CITATION:	*Yarabala Pty Ltd & Anor v Sweetpea Petroleum Pty Ltd* [2023] NTSC 50
PARTIES:	YARABALA PTY LTD AND BB BARKLEY PTY LTD v SWEETPEA PETROLEUM PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-00338-SC
DELIVERED:	9 June 2023
HEARING DATES:	22 and 23 June 2022
JUDGMENT OF:	Barr J

CATCHWORDS:

NORTHERN TERRITORY CIVIL AND ADMINISTRATIVE TRIBUNAL – Application for leave to appeal to Supreme Court – Application for leave to appeal and appeal heard together – Appeal confined to questions of law – Error of law must be sufficient to vitiate the Tribunals decision – Appellant failed to establish vitiating errors of law

MINING AND PETROLEUM – Exploration permit – Pastoral property – Tribunal required to determine provisions of access agreement to allow interest holder to gain access to the property – Regulation 29 – Whether Tribunal had jurisdiction to deal with dispute in relation to compensation – s 82A *Petroleum Act 1984* (NT) – Held appellant not "entitled to compensation" under s 81(1) of the Act – No

entitlement to compensation arises until relevant 'triggering event' has occurred – No express jurisdiction to deal with contested application for compensation for anticipated adverse events when determining the provisions of access agreement – No implied jurisdiction for Tribunal to conduct hearing to assess and make orders for compensation at the time of determining the provisions of access agreement

MINING AND PETROLEUM – Exploration permit – Pastoral property – Certain operations prohibited within 200 m of any "artificial accumulation of water" – Land holder argued before Tribunal that water was artificially accumulated in all of its water infrastructure, including in-ground pipes – Tribunal held that water in tanks and troughs was an "artificial accumulation of water", but not in pipes – Pipes were the means of distribution – Water in in-ground pipes not a 'body of water' – Not established that water in in-ground pipes necessarily came within description of an "artificial accumulation of water" – No error of law

Northern Territory Civil and Administrative Tribunal Act 2014 s 5, s 45, s 46(1), s 141
Petroleum Act 1984 (NT) s 3(1), s 3(2), s 5, s 28, s 29, s 58(j), s 81(1), s 82A, s 111(1)(a)
Petroleum Regulations 2020 (NT) r 12, r 13, r 14, r 17, r 26, r 29, r 57(2), r 57(3), Schedule 2

Great Western Railway Co v Helps [1918] AC 141; *Australian Gas Light Company v Valuer-General* (1940) 40 SR (NSW) 126; *Nelungaloo Pty Ltd v The Commonwealth* (1947-48) 75 CLR 495; *Todorovic v Waller* (1981) 150 CLR 402; *Johnson v Perez* (1988) 166 CLR 351; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; *State of Western Australia v Bond Corporation Holdings Ltd and ors* (1991) 28 FCR 68; *Wardley Australia Ltd and anor v The State of Western Australia* (1992) 175 CLR 514;
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439; *Development Consent Authority v Phelps* [2010] NTCA 3; 27 NTLR 174

Douglas Brown, *Land Acquisition*, 6th edition, LEXIS NEXIS Australia (2009)

REPRESENTATION:

Counsel:

Applicant:	J Horton QC, E Morzone QC, K Wylie
Respondent:	G Rich SC, H Baddeley

Solicitors:

Applicant:	Emanate Legal
Respondent:	Squire Patton Boggs

Judgment category classification:	B
Judgment ID Number:	Bar2306
Number of pages:	65

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Yarabala Pty Ltd & Anor v Sweetpea Petroleum Pty Ltd [2023] NTSC 50
No. 2022-00338-SC

IN THE MATTER of an application for leave to appeal, pursuant to s 141 *Northern Territory Civil and Administrative Tribunal Act 2014*

BETWEEN:

YARABALA PTY LTD

AND

BB BARKLEY PTY LTD
Applicants

AND:

SWEETPEA PETROLEUM PTY LTD
Respondent

CORAM: BARR J

REASONS FOR DECISION

(Delivered 9 June 2023)

[1] The applicants seek leave to appeal against the decision of the Northern Territory Civil and Administrative Tribunal ("the Tribunal"), made 7 February 2022. On 9 March 2022, Grant CJ ordered that the application for leave to appeal and the appeal be heard together. The proposed grounds of appeal have been fully argued before me.

[2] The application for leave to appeal was filed on 14 February 2022. On 8 April 2022, the applicants filed a draft notice of appeal. An amended document headed 'Notice of Appeal' was filed in court on 22 June 2022.

[3] For ease of reference in these reasons, I will generally refer to the applicants collectively as "Yarabala".[1]

The nature of the appeal

[4] An appeal from the Tribunal's decision is governed by s 141 *Northern Territory Civil and Administrative Tribunal Act 2014*, which reads as follows:

> **141 Appeal to Supreme Court**
>
> (1) A party to a proceeding may appeal to the Supreme Court against a decision of the Tribunal on a question of law.
>
> (2) A person may appeal only with the leave of the Supreme Court.
>
> (3) On hearing an appeal, the Supreme Court must do one of the following:
>
> (a) confirm the decision of the Tribunal;
>
> (b) vary the decision of the Tribunal;
>
> (c) set aside the decision and:
>
> (i) substitute its own decision; or
>
> (ii) send the matter back to the Tribunal for reconsideration in accordance with any recommendations the Supreme Court considers appropriate;
>
> (d) dismiss the appeal.

1 The Tribunal referred to the applicants in the same way.

[5] Appeals from the Tribunal to the Supreme Court are thus restricted under the terms of s 141(1) of the Act to "a question of law". I recently discussed errors of law and re-stated a number of important principles in *Rallen Australia Pty Ltd v Sweet Pea Petroleum Pty Ltd*.[2] It is not necessary to repeat that discussion, save to state that an error of law must be such as to vitiate the Tribunal's decision.[3] There must be "a real possibility (but not a mere or slight possibility), that the error of law could (but not necessarily would) have affected the tribunal's decision".[4]

Background

[6] The applicants are the lessees of Beetaloo Station, Perpetual Pastoral Lease 159 over NT Portion 702. The respondent ("Sweetpea") is the holder of a 'petroleum interest' in the form of an exploration permit, Exploration Permit 136 ("EP 136"), issued under the *Petroleum Act 1984* (NT). The area of EP 136 includes part of Beetaloo Station.

[7] The rights conferred by an exploration permit are stated in s 29 *Petroleum Act 1984*:

> (1) An exploration permit, while it remains in force, gives the permittee, subject to this Act and in accordance with the conditions to which the permit is subject and the directions, if any, lawfully given by the Minister, the exclusive right to

---

2 *Rallen Australia Pty Ltd v Sweet Pea Petroleum Pty Ltd* [2023] NTSC 36 at [5] – [11].

3 See *Development Consent Authority v Phelps* [2010] NTCA 3; 27 NTLR 174 at [11].

4 *Development Consent Authority v Phelps* at [24]. The 'tribunal' referred to was the former Lands Planning and Mining Tribunal.

explore for petroleum,[5] and to carry on such operations and execute such works as are necessary for that purpose, in the exploration permit area.

(2) Without limiting the generality of subsection (1) but subject to this Act and any condition or direction referred to in that subsection, a permittee or, if there is more than one, the permittees jointly and his agents and employees may:

(a) at any time, enter and remain in the exploration permit area with such vehicles, vessels, machinery and equipment as are necessary or convenient for carrying out the technical works programme or other exploration of the permit area;

(b) carry out the technical works programme and other exploration for petroleum in the exploration permit area;

(c) extract, remove or allow the release from the exploration permit area for sampling and testing, an amount of material reasonably necessary for the purpose of establishing the presence of petroleum, or such greater amount as is approved; and

(d) subject to the *Water Act 1992*, any prior lawful activity and to the directions, if any, of the Minister, use the water resources of the exploration permit area for the permittee's domestic use and for any purpose in connection with the permittee's approved technical works programme and other exploration.

(3) *Not reproduced*.

[8] Sweetpea, as an 'interest holder', does not have unrestricted right of entry to Beetaloo Station in order to carry out 'regulated operations' in connection with its exploration permit.[6] Regulation 12, *Petroleum Regulations 2020*, provides that an interest holder must not commence regulated operations on land except in accordance with an 'approved access agreement'.

---

5 The definition of '*petroleum*' in s 5 *Petroleum Act 1984* includes "a naturally occurring hydrocarbon, whether in a gaseous, liquid or solid state".

6 Regulation 3 defines 'regulated operations' as "any operations for which an exploration permit, retention licence or production licence is required under the Act, other than preliminary activities".

[9] The parties to an approved access agreement are the holder of the exploration permit and the owner/occupier of the land.[7]

[10] Part 4 Division 3 of the Regulations sets out the process by which an approved access agreement must be reached. At the start of the process, there is a period of negotiation, of at least 60 days, initiated upon service by the interest holder of a 'negotiation notice' in the approved form. Regulation 16 requires that the parties take reasonable steps to negotiate an access agreement. The interest holder must pay the reasonable costs of the owner/occupier in participating in the negotiation process, including the reasonable costs of engaging legal, accounting or other experts to provide advice or reports.[8] If an access agreement cannot be reached within the negotiation period, the interest holder may request the owner/occupier to agree to alternative dispute resolution using a facilitator or mediator to achieve a negotiated outcome. The regulations provide a mechanism for the appointment of a mediator in default of agreement between the parties. If ultimately the alternative dispute resolution process fails to achieve a negotiated outcome within a specified time, the process is brought to an end. If the parties still do not agree on an access agreement, the interest holder may apply to the Tribunal "for a determination as to the provisions that

7 See Regulation 13 read with the definition of 'designated person' in regulation 3.

8 Regulation 17.

should form the contents of an access agreement so as to allow the interest holder to gain access to the relevant land".[9]

[11] In determining those provisions, the Tribunal must take into account and apply the requirements of regulation 14.[10] In brief, the access agreement determined by the Tribunal must contain the 'standard minimum protections' specified in Schedule 2. This is achieved by the inclusion of a provision expressed in the same or substantially the same terms as each of the Schedule 2 protections, or a "provision that reflects or satisfies a requirement specified in Schedule 2", or a "provision which reflects a standard that is greater than a standard specified in Schedule 2".[11] Schedule 2 contains "Standard minimum protections" in respect of 25 separate "Matters to be addressed".

[12] Most of the standard minimum protections in Schedule 2 are clauses capable of inclusion, without amendment, into an access agreement. However, some state the requirements of an intended clause, rather than a draft of the clause itself. In the words of regulation 14, these are provisions 'which reflect or satisfy a requirement specified in Schedule 2'. Relevant to this appeal are clauses 12 and 13 of Schedule 2, set out below:

9 Regulation 26(1)(a) & (b), read with regulation 29(1).

10 Regulation 29(3).

11 Regulation 14(3).

	Matters to be addressed	Standard Minimum protections
12.	Compensation for drilling	(1) The minimum amount of compensation payable for the drilling of a well on the land must be set out under this clause. (2) This clause does not limit any right under any provision of the Act as to the provision or payment of compensation, or any right to apply to the Tribunal with respect to a dispute about compensation
13.	Compensation for decrease in value of land	(1) This clause must indicate whether it is anticipated that any activities carried out on the land will lead to a decrease in the market value of land and, if so, a preliminary assessment of the amount of the decrease. (2) This clause does not limit any right under the Act as to the provision or payment of compensation, or any right to apply to the Tribunal if there is a dispute about compensation.

[13] I discuss clauses 12 and 13 further below.

The proceedings before the Tribunal

[14] After negotiations and then an alternative dispute resolution process had proved unsuccessful, Sweetpea commenced proceedings before the Tribunal pursuant to regulation 29(1) seeking determination of the conditions of an access agreement to allow Sweetpea to gain access to Beetaloo. Specifically, Sweetpea requested a determination that the conditions of the access agreement be those set out in the draft 'Land Access and Compensation Agreement' annexed to its initiating

application.[12] Yarabala in response proposed a different draft access agreement and, inter alia, sought a determination pursuant to s 82A(1)(a) *Petroleum Act 1984* as follows: "that the amount of compensation payable by the applicant to the respondents be in accord with section 81(1)(a), section 81(1)(b) and section 81(1)(c) of the Act."[13]

[15] I set out below s 81(1) *Petroleum Act* 1984:

> **81 Compensation to owners**
>
> (1) The holder of a petroleum interest must pay to:
>
> (aa) the owner of land comprised in the petroleum interest; and
>
> (ab) any occupier of land comprised in the petroleum interest who has a registered interest in the land,
>
> in respect of the owner's and occupier's respective interests in the land, compensation for:
>
> (a) deprivation of use or enjoyment of the land, including improvements on the land; and
>
> (b) damage, caused by the permittee or licensee, to the land or improvements on the land; and
>
> (c) any other prescribed reason or circumstance.
>
> *Note for subsection (1)*
>
> *If a permittee or licensee and a person entitled to compensation are unable to agree on an amount or other benefit, by way of compensation, to which the person is entitled, either party may refer the dispute to the Tribunal under section 82A.*

[16] Regulation 6 prescribed the following circumstances for the purposes of s 81(1)(c) of the Act: (1) the drilling of a well on the land by the interest holder and (2) any decrease in the market value of the land

---

12 AB 26 – 63 (not including annexures). It may be noted that the draft agreement made provision for payment of compensation: clause 11 (AB 40) read with Schedule 1, item 1 (AB 52).

13 AB 2123, Part D, Details of Response, par 3. Yarabala's response proposed amounts of compensation different to those proposed by Sweetpea.

caused by regulated operations carried out on the land by the interest holder.

[17] I also set out the relevant parts of s 82A:

> **82A Jurisdiction of Tribunal for disputes**
>
> (1) The Tribunal has jurisdiction to deal with the following disputes:
>
> (a) if a permittee or licensee and a person entitled to compensation under section 81(1) are unable to agree on an amount or other benefit, by way of compensation, to which the person is entitled;
>
> (b) if a permittee or licensee and a person entitled to compensation under section 82(1) or (2) are unable to agree on an amount, by way of compensation, to which the person is entitled;
>
> (c) any other kind of dispute prescribed by regulation.
>
> (2) A dispute mentioned in subsection (1)(a) or (b) may be referred to the Tribunal by either party.

[18] It is apparent from [14] above that Yarabala contemplated that the approved access agreement would include a determination as to compensation payable pursuant to s 81(1) *Petroleum Act 1984* , that is, make provision for payment of compensation beyond the requirements of regulation 29, read with regulation 14 and clauses 12 and 13 in Schedule 2.[14] However, Sweetpea maintained that the Tribunal did not have jurisdiction to make determinations about amounts payable under s 82A in the proceedings commenced by it.[15] For reasons explained in the following paragraphs, the Tribunal held that, in the proceedings

14 Tribunal Decision, pars 20, 21, 26.

15 Tribunal decision, par 27.

commenced by Sweetpea, its jurisdiction under s 82A of the Act to make an award of compensation under s 81 of the Act had not been enlivened. Hence it declined to assess and award compensation pursuant to s 82A of the Act in determining the provisions of an approved access agreement.

[19] The Tribunal acknowledged that the effect of regulation 14(4) was that an access agreement was not restricted to containing provisions addressing each of the matters specified in Schedule 2 (the 'Standard minimum protections'). It observed that there was nothing to prevent the parties agreeing on such compensation terms as they might consider appropriate.[16] However, on an application to the Tribunal under regulation 29(1), the Tribunal considered that it was restricted to applying the requirements of regulation 14.[17] The Tribunal identified the requirements of standard minimum protections sub-clauses 12(1) and 13(1), which required, respectively, a minimum amount of compensation for the drilling of a well to be set out in the access agreement and an indication as to whether it was anticipated that any activities to be carried out would lead to a decrease in market value of the land and, if so, a preliminary assessment of the amount of the decrease.[18] The Tribunal next referred to sub-clauses 12(2) and 13(2), drafted in very similar terms, which provided that the respective

16 Tribunal decision, pars 33, 34.

17 Tribunal decision, pars 32, 35, 36.

18 Tribunal decision, par 35, 36.

clauses did not limit any right under the Act "as to the provision or payment of compensation, or any right to apply to the Tribunal" if there were a dispute about compensation. On that basis, the Tribunal acknowledged that regulation 29 read with regulation 14 and the above Schedule 2 clauses did not limit a party's right to apply to the Tribunal in circumstances where there was a dispute about compensation. However, the Tribunal held that those regulations and clauses did not "create that right at the point of determining the provisions of an approved access agreement".[19]

[20] The Tribunal then considered whether, at the time of determining the provisions of an access agreement under regulation 29(1), it had jurisdiction conferred elsewhere in the *Petroleum Act 1984* to deal with Yarabala's disputed entitlement to compensation under s 81(1).

[21] The Tribunal ultimately decided that the proceeding currently before it did not involve a dispute as envisaged by s 82A. The Tribunal's reasons were as follows:[20]

> … There is currently no entitlement to compensation under sections 81(1) or 82(1) or (2) as no compensable activities have been carried out on the land. Put shortly, the respondent has suffered no loss. There has been no deprivation of the use or enjoyment of the land nor any damage caused to the land or improvements on it.
>
> Regulation 6 prescribes for the purpose of s 81(1)(c) "the drilling of a well"; and "any decrease in market value of the land caused

19 Tribunal decision, par 37.

20 Tribunal decision, pars 41 – 47.

> by regulated operations carried out on the land …". Neither of those things has yet occurred.
>
> ..... It is not the role of the Tribunal at this stage to consider possible bases of compensation and to include a remedy in advance within the AAA. Indeed to do so would require speculation as to damage and loss and would run the risk of falling short of the standard minimum protections required by regulations 29; 14 and Schedule 2.
>
> Even if such a course was open to the Tribunal it is difficult to see why compensation would be assessed prior to any actual loss or damage when the Act and Regulations clearly provide a process for considering claims after the event. The three year limitation periods provided for in sections 82(3) and 117A clearly envisage responsive rather than pre-emptive claims.
>
> In our view, to the extent the Initiating Application sought a determination under s 82A of the *Petroleum Act*, it was misconstrued. The respondents reliance on that section in their response does not enliven NTCAT's jurisdiction to deal with such claims otherwise than is provided for in the Act and Regulations.
>
> The respondents submit that there is clearly a dispute, as the parties have proposed differing amounts of compensation. The question for the Tribunal, however, is whether there is a dispute under s 82A that enlivens the Tribunal's jurisdiction.
>
> In our view there is not. There has been no actual deprivation of the use or enjoyment of the land (s 81(1)(a)) at this stage. Whether or not there will be and to what extent it will attract compensation remains to be seen. Similarly, no damage has been caused (s 81(1)(b)); and no operations have been carried out (Regulation 6).
>
> We determined that the Tribunal's jurisdiction under section 82A has not been enlivened and we will not consider claims for compensation on that basis.

[22] The Tribunal thus held that the application for a determination under s 82A of the *Petroleum Act* 1984 was misconceived.[21] The Tribunal's

21 Tribunal decision, par 45. The Tribunal's use of the word "misconstrued" was presumably to indicate that the applicant had misconstrued s 82A of the Act.

jurisdiction under s 82A had not been enlivened and so it declined to consider claims for compensation.[22]

[23] The Tribunal's findings discussed in [18] – [22] are the subject of proposed appeal grounds 1 to 4.

Proposed grounds of appeal

[24] The proposed grounds of appeal argued on the application for leave are contained in the Notice of Appeal filed 22 June 2022, as follows:[23]

> **Ground 1 – The jurisdiction question — Reasons [41]**
>
> 1. The Tribunal erred in finding its jurisdiction in s 82A of the *Petroleum Act 1984* (NT) (**the Act)** not to have been enlivened by (erroneously):
>
>   a) construing the provision (and s 81(1) and (2)) to require more than an inability of the parties to agree on an amount or other benefit (which inability here existed) in order to enliven jurisdiction;
>
>   b) finding (contrary to the evidence the subject of Ground 3 below) *'[t]here is currently no entitlement to compensation'* including because no decrease in market value of the land caused by regulated operation carried out on the land has occurred yet.
>
> **Ground 2 - When compensation should (and can) be assessed – Reasons [46]-[48]**
>
> 2. The Tribunal erred in finding that a compensation entitlement can only arise for:
>
>   a) s 81(1)(a) and (c) of the Act; and
>
>   b) Reg 6(1)(b) of the *Petroleum Regulation 2020* (**the Regulation**), after (variously) compensable activities have been carried out on the land; a well has been drilled; there has been deprivation of the use or

22 Tribunal decision, par 48.

23 The bold emphasis reflects the actual drafting of the Notice of Appeal, as does the reference to various paragraphs of the Tribunal's reasons.

enjoyment of the land or damage caused to the land or improvements on it.

Ground 3 & 4 – Evidence of compensable loss

3. The Tribunal erred in finding that the granting of the Access Agreement and/or the Respondent's right to carry out regulated activities under that agreement would not result in a decrease in market value of the land in circumstances (**Reasons [134]**) where:

    a) the Respondent did not challenge the opinion of the Appellants' valuer Mr Hendy which was that such a decrease would result;

    b) the Respondent's own valuer conceded that the proposed activities would cause a decrease in the market value of the land;

    c) the Tribunal misapplied the rule in *Browne v Dunn* by entertaining a submission (later accepted) from the Respondent that it need not have put its case to the Appellants' expert valuer; (**Reasons [127]**).

4. The Tribunal erred in finding (**Reasons [110])** it was required to determine a minimum amount of compensation payable for the drilling of a well, despite the presently proposed activities in the subject proceedings not including any such activity.

Ground 5 - 'Artificial Accumulation of water' – Reasons [94], [95], [98]

5. The Tribunal misconstrued s 111(1)(iii) of the Act by finding the water within the Appellant's reticulated watering system did not constitute an 'artificial accumulation of water'.

Ground 6 –Duration of Access Agreement – Reasons [141]

6. The Tribunal erred in finding the duration of the Access Agreement ought be the same as that of the Exploration Permit (as varied from time to time) in that:

    a) doing so gives rise to impermissible uncertainty (such duration being indeterminate);

    b) to do so would give the Respondent unilateral control over the scope of the EMP and the inclusion of additional regulated activities;

    c) it involved a misconstruction of cl.25 within Schedule 2 of the *Petroleum Regulations 2020* by finding sub-paragraphs (b) and (c) of it to be mutually exclusive;

Ground 7 – Disposal on the merits & denial of natural justice

7. The Tribunal erred in:

   a) failing to decide the proceeding on its merits by permitting the intrusion of issues and arguments in another matter heard after the proceeding below and separately from it (*Sweetpea Pty Ltd v Rallen Australia Pty Ltd* (NTCAT file no. 2021-02700-CT));

   b) failing to permit the Appellants an opportunity to be heard on those matters before they were decided.

Consideration of applicant's arguments

Proposed ground 7

[25] It is appropriate to deal first with ground 7.

[26] The application in which Yarabala was respondent was heard by the Tribunal over three days, from 29 November to 1 December 2021. A separate application in which Rallen Australia Pty Ltd ("Rallen") was respondent was then heard over three days from 8 December to 10 December 2021. There were overlapping issues raised at the hearing of those applications and at least two significant issues raised in the Rallen application were, in substance, the same as those raised in the Yarabala application.[24] On 7 February 2022, the Tribunal made interim orders in each application and published Reasons for Decision to the respective parties.

[27] The essence of Yarabala's complaint is that the Tribunal did a 'copy-and-paste' from its decision in the Sweetpea v Rallen application,

24 I refer to the landowners' contentions that (1) the Tribunal had jurisdiction to determine claims for compensation under s 81 of the Act and (2) that the in-ground poly pipes forming part of a reticulated watering system on their respective pastoral properties constituted or were part of "an artificial accumulation of water" within the meaning of that expression in s 111(1)(iii) of the *Petroleum Act 1984*.

which had the effect of wrongly attributing to Yarabala submissions which it had not made, on issues it had not raised. For example, Rallen had relied on s 58(j) *Petroleum Act 1984* in support of a preliminary argument in relation to jurisdiction, in contending that the operations of Sweetpea would necessarily interfere with the cattle operations ("lawful activities") of Rallen and hence that the Tribunal should not determine the terms of an access agreement in circumstances where Sweetpea would be immediately in breach. Rallen had mounted an additional jurisdictional argument, contending that Sweetpea did not have all of the necessary consents to conduct the activities described in its draft access agreement.

[28] Although Yarabala did not raise those or similar matters to those referred to in the previous paragraph, the Tribunal purported to decide those issues against Yarabala in the same terms as it decided those issues against Rallen.[25] Counsel for Yarabala correctly point out that arguments received treatment in the Yarabala decision which did not properly arise in that proceeding. They refer to "a confusion generally in the Tribunal's delineation of the two matters" which was said to have resulted "in a confusion of the issues".[26] Counsel for the respondent submit that Yarabala's complaints relate to form, not substance.

---

25 Tribunal decision, pars 56 to 66.

26 Applicant's Outline of Argument, par 3.

[29] On appeal, Yarabala has failed to demonstrate that the Tribunal's error had any effect on the determination of the issues the subject of grounds 1 to 6. Clearly the Tribunal was in error, but the error was without consequence in that the inclusion of the matters complained of had no effect on the Tribunal's ultimate decision. In the circumstances, there was no vitiating error of law; ground 7 is not made out.

Proposed grounds 1 and 2

[30] Yarabala argues under these grounds that "the predicate to s 82A of the *Petroleum Act* was satisfied",[27] because (1) compensation was an issue raised by the parties in their respective proposed land access agreements and (2) the parties had been unable to agree to the amount of compensation payable. I assume that reference to 'the predicate' is to s 82A(1)(a) of the Act. Yarabala thus contends that it was entitled to compensation under s 81(1) at the time of the hearing before the Tribunal.[28] Yarabala argues that, because regulation 29 permitted the Tribunal to determine the provisions "that should form the contents of an access agreement so as to allow the interest holder to gain access to the relevant land", either party was entitled to refer the dispute about compensation to the Tribunal.

27 Applicant's Outline of Argument, par 19.

28 This is because s 82A(1)(a), extracted in [16] above, refers to disputes between, relevantly, a permittee and "a person entitled to compensation under section 81(1)" if they are unable to agree on an amount or other benefit by way of compensation "to which the person is entitled".

[31] Yarabala contends that the word 'should' in regulation 29(1) indicates that the sub-regulation has a normative component.[29] Yarabala further contends that "there can be no doubt about the capacity of the Tribunal to consider compensation in the proceeding commenced by [Sweetpea] pursuant to regulation 29(1)".[30] Counsel for Yarabala state a number of matters in support of that contention. They refer to the fact that Yarabala "put in issue its compensation entitlements" by seeking the determination set out in [12] above (which was in effect a cross-claim made pursuant to rule 6(2) of the Tribunal Rules).[31] However, I would observe that rule 6(3) of the Tribunal Rules makes clear that any claim by a respondent for relief against an applicant under rule 6(2) must concern "a matter over which the Tribunal has jurisdiction". The sub-rule reflects the general law. Counsel for Yarabala also assert and emphasise a link between the process commenced before the Tribunal under regulation 29(1) and the anterior alternative dispute resolution process. That link is obvious, given that a regulation 29(1) application to the Tribunal may only be made if an alternative dispute resolution process is terminated. However, the fact that the parties had discussed compensation in the course of their negotiations and the failed dispute resolution process does have the consequence that the Tribunal's jurisdiction extended to determining and ordering payment of

29 Applicant's Outline of Argument, par 25b.

30 Applicant's Outline of Argument, par 22.

31 The sub-rule permitted a respondent to "include in a response a claim for relief against the applicant".

compensation, at the time of determining the provisions of the access agreement.

[32] Counsel for Yarabala also rely on clause 13 of Schedule 2, extracted in [12] above, in support of Yarabala's contention that "the tests for the assessment of compensation give every indication that the assessment is one to be done up-front".[32] I disagree. It is true that standard minimum protection clause 13(1) "must indicate whether it is anticipated that any activities carried out on the land will lead to a decrease in the market value of the land and, if so, a preliminary assessment of the amount of the decrease". To comply with that requirement, the Tribunal was required to draft a clause in the access agreement containing an *indication* as to whether it was *anticipated* that any activities carried out on the land would lead to a decrease in the market value of the land and, if so, to provide a *preliminary assessment* of the amount of the decrease. However, the practical and legal limitations of any such preliminary assessment are made clear by standard minimum protection clause 13(2), which provided that the clause did not "limit any right under the Act as to the provision or payment of compensation, or any right to apply to the Tribunal if there is a dispute about compensation". The result was that any 'preliminary assessment' would have no legal effect and could not bind the parties. On analysis, therefore, clause 13 of Schedule 2 does not assist the

32 Applicant's outline of argument, par 34.

applicant; rather, it is contrary to the applicant's ultimate contention that the Tribunal should have determined and ordered payment of compensation at the time of determining the provisions of the access agreement.

[33] Sweetpea submits that no obligation to pay compensation arises unless and until the circumstances set out in the various subparagraphs of s 81 and regulation 6 have occurred.[33] The specific consequences are as follows:

- under s 81(1)(a) of the Act, there is no entitlement to be paid compensation for 'deprivation of use or enjoyment of the land', if the occupier has not, in fact, suffered any such deprivation.
- under s 81(1)(b), there is no entitlement to be paid compensation for 'damage, caused by the permittee, to the land or improvements on the land' until either the land or its improvements have, in fact, been damaged by the permittee.
- under s 81(1)(c) and regulation 6(a), there is no entitlement to be paid compensation for 'the drilling of a well on the land' unless such a well has actually been drilled.
- under s 81(1)(c) and regulation 6(b), there is no entitlement to be paid compensation for 'any decrease in the market value of the land caused by regulated operations carried out on the land by the interest holder' until the interest holder has, in fact, carried out regulated operations on the land, and those operations have actually caused a decrease in the land's market value.

[34] In any consideration of the entitlement to receive and the obligation to pay compensation, it is important to remember that the essential concept of 'compensation' is payment to make up for the consequences

33 Section 81 is extracted in [15] above; regulation 6 is summarized in [16] above.

of a past adverse event: something which has happened. Sweetpea's argument, that the nature of 'compensation' is such that a party can only recover compensation for actual loss or damage incurred, is supported by the authorities in a wide variety of legal contexts, referred to below.

[35] In the field of workers compensation, the "natural meaning" of 'compensation' is "something which is paid to make up for the loss that the man sustained".[34]

[36] In the law of compulsory acquisition, Dixon J observed as follows with respect to a Commonwealth regulation for acquisition of wheat harvests during World War II:[35]

> Now "compensation" is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner expropriated the full money equivalent of the thing of which he has been deprived.
>
> Compensation prima facie means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it.

34 *Great Western Railway Co v Helps* [1918] AC 141 at 145, per Lord Dunedin.

35 *Nelungaloo Pty Ltd v The Commonwealth* (1947-48) 75 CLR 495 at 571. Underline emphasis added.

[37] In relation to the compulsory acquisition of land, 'compensation' is said to be:[36]

> … a payment made as reparation for the loss of an owner's land. It is a payment to make amends for the taking of land. To compensate means to make up for what is lost; to neutralise the effect of a loss; to counterbalance the loss; or to supply an equivalent. …
>
> The money awarded is paid in order to alleviate the adverse effect of the compulsory taking.

[38] In the assessment of damages for personal injury at common law, where the guiding principle is compensatory,[37] "the object is to award the plaintiff an amount of money that will, as nearly as money can, put him in the same position as if he had not been injured by the defendant".[38]

[39] Counsel for Yarabala, in support of their submission that the assessment of compensation regularly occurs prospectively, contend that personal injury cases "often involve determining compensation for losses to take place in the future".[39] While it is correct that judges in personal injury cases regularly assess damages for future or potential events, such assessments take place only after the occurrence of the adverse event and liability has then been established.[40] As counsel for

---

36 Douglas Brown, *Land Acquisition*, 6th edition, LEXIS NEXIS Australia (2009), par [3.1].

37 *Johnson v Perez* (1988) 166 CLR 351 at 355.2, per Mason CJ.

38 *Todorovic v Waller* (1981) 150 CLR 402, at 412, per Gibbs CJ and Wilson J.

39 Applicant's outline of argument, par 34b.

40 The approach at common law to events that allegedly would have occurred or that allegedly might occur is discussed in *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 642, per Deane, Gaudron and McHugh JJ.

Sweetpea submit, "There is no such thing as a personal injury case which assesses compensation before the plaintiff has been injured".

[40] The requirement for loss or damage to have been suffered in order to obtain compensation is also illustrated in the decision of the High Court in *Wardley Australia Ltd v Western Australia*, in which the plurality observed, with reference to s 82(1) *Trade Practices Act 1974* (Cth):[41]

> Under s 82(1), as under the common law, a plaintiff can only recover compensation for actual loss or damage incurred, as distinct from potential or likely damage.

[41] The plurality agreed with the comments of the Full Court of the Federal Court in its unanimous appeal decision,[42] and expressly disagreed with the statement of French J, in *Western Australia v Bond Holdings*,[43] "that risk of loss is itself a category of loss".

[42] The scheme in place under the *Petroleum Act 1984* for payment of compensation can be briefly summarized.[44] First, s 81(1) of the Act imposes an obligation on the holder of a petroleum interest to pay compensation to the landowner for the consequences specified in paragraphs (a), (b) and (c) of s 81(1). It is implied that the parties are able to agree on "an amount or other benefit, by way of compensation"

---

41 *Wardley Australia Ltd and anor v The State of Western Australia* (1992) 175 CLR 514 at 526.9, per Mason CJ, Dawson, Gaudron and McHugh JJ.

42 *State of Western Australia v Wardley Australia Ltd and ors v* (1991) 30 FCR 245.

43 *State of Western Australia v Bond Corporation Holdings Ltd and ors* (1991) 28 FCR 68 at 87.

44 I exclude consideration of compensation pursuant to s 82(2) for right of access to an exploration permit area.

to which the landholder is entitled. If they are unable to agree, then there would exist a ‘dispute’ for the purposes of s 82A(1)(a), in respect of which the Tribunal would have jurisdiction on referral by either party pursuant to s 82A(2). Section 117A provides that “[a] claim for compensation payable under this Act that is not made within 3 years after the doing of the activity giving rise to the claim is, by virtue of this section, statute barred”. Insofar as s 117A applies to compensation under s 81(1), it is unclear what is meant by the term “claim for compensation”. It could mean a written demand made by a landowner for compensation, similar to the “claim in writing” required by s 82(3), although I note that there is no equivalent procedure specified for claiming compensation under s 81(1) of the Act. It could also mean the formal referral of a compensation dispute to the Tribunal. It is not necessary for me to decide the construction issue. I mention s 117A only because it refers to claims for compensation payable under the Act and sets a time limit of 3 years “after the doing of the activity giving rise to the claim”. Reference to s 117A thus provides additional support for Sweetpea’s contention that there must be adverse consequences of the kind specified in paragraphs (a), (b) or (c) of s 81(1), resulting from the “doing of an activity” by the petroleum interest holder, before there can be any entitlement to compensation in respect of which the Tribunal would have jurisdiction under s 82A(1)(a).

[43] There is much force in the Tribunal's statement that the three year limitation periods provided for in s 117A and s 82(3) clearly envisage responsive rather than pre-emptive claims.[45] As the Tribunal observed in that context: "... it is difficult to see why compensation would be assessed prior to any actual loss or damage when the Act and Regulations clearly provide a process for considering claims after the event".

[44] There are also practical considerations. Damage to land or improvements may be temporary, and one would not normally expect compensation to be assessed until such time as Sweetpea had carried out the rehabilitation and remediation measures required under the Act and standard minimum protection clauses 11 and 14 of Schedule 2. The same expectation applies to assessment of compensation for deprivation of use or enjoyment of land; such deprivation could also be temporary and ultimately limited not only in time but also as to the area of land affected.[46] These considerations weigh against the proposition that the Tribunal had jurisdiction, express or implied, to deal with the question of compensation at the time of determining the provisions of the access agreement.

[45] At all times, the primary task of the Tribunal under regulation 29(2), read with regulation 29(1), was to determine the provisions of an

45 Tribunal decision, par 44.

46 A similar point was made by counsel for Sweetpea before the Tribunal, as follows: "... this property can be described as massive and we are talking about an extremely small fraction of it, over which there will be small-scale, limited duration activities on existing tracks, by and large". AB 2037.

access agreement “so as to allow the interest holder [Sweetpea] to gain access to the relevant land”. Although regulation 57(2) provides that the Tribunal “must seek to find a reasonable balance between the interests of an interest holder and the interests of a designated person” (in this case Yarabala is the ‘designated person’), that obligation is qualified by regulation 57(3), under which the Tribunal must ensure that the interest holder is not prevented from carrying out any operations authorised under the relevant petroleum interest in a manner consistent with or authorised by the Act, the regulations or an exploration permit; or required by the Act, regulations or an exploration permit. In the present case, regulation 57(3) meant that, however the balance was struck between the interests of Sweetpea and the interests of Yarabala, Sweetpea should not be prevented from carrying out operations authorised and required under its exploration permit. To construe the Act and the Regulations to require or even permit the Tribunal to engage in a contested wide-ranging hearing to assess and ultimately make orders for payment of compensation for anticipated adverse events (which may never occur) would result in a significant distraction from the Tribunal’s core task under regulation 29(1): “determination as to the provisions that should form the contents of an access agreement to allow the interest holder to gain access to the relevant land”.

[46] For the reasons given, Yarabala was not "*entitled* to compensation under section 81(1)". Accordingly the Tribunal did not have jurisdiction under s 82A to deal with any dispute between Yarabala and Sweetpea in relation to the compensation claimed by Yarabala.

[47] Yarabala has not established error of law on the part of the Tribunal in declining jurisdiction in relation to assessing and ordering compensation. Grounds 1 and 2 must fail.

Proposed grounds 3 and 4

[48] As I explained in [32] above, the requirement of standard minimum protection clause 13(1) was that Tribunal indicate, for the purposes of the access agreement, "whether it is anticipated that any activities carried out on the land will lead to a decrease in the market value of the land and, if so, [to indicate] a preliminary assessment of the amount of the decrease".

[49] Both parties engaged valuers to prepare reports in relation to the quantum of decrease in market value of Beetaloo as a result of Sweetpea's activities. Sweetpea obtained an expert report from Frank Peacocke and Terry Roth of Herron Todd White. Yarabala obtained an expert report from Shaun Hendy of Colliers.

[50] The intended activity of Sweetpea mainly considered by the valuers was the carrying out of a seismic survey, for which seismic data would be recorded along a grid of existing north-south and east-west cattle

station access tracks spaced approximately 5 km apart. The proposed seismic lines were thus aligned with and would use, as far as possible, existing access tracks.[47]

[51] Mr Peacocke dealt with the standard minimum protection clause 13(1) assessment on the assumption that Sweetpea would use the existing station access tracks as far as possible.[48] Mr Hendy acknowledged in his report that the Sweetpea seismic exploration program had been designed to use existing tracks where possible, with seismic lines meandering around larger trees to minimise disturbance where possible.[49] However, it appears that Mr Hendy then based his opinion on the impacts predicted in the report of Base Consulting Group, that seismic lines would need to be relocated outside of a 200 metre "exclusion zone" from in-ground irrigation pipes, said to be necessary to comply with s 111 of the *Petroleum Act 1984*, resulting in the need for 100% of the Sweetpea seismic line locations to be cleared afresh and, in effect, new tracks created.[50] In considering what he described as "permanent impacts", Mr Hendy relied on evidence from past seismic line surveys of Beetaloo indicating that rehabilitation was not likely

---

47 Seismic Environment Management Plan, Part 3.3.2, AB 142-143. Allowance would be made for line preparation to deviate up to 250 m from the centre line to avoid environmentally and culturally significant sites and mature trees. Any new tracks would be located to avoid vegetated areas, to ensure root stock remained intact.

48 Mr Peacocke considered two alternative scenarios: (1) that the path of seismic lines would run along existing pastoral tracks and skirt around water tanks and troughs, and (2) that the seismic lines would run outside a distance of 200 m from any sacred site, culturally significant area or water tank (artificial accumulation of water). See AB 1204.

49 AB 1361, par 37.

50 The relevant passage from the report of Base Consulting Group (author Ross Marshall), is at AB 1266, par 16.

within 10 years.[51] Under the heading "Valuation Methodology", Mr Hendy stated, "The seismic survey activities are assessed as having a detrimental impact on the land, to the extent that rehabilitation within a reasonable time is not considered likely".[52]

[52] In its consideration of the valuation evidence as to decrease in market value, the Tribunal noted that the methodology adopted by Mr Peacocke and Mr Hendy differed markedly. Mr Peacocke adopted a comparative sales approach to support his opinion that the activities to be undertaken by the applicant on the respondent's land would result in 'nil' decrease in market value. Mr Hendy adopted a piecemeal approach, which led him to conclude that the decrease in market value resulting from Sweetpea's activities would be $624,000.[53]

[53] Mr Peacocke's opinion was formed on the basis of certain critical assumptions, namely that (1) any approved access agreement would include the standard minimum protections; (2) remediation and rehabilitation works would occur in compliance with the Environment Management Plan, industry standards, the standard minimum protections and statutory requirements; (3) activities would be carried out in such a way as to cause as little disturbance as practicable to the

51 AB 1365, par 46.1.

52 AB 1367, par 50.

53 Tribunal decision, par 119.

environment and the landholder's use of the land; and (4) that compensation would be determinable at a future date.[54]

[54] Mr Peacocke had considered comparable sales in the Northern Territory and elsewhere over at least the previous 10 years and had come to the opinion that there was no evidence that the proposed activities would impact the market value of the property.[55] He took into account that the proposed area in which exploration activities would be carried out comprised "only a very small proportion of the overall subject property". His ultimate view was that "a potential purchaser of the subject property would not be successful in negotiating a discernible discount in the price payable for the property due the existence of the previously impacted activity areas".[56]

[55] Mr Hendy acknowledged that the effect of the proposed activities on 'total loss of value' of Beetaloo would be nominal relative to the overall value of the Beetaloo aggregation, but was of the view that the effect on Yarabala's business would be relatively more significant.[57] In calculating the decrease in market value of the land, Mr Hendy included the following three factors:[58] (1) increased operating costs required to monitor and manage affected land for weeds; (2) increased

---

54 Tribunal decision, par 128.

55 Relevant passages of evidence are at AB 2007.5, AB 2012.5, AB 2015.2.

56 Tribunal decision, par 129.

57 Tribunal decision, par 130.

58 Tribunal decision par 132. Mr Hendy used the word 'operating' in par 60 (a).

operating costs required to monitor and manage affected areas for land degradation; and (3) increased operating costs required to communicate with the operator regarding the above issues as required outside of the operator's monitoring and rehabilitation process. Mr Hendy expressed the view that a prudent hypothetical purchaser would be aware of these three factors and the likely increased costs associated with them. He valued the area of land to be disturbed ("the affected area") as $20,800,000, to which he applied a discount of 3% to arrive at an amount of $624,000 for decrease in market value.[59]

[56] The Tribunal's reasons for rejecting the approach of Mr Hendy and preferring the approach or methodology of Mr Peacocke were as follows:[60]

> In our view Mr Hendy's approach is not a compelling basis upon which to determine a reduction in market value. The landholder and any prudent hypothetical purchaser are entitled to rely upon the standard minimum protections and the obligations of the permit holder under the EMP and statutory regime. These include obligations to control weeds and erosion and to monitor and make good any damage. Failure to do so may ground an application for compensation. We do not consider the need to "monitor the monitor" a compelling basis for accepting a decrease in the value of the land. The decision of Mr Hendy to apply a piecemeal approach seems to be in response to the fact that in a comparison between before and after sales any diminution of land value is negligible to the point of being indiscernible. We prefer the method used by Mr Peacocke.

[57] The Tribunal concluded as follows:[61]

---

59 Colliers Report, AB 1369. The percentage discount figure (3%) was not explained. Mr Peacocke queried the percentage discount applied by Mr Hendy on three separate occasions in the course of his cross examination by counsel for Yarabala: AB 2007.8; AB 2008.7; AB 2012.3.

60 Tribunal decision, par 133.

> ... We do not anticipate that the proposed activities will lead to a decrease in the market value of the land and will include a provision to that effect in the AAA [approved access agreement]. The provision will also make clear that it does not limit the right of the respondents to apply for compensation on this basis should a decrease in the value of the land occur as a result of the applicant's activities.

[58] Under proposed ground 3, Yarabala takes issue with the Tribunal's conclusion that the proposed activities would not lead to a decrease in market value.[62]

[59] As can be seen from the extract at [56], the Tribunal's reasons for preferring the approach of Mr Peacocke to that of Mr Hendy were based on fact and logical inference. The Tribunal did not decide a question of law. Prima facie, the reasons do not disclose error of law. However, Yarabala attacks the Tribunal's reasons on what may be characterized as a procedural fairness ground, in reliance on the rule in *Browne v Dunn*.[63]

[60] To better understand the ground, I explain what took place before the Tribunal. It may be noted that both parties' expert valuation reports were in the hearing book which was available in advance of the hearing.[64]

---

61 Tribunal decision, par 134.

62 Applicant's outline of argument, par 51.

63 *Browne v Dunn* (1893) 6 R 67 (HL).

64 Tribunal decision, par 126.

[61] At the hearing, Mr Peacocke was called to give evidence in relation to his report which was tendered or, more accurately, was accepted as having been tendered as part of the hearing book.[65] Mr Peacocke was then cross-examined at some length.[66] It is not necessary for me to summarise the cross examination in detail, but the clear intent of the cross examiner was to have Mr Peacocke agree that if there were two properties – one of which was to be partially disturbed by the grading of tracks, clearing of edges, with required monitoring and management of weeds and consequent increased operating costs, and the other on which none of that would happen – then a hypothetical purchaser would pay less for the property on which these things were going to happen.[67] To that particular proposition, Mr Peacocke answered:[68]

> Hypothetically, yeah … Valuers do this test all the time but then go searching for evidence. … Valuers do that all the time, yeah, put identical properties side by side, and one is more affected than the other, and then you try and find evidence to support that, like sales evidence. But logic would say, depending on the legislation backing it up and the pros and cons of what might happen with this, like whether there is going to be betterment from improved roads or cleared lines, I don't know, have a look at that. But there's a big case for betterment in a lot of this as well. But where there is definitely damage, and it impacts negatively on the property, then there should be compensation.

---

65 Counsel for Sweetpea, in his very brief examination in chief of the witness, said in reference to the expert report, "I would tender that, but I understand that we have tendered the whole hearing book", to which Chairman McCrimmon responded, "Yes" [AB 1999].

66 AB 2000 – 2016.

67 AB 2009 – 2010.

68 AB 2010.1.

[62] Mr Peacocke's evidence extracted in the previous paragraph reflects simple propositions that (1) there was no sales evidence of decrease in market value as a result of disturbance from mining/exploration activities; (2) there would be compensation for any damage caused by disturbance (hence no discount on the sale/purchase price for decrease in market value) and (3) there was at least the possibility of betterment (that is, an increase in market value). Mr Peacocke was later given the opportunity by the cross examiner to further explain why the disadvantages referred to by Yarabala were matters to be dealt with in compensation rather than some assessed decrease in land value:[69]

> I don't necessarily think it would, now I think about it, would it impact on the value of the land? Like, the landowner would hope that it would not, because it is their asset, but they would hope that their time in managing these issues is compensated for separately, I would have thought. ... I think they would rather work out the amount of time it is going to take to manage these issues. It would seem far more accurate way, and then they get recompensed for that.
>
> .....
>
> [Q] But whatever the figure is, it represents a price that the hypothetical purchaser will pay less for the property. It's a diminution in value? --- These factors have existed on other properties. You're asking me a hypothetical. I would have to say hypothetically 'no' because I know there aren't any sales, like watching these properties sell, and if you try to negotiate down hypothetically in this market, someone will come straight in over the top. He goes, "I'm used to that stuff. I can deal with it. I will be compensated for that later. And I'll pay". I can't imagine anyone bidding down in this market. Maybe in the future if the market goes flat they would use that potentially.

69 AB 2012.

[63] Mr Peacocke agreed that the basis for his evidence as to 'nil' diminution in value was that he could not find evidence in the market of any such diminution in his analysis of comparable sales.[70] At one point, it was put to him that one way in which a hypothetical purchaser might approach the requirement to spend the postulated 150 hours a year monitoring the effects of exploration activities, checking for weeds etc, was to capitalise the expense and deduct it from the purchase price. Mr Peacocke agreed that that was one way in which diminution in value could be measured.[71] However, I have to assume that Mr Peacocke was engaging in a hypothetical exercise since he went on to explain that, in his survey of agents, purchasers and vendors for the sales analysed by him, no one had raised an issue about mining activity. As Mr Peacocke said, "You never hear it … It didn't appear to influence their decision … the weight of the analysis says it doesn't matter".[72] Mr Peacocke fairly acknowledged that a rising market may camouflage or obscure the adverse effects,[73] and he agreed with the cross examiner's "hypothetical logic". However, he made a very specific point in relation to Beetaloo at the end of his cross examination:

> … you can't catastrophise what might happen … with regards to seismic activity because most of it has already happened on Beetaloo in terms of the gridline and the lines that have been

70 AB 2012.6.

71 AB 2014.5: "Yes, ... your process is, yeah, fine."

72 AB 2015.2.

73 AB 2015.5.

> cleared, crossing creeks, et cetera. It has already been done, that amount of activity and vehicle activity has happened and there would have been issues with regards weeds associated with that. I don't think it devalued the property, the prospect of those issues given that development.

[64] Counsel for Sweetpea conducted a very brief re-examination of Mr Peacocke, but did not ask any questions about the issues raised in cross examination identified in the summary at [61] – [63].

[65] It must be assumed that, after the cross examination of Mr Peacocke (if not well before), counsel acting for Yarabala clearly understood the critical points at which the methodologies and opinions of the expert valuers diverged.

[66] After counsel for Yarabala opened his client's case, the Chairman, Mr McCrimmon, enquired as to which witnesses were required for cross examination. Counsel for Sweetpea indicated that no one was required for cross examination and he confirmed, in response to the Chairman's specific query, that Mr Hendy was not required for cross examination.

[67] In his closing address, senior counsel for Yarabala put his client's case in relation to decrease in market value as follows. Although it could be assumed that Sweetpea would perform its obligations under the Environment Management Plan, and abide by the general obligation to make good any damage to the land, water, infrastructure or other

improvements on Beetaloo,[74] the owner of such a valuable property would "themselves keep an eye out for risks such as weeds or such as soil degradation, particularly in areas which are going to be disturbed by the miner, if not to even just let the miner know".[75]

[68] Yarabala's case for decrease in market value of Beetaloo was based entirely on increased management costs.[76] As senior counsel told the Tribunal:[77]

> … we don't say that the clearing of the land aspect is a diminution in value because that clearing is expected to be rehabilitated. There is some issue about how long that is going to take, but we are not saying … that that should be part of any diminution. I think that is clear. It is more our time. ….
>
> And again the Tribunal doesn't need to add up all these areas [to be checked], all it needs to know is that there is going to be disturbance of the land along these 293 km of tracks. And it might be that the disturbance is in one place, then it skips to another place, and it might be spread throughout. All that does is give rise to the risk of there being a need for the landholder to check for weeds and degradation. ….
>
> That checking that will occur for those various areas, in terms of time, is probably not going to take much less – it would take less of course, but it is not going to take much less than you might expect for checking the whole of the cleared areas that might have been envisaged because of the poly pipe. And that is because you have to go from one area to the next, so you probably have to travel the track anyway.

[69] The reference to taking less time was in relation to the length of fresh tracks to be cleared in the course of Sweetpea's operations and, on

---

74 See standard minimum protection clause 14.

75 AB 2023.6.

76 AB 2027. 9.

77 AB 2025, 2026.

Yarabala's case, the length of tracks to be then monitored, incurring increased operating costs or increased management costs. As mentioned above, Sweetpea's case was that its proposed operations would use, substantially, existing station tracks in order to minimise the need for land clearing and thereby minimise damage to the land. Yarabala contended that Sweetpea could not use existing tracks because of the operation of s 111(1)(a)(iii) of the Act, which prohibited operations within a distance of 200 metres of "any artificial accumulation of water or any outlet from which water may be obtained". Yarabala contended that its network of in-ground polythene pipes servicing an extensive network of tanks and troughs came within the concept of an "artificial accumulation of water", they being "an integral and connected part of the water accumulation and water outlet system".

[70] The Tribunal gave an oral ruling on the first day of the hearing,[78] and subsequently provided written reasons,[79] that the tanks and troughs were properly characterised as "artificial accumulation[s] of water", but that the in-ground polythene pipes were not. The effect of the Tribunal's decision was that there would be a significant decrease in the length of tracks to be monitored from that which Mr Hendy had assumed for the purpose of his report.

---

78 AB 1982.

79 Tribunal decision, pars 92, 98.

[71] Yarabala contends in written submissions that, because counsel for Sweetpea submitted that Mr Hendy's opinion was affected by errors in critical assumptions he had made, the following matters should have been put to Mr Hendy in cross examination:[80]

- that Mr Hendy's numbers would "come down" or would be "significantly less" if the seismic survey activities use the existing pastoral tracks, with "nowhere near" the same level of erosion and lesser requirement for weed management etc.;[81]
- that Mr Hendy's statement of fact/assumption at par 46.1 of his report, that "evidence based on past seismic line surveys on Beetaloo would indicate that rehabilitation [was] not likely within 10 years" was contrary to the Environment Management Plan;[82]
- that Mr Hendy's statement of fact/assumption at par 46.2 of his report, that weed infestation was considered to be a major issue, notwithstanding that Sweetpea would monitor and conduct regular reviews;[83]
- that Mr Hendy's statement fact/assumption at par 46.4 of his report, that clearing and grading roads where necessary would impact on the natural flow of water across the landscape and cause issues with erosion, based on an assumption that there would not be use of existing pastoral tracks;[84]
- that, once the s 111 assumption falls through, the last sentence of Mr Hendy's paragraph 46.4, the amount attributable to communicating with the respondent, would be significantly less.[85]

---

80 Applicant's outline of argument, par 40.

81 Submitted by Sweetpea's counsel, AB 2031.

82 Submitted by Sweetpea's counsel, AB 2033.1. This was linked to the submission referred to in footnote 79, and the fact that Sweetpea would be using the existing pastoral lines.

83 Submitted by Sweetpea's counsel, AB 2033.6.

84 Submitted by Sweetpea's counsel, AB 2033.7.

85 Submitted by Sweetpea's counsel, AB 2033.9-2034.

[72] The *Browne v Dunn* procedural fairness ground was not strongly pressed on the hearing of the appeal, but was not withdrawn. As a result, I have had to consider the parties' submissions and decide the issue.

[73] The contentions of counsel for Yarabala appear to overlook the fact that it was always proposed that Sweetpea's seismic survey activities would use the existing pastoral tracks; moreover, that the Tribunal gave an oral ruling, on the first day of the hearing,[86] in relation to s 111(1)(a)(iii) of the Act, that water in the in-ground polythene pipes did not amount to "an accumulation of water". After the Tribunal held that it did not have jurisdiction to make any order for compensation pursuant to s 82A(1)(a) of the Act, counsel for Sweetpea proposed that the Tribunal next consider the s 111 issue. Senior counsel for Yarabala then addressed the Tribunal, as follows:[87]

> I think we probably need to reconsider our evidence to make sure that it is limited to the issues that are relevant that the Tribunal's ruled upon. So, that just means perhaps revisiting Mr Hendy's report in assessing what factors he takes into account for his diminution [his assessment of decrease in market value] and the extent to which any other evidence might have gone to it. So, a little bit of time for that is appropriate from our point of view as well. ....
>
> The s 111 argument is probably the one that there is an easy boundary to it that we can see it. The only thing I do not quite know right at the moment is the extent to which Mr Hendy has regard to that. I am sure he does have regard to it for his

86 AB 1982.

87 AB 1971.2.

> diminution because there [are] extra cleared areas although he concludes that in his deprivation of loss of use.

[74] The statement of senior counsel for Yarabala was made before the Tribunal decided the s 111 issue, but was made in contemplation of the Tribunal hearing submissions in relation to that issue. Senior counsel for Yarabala must have been aware that any ruling by the Tribunal, unfavourable to Yarabala's contentions in relation to s 111(1)(a)(iii), would affect the weight to be given to the evidence of Mr Hendy insofar as Mr Hendy's numbers would probably "come down" or be "significantly less" if the seismic survey activities were able to be carried out using the existing pastoral tracks, rather than requiring 100% newly constructed tracks.

[75] After the Tribunal had ruled on the a 111 issue, senior counsel for Yarabala had the opportunity to provide Mr Hendy with further facts and assumptions, to take into account the removal (by the ruling) of a significant barrier to Sweetpea using the existing pastoral tracks. Whether senior counsel took advantage of that opportunity, or not, it would have been appropriate for him to do so, rather than relying on expert evidence which was based on assumptions that were no longer valid. The situation in which senior counsel led no further evidence and asked no relevant questions of the witness in chief was analogous or at least similar to that encountered by the New South Wales Court of

Appeal in *Commercial Union v Ferrcom*,[88] where the Court considered it appropriate to apply the principles in *Jones v Dunkel*.[89]

[76] The fact that Yarabala continued to rely upon expert evidence based on an uncorrected assumption in relation to the s 111 issue was raised by the Tribunal in the course of senior counsel's submissions:[90]

> The Chairperson, McCrimmon: Has any calculation been done based not on the 200 metres from the piping, but on the actual amount of the additional tracks that were going to be made, which was part of the original proposal, plus the new tracks to be within 200 metres of tanks and bores and that sort of thing; assuming your argument is accepted, has that additional management time been valued?
>
> Mr Morzone: The cleared areas, or the areas that would be cleared, assuming the poly pipe issue was a live one, would certainly be more than the cleared areas that are now going to result from just the tanks. ....
>
> Mr Morzone: ... That checking [for weeds, land degradation] that will occur for these various areas, in terms of time, is probably not going to take much less – it would take less of course, but it is not going to take much less than you might expect for checking the whole of the cleared areas that might have been envisaged because of the poly pipe. And that is because you have to go from one area to the next, so you probably have to travel the track anyway.

[77] It therefore appears that, despite not having called further evidence from Yarabala's expert valuer (or anyone else), senior counsel made the submission that the change, which directly affected the length of station tracks to be monitored (I calculate by about 50%), would probably not result in "much less" checking time than that allowed for

---

88 *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty Ltd and anor* (1991) 22 NSWLR 389, at 418E, per Handley JA.

89 *Jones v Dunkel* (1959) 101 CLR 298.

90 AB 2025.1; 2026.5.

and relied on by Mr Hendy.[91] The submission was classic 'evidence from the Bar table'.

[78] In the circumstances described by me, it is extraordinary that senior counsel for Yarabala, in written submissions, now complains about the 'unfairness' of opposing counsel in the Tribunal making a submission that the factual and legal assumptions made by Mr Hendy had not been established, with the consequence that his opinions were at least questionable, if not invalid. Yarabala's submissions bring to mind observations made by Lawton LJ in *R v Turner*, albeit made in a somewhat different context: [92]

> ... Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross examination.

[79] It was not the obligation of Sweetpea's counsel to point out to Mr Hendy that his factual and legal assumptions were wrong, and to then lead evidence in cross examination with reference to other, more relevant, assumptions. To embark on that course could well have been "to cross examine in the dark, with the perils which usually face

---

91 As mentioned above, Mr Hendy's assumption was derived from the report of Ross Marshall of Base Consulting Group, that Sweetpea would not be able to use the existing tracks and that it seismic survey would require completely new tracks to be cleared: "I conclude 100% of the nominated seismic line locations will be cleared". See AB 1265-1267, esp. par 16 at AB 1266.

92 *R v Turner* [1975] QB 834 at 840, cited with approval in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, at [69], per Heydon JA.

journeys into darkness".[93] Mr Hendy was an independent expert, but he was not a witness in Sweetpea's case. It was not the responsibility of Sweetpea's counsel to make good the deficiencies in the evidence of Yarabala's expert. It was not the responsibility of Sweetpea's counsel to cross examine Yarabala's expert witness on a matter which senior counsel for Yarabala had declined to deal with in examination-in-chief.

[80] I am satisfied that there was no unfairness in relation to the making of submissions by counsel for Sweetpea in which he questioned the validity of the assumptions made by Mr Hendy.[94] The rule in *Browne v Dunn* was not even engaged. It is therefore not necessary to consider the extent to which the rule in *Browne v Dunn* requires counsel to put matters to an opposing expert in cross examination in circumstances where there has been an exchange of expert reports and the witness already knows (or should know) that his or her opinion is contested, and the reasons for the contest.[95]

[81] Further, the real issue between the parties in relation to valuation was whether decrease in market value (if any) should be assessed by reference to comparative sales or by the piecemeal approach. As explained in [56] above, the Tribunal ultimately preferred Mr Peacocke's evidence over Mr Hendy's evidence because it preferred

93 The quote is from *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, at [62], per Heydon JA. The context is different, but the description of the risks to the cross-examiner applies.

94 AB 2032-2035.

95 *Cross on Evidence*, 8th Australian Edition (2010), at [17.445]. See also *Kennedy v Wallace and ors* [2004] FCAFC 337; 142 FCR 185 at [56].

Mr Peacocke's method; it did not find Mr Hendy's piecemeal approach a compelling basis upon which to determine any reduction in market value. In the absence of any evidence of adverse effect on sale prices, the Tribunal rejected the proposition that increased operating costs in monitoring and managing disturbed land would somehow be reflected in a decrease in market value of Beetaloo. In my judgment, there was no vitiating error of law in the Tribunal's finding that it did not anticipate that the proposed activities would lead to a decrease in market value of Beetaloo.

[82] Moreover, there is an overarching consideration, namely the limited effect in any event of the Tribunal's consideration of the valuation evidence. I referred at [45] above to the Tribunal's core task under regulation 29(1), namely to determine "the provisions that should form the contents of an access agreement to allow the interest holder to gain access to the relevant land". I referred at [32] to the limited valuation exercise required by standard minimum protection clause 13(1). Even if the Tribunal had preferred the approach of Mr Hendy and, on that basis, 'anticipated' a decrease in the market value of Beetaloo, the only consequence would be that the resulting clause in the access agreement would include a 'preliminary assessment' of the amount of the decrease. However, such a clause would not "limit any right under the Act as to the provision or payment of compensation, or any right to

apply to the Tribunal if there is a dispute about compensation.[96] As a consequence, even if the Tribunal erred in law in relation to the valuation exercise undertaken, the error would not be a vitiating error of law. Any assessment made would be hypothetical only, and would have no effect in law on the rights, entitlements or liabilities of the parties.

[83] Ground 3 is not made out.

[84] I turn briefly to deal with proposed ground 4.

[85] Yarabala has not identified any error of law in the Tribunal's finding that it was required to determine a minimum amount of compensation payable for the drilling of a well. The requirement is imposed by regulation 29(3), read with regulation 14(1), which requires that an access agreement must contain provisions that address the matters specified in Schedule 2. Standard minimum protection clause 12(1), contained in Schedule 2, is: "The minimum amount of compensation payable for the drilling of a well on the land must be set out under this clause."

[86] The Tribunal acknowledged that there was currently no plan to drill a well on Beetaloo, but stated its obligation under the Regulations to determine a provision which reflected clause 12(1).[97] It encouraged the

96 Standard minimum protection clause 13(2).

97 Tribunal decision, par 110.

parties to agree on the minimum amount for the drilling of a well, which could be included in the approved access agreement. The suggested alternative was that the Tribunal convene a directions hearing to hear from the parties as to how best to determine compensation under clause 12. The Tribunal also raised, as a possibility, the appointment of an independent assessor pursuant to s 73 *Northern Territory Civil and Administrative Tribunal Act 2014*.[98]

[87] There was no error of law in the Tribunal's approach. Ground 4 is not made out.

Proposed ground 5

[88] The proposed ground 5 is that the Tribunal misconstrued s 111(1)(a)(iii) *Petroleum Act 1984* by finding that the water within the appellant's reticulated watering system did not constitute an "artificial accumulation of water". Although Yarabala contends that the Tribunal's "determination as to compensation" was founded upon an erroneous application of s 111,[99] the only remaining relevance of s 111 is in relation to the Tribunal's finding, for the purposes of standard minimum protection clause 13(1), that it did not anticipate that the proposed activities would lead to a decrease in the market value of Beetaloo.

98 Tribunal decision, par 117.

99 Applicant's outline of argument, par 52.

[89] As I explained in [45] and [82], the Tribunal was required by the Regulations to determine the contents of an access agreement. A matter to be addressed was compensation for decrease in value of land and the associated standard minimum protection requirement that the access agreement include a clause which "must indicate whether it is anticipated that any activities carried out on the land will lead to a decrease in the market value of land and, if so, a preliminary assessment of the amount of the decrease".

[90] I bear in mind that the parties' submissions in relation to the effect of s 111(1)(a)(iii) *Petroleum Act 1984* were made before the Tribunal decided the issue in relation to the appropriate method for determining the decrease in market value of Beetaloo. Arguably, the fact that the Tribunal ultimately preferred Mr Peacocke's valuation method meant that the contest between the parties in relation to s 111 was largely irrelevant. However, it remained an issue at hearing, and on the application for leave to appeal. Yarabala contended that that Sweetpea could not use existing station tracks because of the operation of s 111(1)(a) (iii) of the Act, such that the operations of Sweetpea would require it to create new access tracks, with more extensive clearing and consequently greater damage or disturbance to Yarabala's land, requiring ongoing monitoring and therefore increased management costs. Sweetpea argued that any assessment of the decrease in market value of the land should be made on the basis that all of its proposed

operations would use existing pastoral tracks in order to minimise the need for land clearing, and thereby minimise damage or disturbance to the land.

[91] Section 111 *Petroleum Act 1984* reads, relevantly, as follows: [100]

> **111 Certain operations prohibited**
>
> (1) Subject to this section, a permittee or licensee must not:
>
> (a) carry out operations, which would otherwise be permitted under this Act, on land that is:
>
> (i) used as, or within 50 m of land being used as, a residence, yard, garden, orchard or cultivated field; or
>
> (ii) used as, or within 200 m of land being used as, a cemetery; or
>
> (iii) within a distance of 200 m of any artificial accumulation of water or any outlet from which water may be obtained; and

100 Subsections (3), (4) and (5) have not been reproduced.

(b) construct a well, wellhead, pipeline or petroleum processing facility, which would otherwise be permitted under this Act, on land that is used as, or within 2 km of land being used as, a habitable dwelling; and

(c) construct a well or well pad, which would otherwise be permitted under this Act, on land that is within 1 km of a designated bore.

(2) The permittee or licensee may carry out operations on land mentioned in subsection (1)(a)(i) or (iii) with the written approval of:

(a) the owner of the land or, if the occupier of the land has, in the land, an interest registered on the Register kept by the Registrar-General under Part 3 of the *Land Title Act 2000*, the occupier; and

(b) any registered native title bodies corporate, or registered native title claimants, in relation to the land.

[92] Mr Hendy described Beetaloo as a well-improved cattle station which had increased productivity through the implementation of a strategic plan which included (1) internal fences subdividing larger paddocks and (2) an extensive stock water development program reducing the number of cattle per water points. Extensive development had taken place to add approximately 30 new bores to the 46 older bores, and most of the bores were equipped with motorised pumps. Water was reticulated by means of a 75 mm polythene pipe system to a network of tanks and troughs. There were in all 603 water points, 559 of which comprised steel and concrete troughs which were set up throughout the paddocks and lane ways.[101]

101 Colliers valuation report, AB 1358-1359, pars 13, 18.

[93] Ross Marshall, environmental scientist and writer of the report prepared by Base Consulting Group, expressed the view that the poly pipe was "clearly an integral and connected part of the water accumulation and water outlet system".[102]

[94] Yarabala argued before the Tribunal that "the poly pipes clearly hold water (under pressure) and service the extensive network of tanks and troughs... The poly pipes are clearly an integral and connected part of the water accumulation and water outlet system".[103]

[95] The Tribunal did not accept that the poly pipes (that is, water within the poly pipes) were an "accumulation of water". In its consideration of the proper construction of the expression "any artificial accumulation of water" in the context of the *Petroleum Act 1984*, the Tribunal held that the expression meant "a body of water gathered or heaped up in mass or quantity", and that s 111(1)(a)(iii) referred to "an entity rather than a process of accumulation ... to water that has already been accumulated".[104] The Tribunal considered that the pipes were the means of distribution of water into the tanks and troughs, and that the tanks

102 AB 1265, par 9.

103 Tribunal decision, par 90.

104 Tribunal decision, par 92.

and troughs were "the artificial accumulations of water".[105] The Tribunal's reasons were as follows:[106]

> In our view it is clear that in the context of the Act and Regulations an accumulation of water is a body of water gathered or "heaped up" in a mass or quantity.[107] While a broad definition of 'accumulation' may include the *process* of accumulation, on the face of it, the term in section 111 refers to an entity rather than a process of accumulation. The operations cannot come within 200 metres of "*any*" accumulation of water. That is, water that has already accumulated. The poly pipes may well be integral and connected to the water system but their function is to transport water to the point of accumulation being the tanks and troughs.

[96] In support of its preferred interpretation, the Tribunal referred to the objective set out in s 3(1) of the Act, to encourage effective exploration for petroleum. In that context, a broad definition of the term "artificial accumulation of water" would often be inconsistent with the objective of the Act. The application of such a broad definition in the present case would result in new tracks, presumably parallel to the existing tracks, requiring significantly more clearing of the property for no apparent benefit. The Tribunal also observed that, if it had been intended that water pipes or pipelines be considered an "accumulation of water", such a definition could easily have been achieved within the legislation. The Tribunal then stated:[108]

---

105 Tribunal decision, par 90.

106 Tribunal decision, par 92.

107 The reference to "heaped up" was taken from *Great Northern Railway Co v The Lurgan Town Cmrs* [1897] 2 IR 340.

108 Tribunal decision, par 94

> It seems likely that the avoidance of accumulations of water is designed to prevent operations in areas where cattle are likely to congregate so as to reduce interference with the cattle. In that context the better definition of an accumulation of water is one around which cattle are likely to congregate.

[97] In its submissions in relation to ground 5, Yarabala contends that the central error in the Tribunal's reasoning was to "collapse the question of statutory construction into pragmatic considerations of the inconvenience to the petroleum interest", whereas s 111 is "an absolute protection", the object of which is to preclude interference with water infrastructure.[109] It contends that the protection provided by s 111 is not a matter "that can be eroded or circumvented by reference to practicalities that suit one or other of the parties". The aim is to have things which are important to the pre-existing pastoral operation quarantined from interference by petroleum exploration activities.[110] Yarabala also contends that the Tribunal's reference to the function of pipes as transporting water, and not the accumulation of water, created a false dichotomy and set up a test which the statute did not impose.[111] I do not accept the latter submission. In my view, the Tribunal was simply explaining the factual distinction between water reticulated by means of in-ground pipes and water accumulated so as to be considered an "artificial accumulation of water" for the purposes of s 111 of the Act.

---

109 Applicant's outline of argument, pars 58, 59.

110 Applicant's outline of argument, par 64.

111 Applicant's outline of argument, par 61.

[98] In relation to the expression "artificial accumulation of water", neither party on appeal contended for any technical meaning of the composite expression or referred to the concept of 'accumulation of water' as part of a hydrologic cycle. There is no question of law raised as to whether the *Petroleum Act 1984* uses the expression "artificial accumulation of water" in any sense other than that which it has in ordinary speech. However, that still leaves open the question whether the relevant improvements, or 'water infrastructure components',[112] are necessarily within or outside those descriptions.

[99] There are several possible policy reasons for the prohibition or restriction in s 111(1)(a)(iii). The fact that the prohibition is directed at protecting artificial and not natural accumulations of water (for example, natural watercourses and lagoons) suggests that the sub-paragraph is not concerned with the environment or maintaining water quality generally. The sub-paragraph may well be directed to avoiding or minimising damage to specific kinds of pastoral improvements ("precluding interference with water infrastructure", as Yarabala contends), but also to avoiding or minimising disruption of pastoral operations and activities at locations where cattle congregate to drink, as suggested by the Tribunal.[113] The inclusion or addition of water outlets – "any outlet from which water may be obtained" – would

112 Yarabala uses the expression "water infrastructure components" as part of the heading to par 53 of the Applicants' Outline of argument.

113 Tribunal decision, par 94.

support the latter objective. Man-made dams come to mind as obvious artificial accumulations of water, although there was limited reference to dams in the evidence or submissions before the Tribunal.[114] No single policy objective clearly stands out, particularly when one considers that land protected by the s 111 prohibitions is not restricted to land used for pastoral purposes.

[100] In my opinion, the Tribunal was correct to focus upon an 'entity' or 'body of water' as constituting the relevant "artificial accumulation of water", rather than the means by which water is transported to the point of accumulation. The fact that there may be in-ground pipes installed in a sophisticated grid does not necessarily mean that there is water in the pipes at all times. Indeed, in the present case there was evidence before the Tribunal which suggested that the in-ground pipes may at times be empty: "the landowners indicate that it takes in excess of three days to refill water stored within poly pipe and make the system operational".[115] In-ground pipes are not visible, just as any water within those pipes would not be visible.

[101] Although, in simple terms, it might be true that water stays or 'accumulates' in a water pipe until such time as a tap is turned on and the water flows out, that does not mean that water in the in-ground

114 Mr Marshall referred to "various areas of accumulated water (dams) along and adjoining natural watercourses and associated tributaries" – see par 10 of his report, AB 1265. Mr Hendy referred to there being 44 dams – see par 20 Colliers report, AB 1359.

115 Report Mr Marshall, par 9, AB 1265.

water pipes at Beetaloo was an "artificial accumulation of water" for the purpose of s 111(1)(a)(iii) of the Act. In my opinion, the Tribunal's 'body of water' conceptual approach to construction of the expression was an entirely legitimate approach. Given the Tribunal's factual findings as to the function of the in-ground polythene water pipes at Beetaloo, it could not be said that water in those pipes *necessarily* came within the description of an "artificial accumulation of water".[116]

[102] Yarabala has not established that the Tribunal erred in law in the construction of the expression "artificial accumulation of water" in s 111(1)(a)(iii) of the Act by excluding the water in in-ground pipes from that description.

[103] As I explained in [5] above, to attract the intervention of this Court, an error of law must be such as to vitiate the Tribunal's decision. The only relevance of the Tribunal's consideration of the s 111(1)(a)(iii) prohibitions was in relation to Mr Hendy's piecemeal valuation methodology, which the Tribunal rejected in favour of Mr Peacocke's approach. Moreover, the Tribunal's consideration was only in relation to the content of standard minimum protection clause 13(1), which required a preliminary non-binding assessment of the amount of decrease in market value. I refer to my observations in [88] and [89]

---

116 As to the word "necessarily", see the statement of Jordan CJ in *Australian Gas Light Co v Valuer-General* (1940) 40 SR (NSW) 126 at 138: "[I]f the facts inferred ... from the evidence ... are necessarily within the description of a word or phrase in a statute or necessarily outside the description, a contrary decision is wrong in law". That statement was cited with approval in *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [24], per Gleeson CJ, Gummow and Callinan JJ.

above. Therefore, if (contrary to my view) the Tribunal erred in relation to s 111(1)(a)(iii), such error would have had no practical effect at all, being relevant only to a preliminary assessment indication, which in any event was unlikely to have changed, given the Tribunal's preference for Mr Peacocke's methodology. As a result, any error would not have been a vitiating error.

[104] I would make a final observation in relation to this ground. Given the basis on which the Tribunal was required to consider s 111(1)(a)(iii) of the Act, the Tribunal's view in relation to the relevant prohibitions could not bind a court of law in civil or criminal proceedings if in future it were alleged that Sweetpea had carried out prohibited operations, contrary to the Act.

[105] Proposed ground 5 cannot be maintained.

Proposed ground 6

[106] Yarabala contends under this ground that the Tribunal erred in determining that the duration of the access agreement should be the same as that of the exploration permit as varied from time to time. Although the proposed ground asserts that the Tribunal's determination gives rise to "impermissible uncertainty",[117] that contention is not pressed. Yarabala now argues that the Tribunal's errors were twofold: that it misconstrued standard minimum protection clause 25 in

117 See ground 6(a) extracted in [24] above.

Schedule 2 to the Regulations; and that linking the access agreement to a permit which can be varied or renewed by unilateral act of Sweetpea was "practically speaking, not workable".[118]

[107] The proposed ground of appeal requires a consideration of clause 25, which sets out the 'standard minimum protection' in relation to termination of an access agreement:

Matters to be addressed	Standard Minimum protections
25. Termination	(1) The agreement terminates: (a) by mutual agreement between the parties; or (b) on the expiration of the term of the agreement (unless the term is extended by mutual agreement between the parties); or (c) on the expiration of the petroleum interest (unless the agreement is extended by mutual agreement between the parties); or (d) if the Tribunal determines that the agreement be terminated (2) The termination of the agreement does not affect any right or liability accrued before the termination agreement.

[108] In the Tribunal proceedings, Yarabala argued that the term of the access agreement should be 12 months. Sweetpea sought that the term

118 Applicant's outline of argument, par 66.

of the access agreement should be consistent with the term of the exploration permit. The Tribunal's determination was that "the appropriate termination provision is one that is consistent with the period of the EP as varied from time to time".[119] The Tribunal's full reasons for its determination on this issue are set out below:[120]

> [135] A clause commensurate with clause 25 of the SMPs in Schedule 2 must be included in the AAA. That clause establishes when an AAA is terminated and provides four options being:
>
> (a) by mutual agreement; or
>
> (b) on the expiration of a set term; or
>
> (c) on the expiration of the EP; or
>
> (d) if terminated by the Tribunal.
>
> [136] In our view options (b) and (c) are mutually exclusive and we must determine to include one or other of them.
>
> [137] In these proceedings there is little likelihood that once a term is set, the parties will mutually agree on a termination but it remains open to them to do so. Similarly there is currently no agreement between the parties as to the appropriate length of any set term.
>
> [138] In each proceeding the applicant submits that the term of the agreement should be consistent with the period of the EP as extended from time to time.
>
> [139] In the Yarabala proceeding, the respondent submits that the AAA should terminate on the earlier of the completion of the activities or 12 months from the date of the AAA.
>
> [140] In the Rallen proceeding ... [not relevant].
>
> [141] We have determined that absent agreement between the parties, the appropriate termination provision is one that is consistent with the period of the EP as varied from time to time. We accept the applicant's submission that the period of operations under the legal framework is inherently uncertain. How long access will be required depends on the results of the exploration phase. Any change in the nature of operations will be considered by the Minister and will require a variation of the existing or a new EMP. Where necessary either party can initiate the process under section 37 to vary an AAA.

119 Tribunal decision, par 141.

120 Tribunal decision, pars 135 – 141.

[109] Yarabala contends that the term of the access agreement need not be linked to the expiry of the underlying a petroleum interest.[121] That contention is correct, but it does not mean that linking the term of the access agreement to the expiry of the underlying petroleum interest is an error of law. Yarabala further contends that the term of the agreement ought to be fixed by reference to the regulated operations, that is, the operations for which an exploration permit is required,[122] limited to the regulated operations expressly described in the Environment Management Plan.[123] I am not persuaded that, as a matter of law, the term of the access agreement is required to be limited in the manner contended for by Yarabala. However, I agree with the 'residual' argument that the term of the access agreement should be sufficient to permit all regulated operations to occur.[124] In this respect, I note that the Tribunal, in its discretion, considered that a term commensurate with the term of the exploration permit was the appropriate term, no doubt to ensure sufficient time for those regulated operations to be completed.

[110] Evidence before the Tribunal was that the exploration permit (EP 136) had been granted by the Minister on 28 August 2012, for a period of 5 years. Subsequently, there had been various extensions, suspensions

121 Applicant's outline of argument, par 68c.

122 Applicant's outline of argument, pars 70-74.

123 Applicant's outline of argument, par 71. The further limitation contended for was that Sweetpea should be limited to proposed regulated operations described in the negotiation notice served under regulation 15.

124 Applicant's outline of submissions, par 71.

and variations approved by the Minister's delegate. For example, a 12-month suspension of the proposed Year 4 work commitments and an extension of the term of the exploration permit had been granted to give Sweetpea "additional time to undertake mediation with the leaseholders of Beetaloo Station and Tanumbirini Station, to secure an access agreement and commence the 2D seismic survey". The most recent extension of the term of the exploration permit was to 27 August 2023.

[111] Yarabala contends that the Tribunal misconstrued standard minimum protection clause 25 by reading it as providing "four options" set out in clause 25(1).[125] I disagree. It is tolerably clear that clause 25(1) sets out four 'options', that is, four alternative circumstances in which the access agreement will terminate. Yarabala further submits that clause 25(1)(b) required that the Tribunal fix a term, "one which exists independently of the other criteria in clause 25(1)".[126] I reject that argument, at least insofar as it suggests that the Tribunal was required by law to fix a specific term by reference to a fixed end date. I see no legal obstacle to the Tribunal determining (as it did) that the access agreement should terminate on the expiration of the petroleum interest.[127] Yarabala has not established error of law. In the exercise of its discretion, the Tribunal determined that the term of the access

125 Applicant's outline of argument, par 69.

126 Ibid.

127 Tribunal decision, par 141.

agreement should be co-extensive with the term of the exploration permit, as varied from time to time, because it accepted that the period of operations was inherently uncertain and that the length of time for which access was required would depend upon the results of the exploration phase. The Tribunal also noted that either party could initiate a process to vary an approved access agreement.[128]

[112] I note that proposed ground 6c was not pressed by counsel for Yarabala. The only asserted misconstruction of standard minimum protection clause 25 is that explained and dealt with in [111]. Nonetheless, counsel for Sweetpea addressed the sub-ground in the respondent's outline,[129] and I deal with the issue in [113] – [116] below.

[113] Most of the standard minimum protection clauses in Schedule 2 are capable of inclusion without amendment into an access agreement. Others state the requirements of the intended clause, rather than set out a draft of the clause itself. Clause 25 in Schedule 2 is the former. The effect of regulations 14(2) and 14(3)(a) is that the access agreement had to include "a provision expressed in the same, or substantially the same terms" as clause 25.[130] The question raised by proposed ground 6c

---

128 The Tribunal mistakenly referred to section 37. It is clear, however, that it was referring to regulation 37, which permits an approved access agreement to be varied, if not in accordance with its own terms or otherwise by agreement between the parties, then by further processes in proceedings under Part 4 Division 7 of the Regulations.

129 Respondent's outline of submissions, pars 70-71.

130 Although, under regulation 14(3)(c) – not presently relevant – it could have included "a provision that reflects a standard that is greater than a standard specified in Schedule 2".

is whether the Tribunal erred in law in not including a provision (in the alternative) for the access agreement to terminate "on the expiration of the term of the agreement…".

[114] If the standard minimum protection clause 25 in Schedule 2 were inserted into the access agreement, in precise terms as follows:

> This agreement terminates:
> .....
> (b) On the expiration of the term of this agreement (unless the term is extended by mutual agreement between the parties)

The clause would achieve nothing unless the term of the agreement were specified elsewhere. Therefore, to the extent that the contended error of law is that the Tribunal did not replicate standard minimum clause 25(1)(b) in the access agreement, it does not resolve Yarabala's real complaint, namely, that the Tribunal, in the exercise of its discretion, determined that the term of the access agreement should be co-extensive with the term of the exploration permit as varied from time.

[115] Sweetpea submits that the Tribunal correctly identified options (b) and (c) as mutually exclusive. It contends that, if both options were included in an access agreement, then a 'term of the agreement' fixed under option (b) would end, either before 'the expiration of the petroleum interest', in which case option (c) would not be the termination date at all; or conversely, after the 'expiration of the

petroleum interest', in which case option (b) would not be the termination date.[131] That submission is logically correct. Sweetpea contends that, properly understood, clause 25 gave the Tribunal a choice between setting a fixed term or a term lasting until the expiration of the petroleum interest and that, in choosing one rather than the other, the Tribunal made a discretionary decision which is not susceptible to an appeal.

[116] I am not satisfied that the Tribunal erred in law as asserted in any of the sub-grounds to proposed ground 6.

Orders

[117] The application for leave to appeal is allowed.

[118] The appeal is dismissed.

[119] The question of costs is reserved.

[120] If Yarabala contends that a costs order should not be made against it in this appeal, it must file and serve written submissions within 21 days of today. If Yarabala does not avail itself of that opportunity, I will determine costs without further reference to the parties. If Yarabala files and serves written submissions in relation to costs, Sweetpea then has 21 days from the date of receipt of Yarabala's submissions to file and serve written submissions in response. Yarabala then has a further

131 Respondent's outline of submissions, par 70.

10 days within which to file and serve its reply. The issue of costs will then be determined on the papers.

[121] The parties should file orders in the Registry consistent with these Reasons.
