisition in this matter until after review of the Tribunal's decision in the Timber Creek matters.

Nevertheless, it is submitted that, should the Tribunal elect to make a recommendation in relation to this matter before review of the Tribunal's decision in the Timber Creek matters, having regard to the purpose of the acquisition (a private commercial operation) and the effect of the acquisition on the objectors' native title rights (ie extinguishment), the objection in this matter should be upheld.

It is further submitted that should the Tribunal await the review of the recommendation in the Timber Creek matters and it were determined on review that the operation of the *Lands Acquisition Act* were valid insofar as it affects native title and the exercise of the power of compulsory acquisition were valid to the extent that it affects native title, the objection in this matter should nevertheless be upheld, having regard to the matters stated above.

10. As a consequence the matter was ventilated before the Tribunal on 15 May when leave was given to the Objectors to file an affidavit by 2 deponents. Those issues in the 7th paragraph of the NLC letter were to be addressed in the manner set out in the order, on or before 30 May 2002.
11. On 24 May 2002 advice was given by the Objectors to the Tribunal and the Applicant to the effect that the submission would be pursued and that leave would be sought to amend the grounds of opposition as already indicated in this decision.
12. The formal Form 4 application was supported by an affidavit sworn by Penelope Alice Creswell and on 4 June 2002 as indicated leave was given to amend the grounds of opposition in terms as already set out in this decision.

13. It was also the case on that day that, apart from adjudicating on the matter of the stay set out in paragraph 7 of the NLC letter, neither party wished an oral hearing to take place and required the Tribunal to make its decision on the material filed by the parties in the event it ruled against the application for a stay.
14. Written submissions in relation to various relevant matters were duly submitted by the parties.

THE SUBMISSIONS

15. The Objectors' submissions filed on 30 May 2002 (Objectors' May submissions) are set out below:

OBJECTORS' SUBMISSION

1.1 On 15 May 2002 The Lands and Mining Tribunal ("the Tribunal") ordered that the Objectors file supporting submissions regarding the submission set out in paragraph 7 of the Northern Land Council letter to the Tribunal dated 9 May 2002.

1.2 The said letter states that the Objectors rely upon the arguments in the so-called "Timber Creek matters" (File No.s .20102818, 20108447 and M20019145)

1.3 Specifically, paragraph 7 of the said letter submits that no recommendation

should be made by the Tribunal regarding the proposed compulsory acquisition in this matter until after review of the Tribunal's decision in the Timber Creek matters.

2. REASONS RELATING TO JURISDICTION OF THE LANDS AND MINING TRIBUNAL

2.1 The review of the Tribunal's decision in the Timber Creek matters of 22 March 2002 is in part in regard to the Tribunal's findings in relation to jurisdiction. It is submitted that no recommendation should be made by the Tribunal regarding the proposed compulsory acquisition in this matter because:

- Should the review of the jurisdictional grounds in the Timber Creek matters succeed then the recommendation made by the Tribunal will be invalid;

- While the jurisdiction of the Tribunal remains unclear it is unworkable for the Northern Territory Government to act on any such recommendation made by the Tribunal;
- In these circumstances, should the review of the jurisdictional grounds in the Timber Creek succeed, the time and resources of the Tribunal will have been wasted.
- Furthermore, should the review of the jurisdictional grounds in the Timber Creek succeed, and the Minister has in the interim made a decision to proceed with the acquisition after considering the Tribunal's recommendation in this matter, the acquisition may' extinguish native title contrary to the provisions of the *Native Title Act 1993*.

These submissions are discussed further in the following paragraphs.

1.2 Both this matter and the so-called Timber Creek matters concern proposals to compulsorily acquire native title interests within towns for non-government parties. Such acquisitions are future acts under the *Native Title Act*. The validity of a proposed future act is dependent upon the appropriate processes required by the *Native Title Act 1993* being followed.

2.3 Future acts that are the compulsory acquisition of native title interests within towns for non-government parties are governed by section 24MD(6B) of the *Native Title Act 1993* (Cth). Section 24MD(6B) requires that if a native title claimant objects to the doing of such a future act and requests that their objection be heard by an independent person or body, then the Commonwealth, State or Territory proposing to acquire the native title interests must ensure that the objection is heard by an independent person or body [section 24 MD(6B)(f)]. In the Northern Territory future acts to which section 24MD(6B) of the *Native Title Act 1993* apply are governed by the *Lands Acquisition Act* [section 5A *Lands Acquisition Act*]. The body assigned to hear and determine objections to which section 24MD(6B) of the *Native Title Act 1993* apply is the Lands and Mining Tribunal [section 38 *Lands Acquisition Act*].

2.4 Where, as in this case, native title claimants have objected to the proposed future act they are entitled to have the required processes under the *Native Title Act 1993* followed, including that the Tribunal hears the objection and makes a recommendation.

2.5 However if, as is contended in the review of the Timber Creek matters, the Lands and Mining Tribunal does not have jurisdiction to hear such objections then any recommendation made by the Tribunal in relation to the objection will not be a valid determination, per section 24MD(6B) of the *Native Title Act 1993*

2.6 Consequently, one reason that the Objectors seek that the Tribunal does not make a recommendation in this matter is one of common sense and sensible utilisation of resources. Should the review of the jurisdictional grounds succeed the recommendation made by the Tribunal will be invalid and the time and resources of the Tribunal in making the recommendation will have been wasted.

2.7 A further consequence should the review of the jurisdictional grounds succeed is that a decision to acquire the native title rights and interests made by the Minister on the basis of an invalid recommendation of the Tribunal will not comply with Part 2 Division 3 of the *Native Title Act*.

2.8 Consequently, as stated at point 2.1, a further reason the Objectors seek that the Tribunal does not make a recommendation in this matter is that it is unworkable for the Northern Territory Government to act on any such recommendation while the jurisdiction of the Tribunal remains in question.

3. REASONS RELATING TO THE CONDUCT OF THE CASE

3.1 The review of the Timber Creek decisions also deals with the treatment by the Tribunal of evidence put before it during the Timber Creek matters and the treatment of registered native title rights and interests which affect the way the Objectors present their case.

4. LAW RELATING TO ADJOURNMENT AND STAY OF DECISION /

STAY OF PROCEEDINGS

4.1 There exists a considerable body of case law dealing with questions of stays of proceedings where an appeal is on foot. The general rule in such cases is that an appeal from a judgment does not operate as a stay of the judgment unless there are special circumstances that would justify a stay. Such special circumstances exist where it is necessary to prevent the appeal, if successful, from being nugatory. Such circumstances might include where 'there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed' [McBride v Sandland (No.2) (1918) 25 CLR 369; see also Federal Commissioner of Taxation v Myer Emporium Ltd. (no.1)(1986) 160 CLR 220].

4.2 The submission in this matter is that Tribunal should refrain from making a recommendation in this matter pending the outcome of a review of another matter in which largely the same submissions have been raised. While the circumstances are not directly analogous to those described in the preceding paragraph, it is submitted that similar principles should apply.

4.3 It is submitted that pending the outcome of the review of the questions in the Timber Creek matters, the question of the Tribunal's jurisdiction is a significant legal question that is yet to be conclusively determined and which significantly affects the Objectors' interests in this matter.

4.4 Where the compulsory acquisition of their registered native title rights and interests is contemplated the Objectors are entitled to the benefit of those processes required by the *Native Title Act 1993* described above.

4.5 Yet if the Objectors' registered native title rights and interests are compulsorily acquired prior to the determination of the review of the Timber Creek matters that review may reveal that the process by which native title was extinguished did not comply with the processes required by the *Native Title Act 1993* and consequently, was illegal. In such circumstances, it is not clear whether the illegal extinguishment of native title rights will lead to reinstatement of the native title rights and interests or only to a right to compensation.

4.6 It is submitted that were native title to be extinguished illegally (as a result of a failure to extend to the registered native title holders the benefit of the future act processes required by the *Native Title Act 1993*) then a right to compensation would not substantially restore the Objectors to their former position in relation to their native title rights. That compensation would not serve to restore the Objectors to their former position is apparent from the fact that the value of native title lands to the culture and community of the native

title claimants is invaluable and extinguishment cannot be completely compensated in financial terms.

16. On 11 June 2002, the Applicant filed submissions (“Applicant’s submissions”). The text of those submissions, without the attachment, is set out below:

APPLICANT'S SUBMISSIONS

Background

1. The Minister for Lands and Planning ("the Applicant") proposes to acquire, pursuant to his powers under section 43 of the *Lands Acquisition Act* ("the LAA"), all interests including native title rights and interests (if any) in part Lot 291 Town of Pine Creek ("part Lot 291 ").

2 The location of part Lot 291 is shown on the map marked "NAB 4" and the aerial photograph marked "NAB 6" , annexed to the affidavit of Noreen Alma i Blackley sworn on 22 August 2001.

3 All of part Lot 219 within the boundary of the Town of Pine Creek as proclaimed in the Australian Government Gazette no.129 on 20 September 1973 and as amended and extended by proclamation under the Crown Lands Act and published in the Northern Territory of Australia Government Gazette G38 of 23 September 1983 pursuant to section 7(1)(a) of the *Local Government Act* 1979. By section 267 of the *Local Government Act* the proclamation made under section 7(1)(a) of the previous Act continues in force as if it were made under section 29 of the present Act.'

2. The Northern Land Council ("the NLC") is the representative Aboriginal/Torres Strait Islander body in the relation to part Lot 291 and, having been so recognized by the Commonwealth Minister under section 203RD of the NTA.

The proposed compulsory acquisition

3. The Territory proposes to compulsorily acquire all interests (including native title rights and interests) in part Lot 291 Town of Pine Creek under the provisions of the LAA.

4. The subject land is presently vacant Crown land. Part Lot 291 was unalienated Crown land from 1936 to 1 July 1961. From 1 July 1961 until 9 April 1965 part Lot 291 formed part of Pastoral Lease 643 (Bonrook). On 9 July 1965, an area of 1.25 square miles was surrendered from PL 643 including part Lot 291 and part Lot 291 became unalienated Crown land.

5. The proclamation published in the Northern Territory Government Gazette no G38, 23 September 1983 is referred to in the tenure history marked "NAB 3" annexed to the affidavit of Noreen Alma Blackley sworn on 22 August 2001 but was omitted from the copies of relevant documents attached. For the sake of completeness a copy of the later proclamation is attached hereto

6. The manner in which the Territory proposes to deal with the land, if it is acquired, is as follows:

- (a) Grant a Crown Lease (Term) under the provisions of the *Crown Lands Act*, to Pine Creek Mango Plantation Pty Ltd or its nominee for the purposes of extending the existing Pine Creek Mango Plantation currently located on Lot 305 Town of Pine Creek. Upon completion of the development, the Crown Leases (Term) may be surrendered in exchange for a freehold title and consolidated with Lot 305;
- (b) Provision of irrigation and additional planting of trees;
- (c) Construction of improvements ancillary to the development including fencing machinery shed etc.
- (d) Grant of any easements for the purposes of water supply, drainage, sewerage, access and general services required by the Power and Water Authority and the Pine Creek Community Government Council.

7. Part Lot 291 is bounded on the southern side by the Pine Creek Airstrip, on the west by the Stuart Highway, on the east by Bonrook Station and to the north, by vacant Crown land.'

8. There is no Town Plan Zone applicable to part Lot 291 under the Pine Creek Town Plan. Accordingly there is no bar to the development of the land as proposed.

9. The proposed use of part Lot 291 is likely to result in increased commercial activity within the Town of Pine Creek as the Mango Plantation is a significant business, employer and tourist attraction in the area.

10. The compulsory acquisition of native title rights and interests over part Lot 291 pursuant to the LAA is sought to ensure the validity of the grant of an interest in the land to a third party in the event that native title is determined by the Federal Court to exist in respect of part Lot 291.

Process

11. A Notice of Proposed Acquisition of Land for part Lot 291 was published in the Northern Territory News on 30 August 2000 and Notices of Proposal were served on the Registrar of the National Native Title Tribunal, the Chief Executive Officer of the NLC and the Objectors on 5 October 2000. The Notice of Proposal was served by mail on the NLC on 5 September 2000 and the Objectors with a Statement Summarising the Rights of Persons served with a Notice of Proposal ("Statement of Rights") and a Notice of Objection to a Proposed Acquisition ("Notice of Objection").'

13. On 15 September 2000 the NLC, acting for the Objectors, lodged a Notice of Objection to Proposed Acquisition of part Lot 291 and advised that an application for determination of native title (D6015/99) had been lodged in respect of the land by the Objectors and was pending registration

14. By letter dated 13 December 2000, the Objectors were invited to consult with the Applicant. On 28 February 2001 a second invitation to consult was forwarded to the Objectors. The consultation period expired on 24 April 2001 with no further consultation and no agreement being reached.

16. By letter dated 23 May 2001 the Applicant applied to have the objection to the acquisition heard by the Lands and Mining Tribunal ("the Tribunal").

17. A Form 3 response to this application was filed on 28 June 2001 and amended grounds for opposing the application were filed with the Tribunal on 4 June 2002.

18. On 30 May 2002 the Objectors filed submissions which in part assert that no recommendation should be made by the Tribunal pending a review of the decision of the Tribunal in file nos.20102818, 20108447 and 20019145 ("the Timber Creek Matters").

Jurisdiction of the Tribunal

19. By section 5A(1)(a), the LAA applies to a proposed acquisition if it is in relation to an acquisition of an interest in land that comprises native title rights and interests that is an act to which the consequences in section 24MD(6A) or (6B) of the NTA apply.

20. Section 24MD falls within Subdivision M of Division 3 of Part 2 of the NTA. Division 3 deals mainly with "future acts" which are defined in section 233 of the NTA. Specifically, for present purposes, section 24MD concerns future acts which pass the "freehold test".

21. The consequences of subsections 24MD(6A) and (6B) apply if the acquisition is not an act to which Subdivision P applies, including, as here, where the proposed acquisition is the "compulsory acquisition of native title rights and interests that relates solely to land or waters wholly within a town or city".

22. Additionally, the consequences of subsection 24MD(6B) of the NTA apply if, as here, the compulsory acquisition is for the purpose of conferring rights and interests in relation to the land on a person other than the Territory.

23. Thus, in order for the LAA to apply to the proposed compulsory acquisition, the acquisition must:

- (a) be a future act as defined in section 233 of the NTA;
- (b) pass the "freehold test"; and
- (c) be an act to which Subdivision P does not apply.

24. Subject to compliance with sections 36, 37 and 38 of the LAA, the Tribunal has jurisdiction to hear and make recommendations about objections to the acquisition of land under the LAA by persons whose interests in the land will be divested, modified or affected by the acquisition, including objections by registered native title claimants so far as it affects the registered native title rights and interests of the claimants and bodies.

25. In respect of part Lot 291, the Objectors challenge the jurisdiction of the Tribunal to hear the Objections on the basis that the act of proposed compulsory acquisition is not an act to which Subdivision M of Division 3 of Part 2 of the NTA applies, on the grounds that the proposed compulsory acquisition:

- (a) does not pass the freehold test so as to attract the consequences of section 24MD(6B) of the NTA and the application of Part IV of the LAA; and/or

(b) is discriminatory for the purposes of sections 9-10 of the *Racial Discrimination Act 1975* (Cth) ("the *RDA*"); and/or

(c) is a proposed invalid exercise of the power of compulsory acquisition.

26. The same challenge was made to jurisdiction in the Timber Creek Matters and certain questions, raising issues concerning the application and effect of the NTA and the *RDA* in the protection of native title, were posed for the consideration of the Tribunal. In relation to those grounds of objection, the Applicant adopts its submissions made in the Timber Creek Matters as to the jurisdiction of the Tribunal and the reasons of the Tribunal delivered on 22 March 2002 in dismissing that challenge.

27. For the purposes of the Tribunal's jurisdiction, it remains only to consider whether or not there has been compliance with sections 36, 37 and 38 of the *LAA*. In the absence of challenge from the Objectors or any obvious issue of fact or law which questions it, the Tribunal is entitled to assume that there has been compliance with those sections; presumptions of regularity apply.

Stay Application based upon Judicial Review Application in Timber Creek Matters

28. By letter dated 9 May 2002 the Objectors submitted that no recommendation should be made by the Tribunal in this matter until the outcome of an application for judicial review, filed purportedly pursuant to section 45A of the *LAA* in relation to the decision of the Tribunal in the Timber Creek Matters.

29. On 4 June 2002 the Tribunal made orders sought by the Objectors in a Form 4 Application dated 24 May 2002 to amend the grounds of objection filed in this matter to include the jurisdictional arguments raised in the Timber Creek Matters. Those arguments are addressed in paragraphs 20 to 26 inclusive above.

30. As to the merits of the application for judicial review, until the Minister for Lands and Planning exercises his administrative powers under the *LAA* and acquires the land in the Timber Creek Matters, the Objectors are not "persons aggrieved" within the meaning of section 45A (3)(a) of the *LAA*.

31. As to whether the circumstances in this matter are such that if judicial review overturned the decision of the Tribunal in the Timber Creek Matters, the appeal would be nugatory with respect to this matter, the Applicant points to the authority of *McBride v Sandland (No 2)* in opposing the Objectors' application for a stay of proceedings in those circumstances. A recommendation of the Tribunal that the Applicant compulsorily acquire part Lot 291 would not, of itself, effect compulsory acquisition and thereby preclude the restoration of the position of the Objectors with respect to the land. If the Tribunal recommends that part Lot 291 be acquired, the Applicant must consider relevant matters, including where appropriate, the matters set out in paragraph 2.1 of the Objectors' Submissions, in the exercise of his administrative powers under the *LAA*.

32. As there is no evidence before the Tribunal of the exercise of native title rights and interests on part Lot 291 by the Objectors, no basis exists upon which the Tribunal can establish "sufficiently exceptional circumstances" to disturb the general rule relating to stay of proceedings pending an appeal.

The Objections - Registered native title rights and interests

33. The Objectors are the registered native title claimants in Federal Court proceedings D6015 of 1999 ("Application") in relation to land and waters which includes part Lot 291 in the Town of Pine Creek.

34. The native title rights and interests claimed in the Pine Creek Application as accepted for registration are:

(a) to possess, occupy, use and enjoy the application area to the exclusion of all others.

(b) to speak for and to make decisions about the use and enjoyment of the application area;

to reside upon and otherwise have access to and within the application area;

(d) to control the access of others to the application area;

(e) to use, enjoy and manage the resources of the application area;

(e) to control the use and enjoyment of others of the resources of the application area;

(f) to share, exchange and/or trade resources derived on and from the application area;

(g) to maintain and protect places of importance under traditional laws, customs and practices in the application area;

(h) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area;

(i) to determine and regulate membership of, and recruitment to, a landholding group.

Evidence of claimed incidents of native title which could be affected

35. Although it is not appropriate for the Tribunal to embark on a full inquiry into whether native title exists and, if so, in what form, it must look for evidence of the existence and exercise of registered native title rights in respect of the subject land and the effect of the proposed acquisition/s on the enjoyment of those rights.

36. The Objectors have filed the following affidavits in support of their objections to the compulsory acquisition:

(a) Affidavit of Bessie Coleman affirmed on 8 May 2002

(b) Affidavit of Kirsty Jean Gowans affirmed on 19 February 2002

37. In her affidavit Gowans refers to a settlement by negotiation of the Upper Daly (repeat) Land Claim whereby land is being granted to the Wagiman People as Aboriginal Land or Freehold land. The affidavit further refers to other applications for determination of native title over areas of land in or around the Town of Pine Creek.

38. It is submitted that any agreement reached between the Territory and the Wagiman People regarding other land or the existence of other native title applications in the area in or around Pine Creek does not assist in establishing the native title rights it is claimed exist over part Lot 291 and in relation to which the Tribunal must determine what effect the proposed acquisition will have on those rights.

39. In her affidavit Gowans refers to a Draft Land Use Objectives document prepared by the Department of Infrastructure Planning and Environment. The same challenge to the acquisition based upon Draft Land Use Objectives was made in the Timber Creek Matters. The Applicant adopts the reasons of the Tribunal in dismissing that challenge.

40. In her affidavit Coleman identifies herself as a "Jarwoyn person" and claims native title rights and interests "in and surrounding Lot 291 of the Town of Pine Creek". Ms Coleman evidence is that the "Jarwoyn people used to have a big camp down by the river" and that "when [she] was a little girl Lot 291 was our hunting area."

41. No witness has deposed to the use of part Lot 291 for any of the claimed incidents of native title by the Objectors.

42. There are no registered or recorded sacred sites located on part Lot 291.

Section 38AA criteria

43. The effect of the proposed compulsory acquisition on the enjoyment by the claim group of the claimed native title rights and interests

(a) The effect of the compulsory acquisition is to extinguish any native title rights and interests over the land - this results from the operation of section 24MD(2)(c) of the NTA.

(b) However, in circumstances where there is no evidence of present use of the relevant areas and there are no known sites, the effect of the proposed acquisition is minimal.

(c) In any event access to any site of significance is ensured under section 46 of the *Sacred Sites Act*: see also sections 33-35.

(d) The evidence is that there has been no reports or complaints to the Department indicative of occupation of part Lot 291

44. The effect of the proposed compulsory acquisition on the way of life, culture and traditions of the claim group

(a) On the basis of the evidence given, the acquisition would appear to have no impact at all on the way of life, culture and traditions.

(b) No relocation from present residence is required, nor will there be cessation of any present use. The acquisition will not cause any ceremonies to cease, nor, on the evidence, will it prevent the present "exercise" of culture.

45. The effect of the proposed compulsory acquisition on the development of the social, cultural and economic structures of the claim group

(a) On the basis of the evidence given the acquisition would appear to have no effect on the social cultural and economic structures of the claim group.

(b) There is no evidence of any competing proposals for development of part Lot 291.

46. The effect of the proposed compulsory acquisition on the freedom of access by the claim group to the land concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land in accordance with their traditions.

(a) Even if the acquisition proceed, access to sacred sites is ensured. However, there is no evidence of present access for any other purpose and no evidence of ceremonies or other activities of cultural significance being carried out on part Lot 291.

47. The effect of the proposed compulsory acquisition on any area or site on the land concerned of particular significance to the claim group in accordance with their traditions

(a) There is no evidence of sites of particular significance on the land; those sites are protected by Sacred Sites Act in any event

48. Ways of minimising the impact of the acquisition on registered native title rights and interests, including in relation to access to part Lot 291

(a) As the impact of the acquisition on registered native title rights and interests is likely to be minimal, this criteria has little relevance in the present inquiry.

(b) In any event, minimising impact of the acquisition does not mean that the decision should not proceed. As the principal effect of the acquisition is to extinguish native title over part Lot 291 (if it continues to exist), the inquiry is directed to any practical effect of that extinguishment on registered native title rights. Accordingly if the claimants had been residing on the land but the impact of the acquisition was to require relocation then ways of minimising that effect are to be investigated e.g. alternate residential locations, allocation of some land in a land development for residential or cultural purposes.

49. The economic or other significance of the acquisition to the Territory and to the region

(a) Evidence of the economic or other significance of the acquisition is found in the affidavit of Blackley sworn 22 August 2001 at paragraphs 3(a), 3(b), 3(d) and annexure NAB 1.

50. The public interest in the acquisition

(a) Evidence of the public interest in the acquisition is found in the above references to the affidavit of Blackley sworn 22 August 2001. It is clearly in the public interest to provide an opportunity for the growth of a proven commercial activity which will provide employment opportunities in the region.

17. On 21 June 2002, the Objectors filed submissions in response (Objectors' June submissions), as set out below.

OBJECTORS' SUBMISSIONS

1. The Objectors rely on the submissions contained in their letter to the Lands and Mining Tribunal (the 'Tribunal') dated 9 May 2002, the submissions filed in the Tribunal on 30 May 2002, the amended grounds of objection filed 24 May 2002, and the Affidavits of Ms Gowans filed on 20 February 2002 and Ms Coleman filed on 10 May 2002.

Stay Application based on Timber Creek matters

2. It is noted that at paragraph 28 of the Applicant's Submissions the Applicant has mistaken the basis of the judicial review requested in the Timber Creek matters and consequently, that the comments as to the validity of that application at paragraph 30 are incorrect.

The effect of the proposed compulsory acquisition on the registered native title rights and interests referred to the Tribunal

3. In making a recommendation in relation to the acquisition of native title rights and interests the Lands and Mining Tribunal (the 'Tribunal') must take into account the matters listed in section 38AA(2) of the *Lands Acquisition Act* (the 'LAA'). In particular the Tribunal must take into account '... the effect that the acquisition will have or is likely to have on registered native title rights and interests that were referred to the Tribunal...' [s 38AA(2)(a)]

4. The registered native title rights and interests that were referred to the Tribunal include entitlements, under traditional laws acknowledged and customs observed, to exercise native title rights and interests in relation to the area claimed which include as follows:

- (a) to possess, occupy, use and enjoy the area claimed to the exclusion of all others;
- (b) to speak for and to make decisions about the use and enjoyment of the application area;
- (c) to reside upon and otherwise to have access to and within the application area;
- (d) to control the access of others to the application area;
- (e) to use and enjoy the resources of the application area;
- (f) to control the use and enjoyment of others of the resources of the application area;
- (h) to maintain and protect places of importance under traditional laws, customs and practices in the application area;
- (i) to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area;
- (j) to determine and regulate membership of, and recruitment to, a landholding group.

5. The Applicant's submissions filed on 11 June 2002 stated at paragraph 35 that 'Although it is not appropriate for the Tribunal to embark on a full inquiry into whether native title exists and, if so, in what form, it must look for evidence of the existence and exercise of registered native title rights in respect of the subject land and the effect of the proposed acquisition/s on the enjoyment of those rights.'

6. It is submitted that the Applicants have attributed to the Tribunal greater powers than are required under the *Lands Acquisition Act* [the 'LAA']. The Tribunal is not required by the LAA to 'look for evidence of the existence and exercise of registered native title rights'. The LAA requires the Tribunal to take into account 'the effect that the acquisition will have or is likely to have on *registered* native title rights and interests' [s38AA(2)(a)]. It is the fact of registration that enlivens the Tribunal's jurisdiction and it is regarding the *registered* native title rights and interests that the Tribunal must ascertain the effect of the proposed compulsory acquisition. There is no further requirement on the Objectors to prove the *exercise* of the native title rights and interests. The Tribunal is required to treat such rights and interests, once registered, as existing and must assess the effect of the proposed compulsory acquisition on them on that basis.

7. Further evidence of the registered native title rights and interests is found in the Affidavit of Ms Kirsty Gowans filed on 20 February 2002. Ms Gowans' affidavit details sacred sites within the town of Pine Creek in the vicinity of part Lot 291 [paragraph 5 and Appendix 3 of Ms Gowans Affidavit], sites within the vicinity of Pine Creek [paragraph 6 and Appendix 3 of Ms Gowans Affidavit], areas held as Aboriginal land in the vicinity of Pine creek [paragraph 11 and Appendix 4 of Ms Gowans Affidavit] and other native title applications lodged by the Objectors over areas of land in and around the Town of Pine Creek, including land immediately abutting part Lot 291 [paragraph 16 and Appendix 7 of Ms Gowans Affidavit].

8. The Applicant's submissions state at paragraph 38 that '...any agreement reached between the Territory and the Wagiman People regarding other land or the existence of other native title applications in the area in or around Pine Creek does not assist in establishing the native title rights it is claimed exist over part Lot 291 and in relation to which the Tribunal must determine what effect the proposed acquisition will have on those rights'. As stated above, the Tribunal is required to make a recommendation based upon the registered native title rights and interests referred to it. The Objectors are not required to prove the existence of their native title rights and interests. Nevertheless, the evidence of further native title rights and interests in land surrounding the claimed area provides the context in which the Tribunal's assessment of the effect of the proposed the compulsory acquisition on the registered native title rights and interests referred to it, must be made.

9. The registered native title rights and interests in part Lot 291 are a part of the claimants' broader native title rights and interests in lands surrounding the area. The existence and exercise of those rights and interests must be considered in the context of the rest of the claimants' claimed native title lands. To properly assess the effect of the proposed the compulsory acquisition on the native title claimant group, the Tribunal must assess the effect of the extinguishment of native title in Lot 291 in diminishing the native title claim group's land base, and the effect of this on the matters listed in s 38AA of the LAA.

10. Further evidence of the registered native title rights and interests is found in the affidavit of Ms Bessie Coleman filed on 10 May 2002. Ms Coleman's affidavit attests to the occupation and residence of part Lot 291 [paragraphs 2, 7 and 8]

and to the occupation and residence of lands surrounding part Lot 291 [paragraphs 5, 6, 7, 8 and 9] by the native title claimant group. Ms Coleman's affidavit attests to the use of part Lot 291 as a hunting ground and a place to gather food [paragraphs 3, 4 and 7]. She attests that these rights and interests were exercised until the time when the Mango Farm was developed in the land immediately adjoining part Lot 291 [paragraph 8].

11. Ms Coleman further asserts her right as a native title holder to speak for and make decisions about the use and enjoyment of the area and to control the access of others to the area [paragraphs 8 and 10]. Ms Coleman further attests to her right as a native title holder to transmit to others the cultural knowledge, customs and practices associated with the application area [paragraph 11].

12. The Applicant's submissions state at paragraph 41 that 'No witness has deposed to the use of part Lot 291 for any of the claimed incidents of native title by the Objectors'. It is submitted that this is incorrect. Ms Coleman's affidavit attests to the use of part Lot 291 according to the registered native title rights and interests described in the previous paragraph and in the amended native title application. The Objectors' objection to the proposed compulsory acquisition is on behalf of all native title claimants for the claimed area. Ms Coleman's affidavit is the evidence of a native title claimant over the claimed area.

Section 38AA Lands Acquisition Act criteria

13. In making its recommendation the Tribunal must take into account the effect of the proposed compulsory acquisition on registered native title rights and interests referred to the Tribunal. It is submitted that because the proposed compulsory acquisition of all native title rights and interests would cause total extinguishment of native title in the area the impact of the proposed acquisition is fundamental. In particular, the Tribunal is required to consider the effect of the proposed compulsory acquisition on the matters listed in section 38AA(2) of the LAA.

(a)(i) the enjoyment by the native title claim group of the registered native title rights and interests;

14. The Applicants state at paragraph 43 of their submissions that '... in circumstances where there is no evidence of present use of the relevant areas and there are no known sites, the effect of the proposed acquisition is minimal'. It is submitted that this is incorrect. As stated above, where the effect of the proposed compulsory acquisition would be to extinguish native title the effect is fundamental because it removes all future capacity to exercise native title rights and interests in the area. Once lost, native title does not revive. The effect of the acquisition is to permanently remove from the native title claim group, the right to enjoy any of the registered native title rights and interests.

(a)(ii) the way of life, culture and traditions of the native title claim group;

15. The Applicants state at paragraph 44 of their submissions that 'On the basis of the evidence given, the acquisition would appear to have *no impact at all on the way of life, culture and traditions*'. It is difficult to see how the Applicant substantiates this assertion in the fact of the unchallenged evidence of Ms Coleman. Ms Coleman's sworn evidence is that, until the Mango Farm was developed, the native title claimant group physically occupied part Lot 291 and used the land in accordance with their traditional rights and customs. Further, Ms Coleman gives evidence that the native title claimants currently assert their rights in relation to part Lot 291.

16. The existence of native title claims and the existence of prior successful claims under the Aboriginal Land Rights Act is also evidence of the assertion of an interest in the traditional country of the claimants, including part Lot 291.

17. The Tribunal has before it a copy of the report of the Aboriginal Land Commissioner, summarising the evidence before him concerning the way of life, culture and traditions of the native title claimants (then Aboriginal Land claimants). That report is Annexure KJG-1 to the Affidavit of Kirsty Jean Gowans affirmed 19 February 2002). It details:

- the history of the then Aboriginal land claimants connection to the wider areas of their traditional country (pp63-72).
- evidence of the then Aboriginal land claimants general concern for the protection of sacred sites (which the Aboriginal Land Commissioner notes was "shown by the fact that they had sought to protect certain sites near Pine Creek, by utilizing the legislation relating to sacred sites"(at p 83).
- evidence that the then Aboriginal land claimants active care for their country, described as being evidenced by "visiting it constantly." (at p. 83), "worry"and "burning of country" (sometimes described as cleaning it).
- evidence of the residential connection to the areas in the town of Pine Creek.
- evidence of the ongoing maintenance of traditional cultural practices and beliefs.

18. It is submitted, that the loss of all native title rights and interests will have an impact upon the claimants' capacity to access, use and control the area of land, subject to the acquisition. The extinguishment of native title rights and interests in part Lot 291 further diminishes the native title claimant group's traditional lands. It is submitted that the loss of rights and interests in part Lot 291, when taken together with past (and future) losses of land, will have a progressive detrimental impact on the capacity of the native title claim group to maintain its' way of life, culture and traditions.

(a)(iii) the development of the social, cultural and economic structures of the native title claim group;

19. The Applicants state at paragraph 44 of their submissions that 'On the basis of the evidence given, the acquisition would appear to have *no effect on the social cultural and economic structures of the claim group*'. It is submitted that this is incorrect. Land ownership, in itself, could form a basis for economic development of the native title claim group. The removal of the opportunity for the native title claim group to use and develop part Lot 291 (and the gradual reduction of the native title claim group's land base) is detrimental to its future economic, social and cultural development. Extinguishment of native title rights and interests removes the opportunity and the capacity of the native title claim group to choose regarding the development of their future social, cultural and economic structures.

20. The Applicant's submissions further state that 'there is no evidence of any competing proposals for development of part Lot 291'. In this respect, the objectors note that the Tribunal found in previous cases that it's role was not to balance competing land use proposals but to assess the impact of the proposed

compulsory acquisition of native title rights and interests in accordance with the Act.

(b) ways of minimising the impact of the acquisition on registered native title rights and interests, including in relation to access to the land the subject of the acquisition;

21. The purpose of the proposed acquisition of the part Lot 291 is to allow for the extension of the existing Pine Creek Mango Plantation currently located on Lot 305 Town of Pine Creek. This involves the provision of irrigation, additional planting of trees and construction of ancillary improvements including fencing. The Applicants submit at paragraph 10 that the native title rights and interests in part Lot 291 are to be compulsorily acquired in order to "...ensure the validity of the grant of an interest in the land to a third party in the event that native title is determined by the Federal Court to exist in respect of part Lot 291".

22. It is submitted that extinguishment of native title for the purpose of granting rights in land to a third party is unlawful. The submissions in the so-called 'Timber Creek matters' are relied on in this respect.

23. It is further submitted that, in the alternative, that the extinguishment of all native title rights and interests in the land is not necessary to allow the development proposed for part Lot 291. Consequently, it is submitted that the Applicant has not sufficiently attempted to minimise the impact of the acquisition on registered native title rights and interests.

24. The Applicant further submits at paragraph 48 that 'As the impact of the acquisition on registered native title rights and interests is likely to be minimal, this criteria has little relevance in the present inquiry'. As stated above, it is submitted that where native title rights and interests are to be permanently extinguished, the effect is fundamental.

25. The applicant further submits at paragraph 48 that the Tribunal's inquiry '... is directed to any practical effect of that extinguishment on registered native title rights'. The Applicant's submissions imply that acquisition only impacts on native title claimants if it is actual physical interference with claimants' access to land. It is submitted that this is incorrect. As stated above, it is not the exercise of native title rights and interests that the Tribunal must consider. The Tribunal is required by s 38AA LAA to assess the effect of the acquisition upon the enjoyment of the *registered* native title rights and interests. The Tribunal is required to assume that those rights exist.

26. It is submitted that if the acquisition of part Lot 291 is to proceed, it will have the effect of terminating the enjoyment of the following registered native title rights and interests:

a) to reside upon and otherwise to have access to and within the application area;

b) to control the access of others to the application area;

c) to use and enjoy the resources of the application area;

d) to control the use and enjoyment of others of the resources of the application area;

27. It is submitted that if the acquisition of part Lot 291 is to proceed, it will have the effect of impairing the enjoyment of the following registered native title rights and interests:

a) to maintain and protect places of importance under traditional laws, customs and practices in the application area;

b) to transmit to others their cultural knowledge, customs and practices associated with the application area;

(c) the economic or other significance of the acquisition to the Territory and to the region in which the land the subject of the acquisition is located, including the Aboriginal peoples who live in the region;

28. The Applicant submits at paragraph 9 that "The proposed use of part Lot 291 likely to result in increased commercial activity within the Town of Pine Creek as the Mango Plantation is a significant business, employer and tourist attraction in the area." A similar statement is found at paragraph 3(d) of the Affidavit of Noreen Alma Blackley, filed 23 August 2001, where she states that "The company is a significant business, employer and tourist attraction in the Pine Creek region". Yet the Applicant provides no evidence to support these assertions. No information is provided about the number of employees or financial situation of the company. Neither is any information provided regarding whether acquisition of land will increase numbers of persons employed by the company or in any other way contribute to the economy of the region or the Territory. The only evidence filed regarding the business is a brochure attached to the affidavit of Ms Blackley that appears to be a marketing brochure 'prepared by the Company in contemplation of the sale'. The brochure is undated and provides no information about the value of the business.

29. The terms of section 38AA(2) are mandatory; where the extinguishment of native title rights and interests is proposed for the purpose of granting interests to a third party the Tribunal must take into account "the economic or other significance of the acquisition to the Territory and to the region in which the land the subject of the acquisition is located, including the Aboriginal peoples who live in the region". As the proposal is made by the Applicant it is incumbent upon the Applicant to show some economic or other benefit of the proposed acquisition to the region, including the Aboriginal peoples who live in the region. In this case the Applicant has not provided sufficient evidence for the Tribunal to make an assessment regarding whether the economic or other significance of the proposed acquisition.

(d) the public interest in the acquisition.

30. The Applicant submits at paragraph 50 that "It is clearly in the public interest to provide an opportunity for the growth of a proven commercial activity which will provide employment opportunities in the region". As stated above, no evidence has been adduced by the Applicant to substantiate its claim that the Mango Farm is a 'proven commercial activity' or that the proposed acquisition will increase employment opportunities.

31. It is further submitted that the acquisition of native title rights and interests for the purpose of granting interests in land to a third party is not in the 'public interest'. The submissions in the 'Timber Creek matters' are relied upon in this respect.

COMMENTS AND FINDINGS OF THE TRIBUNAL

18. In the Objectors' May submissions in paragraph 2.1 it is asserted that if a recommendation is made by the Tribunal:
 - Such recommendation would be invalid;
 - It is unworkable for the Northern Territory Government to act on any recommendation;
 - The time and resources of the Tribunal will have been wasted if the judicial review in the Timber Creek matters is successful;
 - If the Minister proceeds with the acquisition following upon a recommendation by the Tribunal it "may extinguish native title contrary to the provisions of the Native Title Act 1993".
19. Distilling the succeeding arguments into a crisp point, it is contended by the Objectors that if the Tribunal does not have jurisdiction any recommendation made by it would not be a valid determination in terms of section 24MD(6B) of the Native Title Act 1993.
20. There is also addressed the consequences of the Minister making any acquisition following upon any recommendation. So far as that particular act is concerned it will not be dealt with as an issue by this Tribunal. That is a matter for the Objectors to address in another forum and insofar as they may be so advised.
21. Discretely in relation to the issue of the stay, the Objectors purport to set out the law in paragraph 4 of the submission and the Tribunal accepts the postulation of the law at paragraph 4.1. The Tribunal makes the case that in this matter it can only make a recommendation. It is not the recommendation which is the act of extinction of native title. There is no consequent risk that "it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed" if a recommendation is made:
22. The fact of the matter is that the judicial review referred to as being the basis for the request of a stay is not proceeding. The factual position

pertaining to that review is to be ascertained from a transcript of the ventilation or at least preliminary ventilation before the Supreme Court.

THE SUPREME COURT OF THE NORTHERN TERRITORY RILEY J
TRANSCRIPT OF PROCEEDINGS SC 74 of 2002 (20207368) ALAN GRIFFITHS
and WILLIAM GULWIN v LANDS & MINING TRIBUNAL. and MINISTER FOR
LANDS, PLANNING & ENVIRONMENT AT DARWIN ON THURSDAY 13 JUNE
2002 AT 10:15 AM

HIS HONOUR: Yes, Mr Schneider?

MR SCHNEIDER: Could I mention the matter of - it's an originating motion of the plaintiffs, a Mr Griffiths and Mr Gulwin. The first defendant is the Lands and Mining Tribunal and the second defendant is the Minister for Lands, Planning and Environment.

HIS HONOUR: Yes.

MR SCHNEIDER: It's proceeding number - my document doesn't have a number.

HIS HONOUR: It's number 3 in my list. I have it.

MR SCHNEIDER- Yes, 74 of 2002. I appear, if Your Honour pleases, on behalf of the first defendant, the Minister. No, sorry, the Tribunal.

MS CRESWELL: Your Honour, Ms Creswell, appearing for the plaintiffs.

HIS HONOUR: Ms Creswell, Mr Hearn?

MR HEARN- Mr Hearn, appearing for the second defendant, the Minister.

HIS HONOUR: Yes.

MS CRESWELL: Your Honour, it appears we've reached a consensual position by way of undertaking so that the interlocutory summons before you today can be adjourned - - -

HIS HONOUR: and is that the undertaking that appears in your latest affidavit, Ms Creswell?

MS CRESWELL: Yes, it is, Your Honour

HIS HONOUR: I had that a moment ago

MS CRESWELL: I understand the wording would be the same

HIS HONOUR: That is that, 'The Minister for Lands and Planning undertakes treat he will not publish or cause to be published in the Government Gazette any notice of acquisition in relation to lot 47, lots 97 to 100, and 114 and proposed lot 109 in the Town of Timber Creek until further order of the court'?

MR HEARN: Yes, Your Honour, that's the undertaking of the Minister.

HIS HONOUR: All right, thank you, Mr Hearn.

Do you need to be heard on that, Mr Schneider?

MR SCHNEIDER: No, Your Honour.

HIS HONOUR: And you're content with that, Ms Creswell?

MS CRESWELL: Yes, Your Honour. There were a couple of other short orders that we'd seek. Liberty to apply in seven days.

HIS HONOUR: Liberty to apply in seven days?

MS CRESWELL: And just ;an order that we have the transcript made, and then I understand we're to give an undertaking or we will give an undertaking, the usual undertaking, as to damages

HIS HONOUR: And when you say `we', who is that?

MS CRESWELL: I beg your pardon. The plaintiffs.

HIS HONOUR: The individual plaintiffs?

MS CRESWELL: Yes.

HIS HONOUR: All right. The individual plaintiffs, but not on behalf of the communities?

MS CRESWELL: I beg your pardon. It's the plaintiffs on behalf of the Ngaliwurru/Nungali people, yes, as a group of people who are defined, if you like, in the original Native Title application.

HIS HONOUR: I have a little difficulty with that. They're giving undertakings as to damages on behalf of a whole range of people. Can I assume that they have individual approval from each of those individuals?

MS CRESWELL: No, that hasn't been done, so perhaps I should consider that again.

HIS HONOUR: Well, you at least have instructions on behalf of Alan Griffiths and William Gulwin - - -

MS CRESWELL: Yes.

HIS HONOUR: - - - to give the usual undertakings as to damages?

MS CRESWELL: Yes, Your Honour.

HIS HONOUR: Does that satisfy you, Mr Hearn?

MR HEARN: Yes, Your Honour.

HIS HONOUR: All right. Seven days notice, is that just a little long?

MS CRESWELL: I'd be happy to have a shorter period.

HIS HONOUR: 48 hours? It's really protecting your interests, Mr Hearn.

MR HEARN: Well, Your Honour, my personal philosophical view is that seven days gives people time to get ready. 48 hours has some difficulty certainly for us and probably more so for the applicants in getting instructions.

HIS HONOUR: There's no difficulty with it. I was looking at your interests rather than the interests of the plaintiffs.

MR HEARN: No, we're quite happy with seven days.

HIS HONOUR: I note the undertaking given on behalf by the Minister. I grant the parties -- sorry, I withdraw that. I also note the undertaking as to damages given by Alan Griffiths and William Gulwin through their counsel, That is the undertaking as to damages in the usual form.

I give the parties liberty to apply on seven days' written notice to the other parties. I direct that a transcript of this morning's exchange be placed on the file. I adjourn the matter generally.

MR SCHNEIDER: Thank you, Your Honour,

HIS HONOUR: Thank you.

23. Further, and in any event, the advice to the Tribunal is that the Minister is confident that the judicial review proceedings lack any merit.
24. At paragraph 4.5 of the Objectors May submissions they address the issue which is contingent on the Minister's overt action. It is the Tribunal's view that if it proceeded to make a recommendation it would be at that point in time that any application for a stay may appropriately be addressed and that would involve a separate application in another jurisdiction. It would also be an application to stay the acquisition by the Minister.
25. In relation to 4.6 of the Objectors May submissions, as a matter of law native title cannot in the Tribunal's perception be extinguished illegally. It can only be extinguished by legal and proper process in accordance with the Native Title Act.
26. The Applicant's submissions of course do not solely address the issues the subject of this decision and it is only those submissions which do relate to that discrete function of this Tribunal that are canvassed in this decision.

The Applicant addresses the matter of the stay application from paragraph 28 of their submissions.

27. At paragraph 30 of the Applicant's submissions there is a distinct submission relating to the provisions of section 45A(3)(a) of the Lands Acquisition Act. It is apposite for the Tribunal to visit paragraph 2 of the Objectors submissions.
28. The argument set out at paragraph 31 and 32 of the Applicant's submissions in essence amounts to the primary position postulated by the Tribunal in relation to the Objectors' submissions of 30 May 2002.
29. On 21 June 2002 the Objectors filed additional submissions already referred to and again the Tribunal in respect of those submissions will focus only on issues relating to the stay application.
30. Paragraph 2 of the Objectors' 21 June submissions has already been addressed in this decision. The remaining paragraphs relate to the merits of the proceeding.
31. Ms Heatherton stated that in the event the Tribunal did not uphold the submission that there should be a stay of the Tribunal's recommendation it was the wish of the Objectors, concurred with Ms Walters for the Applicant, that the Tribunal should proceed as required prior to the NLC letter raising the stay issue.
32. During argument on 5 July 2002 Ms Walters and Ms Heatherton made oral submissions. Ms Walters sought to rely on the decision of the National Native Title Tribunal ("NNTT") made on 30 April 1996 in application no WF96/4 and other matters referred to. For reason that all parties are familiar with this decision, it will be referred to by the Tribunal as the "*Aztec Mining decision*". Ms Walters, in this Tribunal's perception incorrectly, sought not to distinguish the procedural issues being dealt with by the NNTT in *Aztec Mining decision* from those that apparently face this

Tribunal. In *Aztec Mining decision* the issue was whether or not procedural steps ought be halted. That is of course not the case in the instant matter. All procedural steps in the matter before this Tribunal have already been completed.

33. It is useful however to elicit from the decision those principles stated by CJ Sumner, NNTT member, which have application discretely to an application to stay any relevant decision and the law is eloquently stated by him at page 7 of 10:-

The decision to grant or refuse a stay is a matter of discretion for the Tribunal, but action should not be taken which would altogether defeat the rights of a party or result in injustice to one or other of the parties (*Bloch v Bloch & Another* 1981 37 ALR 55 at p.58 (Wilson J.)) The Tribunal must engage in a weighing process involving considerations of fairness to the respondent and of more general considerations of public interest. It involves a subjective balancing of a variety of factors and considerations (*Walton v Gardiner* 57 ALJR 485 at pp.491 & 494).

34. Mr Sumner stated himself:-

Any decision should not defeat the rights of the parties altogether and a stay should be granted if not to do so would result in 'material circumstances being changed in such a way that success in the appeal may be negated' or 'an unalterable situation being reached' (Lee J., Federal Court, *Ben Ward v State of WA and Australian United Gold WAG 60060/1995*, 14 December 1995, Unreported, at pp.4 and 5).

35. As is apparent from observing the non-compliance by the Objectors with so many procedural orders it could not objectively be said that the prosecution of the objection had been conducted with any degree of alacrity.
36. It is sadly but, factually the case in most of the matters, in “objection proceedings” that proceed in this Tribunal such dereliction of obligation is common. Suffice it to say that if the procedural steps that had been decreed by this Tribunal had in fact been complied with there would have been every prospect that this matter would have been disposed of at a much earlier point in time.
37. There is also the illogicality of the conduct of the Objectors to be noted. The Tribunal refers to the fact that until 9 May 2002 the Tribunal was

entitled to and was in fact proceeding on the assumption that the position prevailing on 9 April 2002 would determine the outcome of this matter.

38. The lack of demonstrated prejudice to the Applicant has hitherto determined an extensive degree of laxity or accommodation being extended to the Objectors. Whether such a course of action continues into the future in this or other matters is only to some extent in the hands of the Tribunal.
39. Certainly the non-compliance with the Tribunal's orders and other matters referred to arising out of the position prevailing on 9 April 2002 are factors which the Tribunal takes into account in refusing to accede to the request for a stay. Those matters are however not in themselves definitive. The real tests as postulated by Member Sumner, and in the other authorities referred to and traversed by the Tribunal in its decision, all dictate that there should not in effect be any stay granted because of the lack of any real prejudice to the Objectors.
40. If the Tribunal proceeds to make its recommendation as has already been pointed it is then up to the Objectors to decide whether or not they wish to seek some form of stay or mandamus against the Minister exercising his rights to acquire. It is the acquisition which is the act which extinguishes native title. The recommendation of this Tribunal does not extinguish native title and the criteria which are required to be met then do require application.
41. This view of the Tribunal is despite the fact that, as seemingly correctly submitted by Ms Heatherton, there is no obligation on the Minister to give notice of his intention to acquire once the Tribunal's recommendation is published. Nevertheless in these circumstances, it seems that it is open to the Tribunal to impose a condition requiring him to do so and that is what the Tribunal proposes to do. Whether the condition is strictly speaking a condition within the power of the Tribunal or not, doesn't seem in a practical sense to matter at all.

42. There is one further matter. From the time that the last submissions are made there is a peremptory statutory obligation imposed by section 17 LMT which requires the Tribunal to deliver its decision within a period of 2 months. There is no exception provided for and arguably then for the Tribunal not to go ahead and finalise its recommendation would result in the Tribunal being in breach of a statutory provision.

DECISION

43. In all the circumstances, the application for the stay is refused. The Tribunal will then, pursuant to the joint wishes of the parties as expressed by their legal representatives, proceed to finalise its decision in relation to a recommendation to the Minister and deliver its recommendation in due course.

Dated: 6 August 2002

DAVID LOADMAN
CHAIRPERSON