National Native Title Tribunal

Native Title Amendment (Reform) Bill 2011

Supplementary submission to the Senate Legal and Constitutional Affairs Committee

National Native Title Tribunal, 17 August 2011

The Tribunal thanks the Senate Legal and Constitutional Affairs Committee for the opportunity of providing additional information in relation to this inquiry.

In a submission to the inquiry dated 29 July 2011, Professor Ciaran O'Faircheallaigh states (among other things) that the Native Title Amendment (Reform) Bill 2011:

> [W]ould not address the tendency of the NNTT to favour miners in its determinations regarding the grant of mining leases, its reluctance to impose substantive conditions on the grant of mining leases, or its tendency to conduct arbitration processes in ways that disadvantage native title parties—at pp 2-3.

Professor O'Faircheallaigh further submits that, in order to 'address the fundamental inequality' created by the existing future act provisions of the *Native Title Act 1993* (Cwlth), 'additional changes are required to remove the arbitral function' from the National Native Title Tribunal. Professor O'Faircheallaigh also requests that a journal article written by him and Mr Tony Corbett in respect of the exercise by the Tribunal of its arbitral function should be treated as part of his submission.

In that context, the Tribunal invites the Committee to consider the attached journal article and conference paper:

- 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries' (2009) 34 *University of Western Australia Law Review* 191, Deputy President Christopher Sumner and Lisa Wright; and

- 'Getting the most out of the future act process', a paper delivered by Deputy President Chris Sumner at the AIATSIS Native Title Conference on 7 June 2007.

17 August 2011

Contact Officer: Lisa Wright

Att: 'The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries'
'Getting the most out of the future act process'

The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries

Christopher J Sumner* & Lisa Wright**

In an article published in an earlier volume, Mr Tony Corbett and Professor Ciaran O'Faircheallaigh claimed that the 'politics' of native title need to be 'unmasked' to show that the National Native Title Tribunal displays an institutional bias against native title parties when making future act determinations concerning the grant of mining leases. The nature of their allegations, coupled with the subsequent uncritical acceptance of them by some other commentators, requires a response to ensure any further discussion of the Tribunal's role in these matters is better informed. Fundamentally, the criticisms Mr Corbett and Professor O'Faircheallaigh make of the Tribunal are either based on a misunderstanding of the Native Title Act 1993 (Cth) or more properly characterised as criticisms of the policy choices made by the Australian Parliament in passing the relevant legislation. The authors also fail to appreciate that what most often leads the Tribunal to determine that a mining lease may be granted with or without conditions being attached is the absence of any adequate material from the native title party addressing the criteria the Tribunal must take into account.

THE analysis of various resource development agreements involving Indigenous Australians undertaken primarily by Professor Ciaran O'Faircheallaigh has resulted in a substantial body of work.[1] In providing the results of that analysis,

* Deputy President, National Native Title Tribunal.

** Legal Officer, National Native Title Tribunal.

The views expressed here are those of the authors, and not necessarily those of the National Native Title Tribunal. We thank G Neate, S Sparkes and D O'Dea for their comments on earlier drafts. The comments of the referee were also useful in assisting us to finalise this article for publication. Any errors or omissions that remain are attributable to us.

1. See eg C O'Faircheallaigh, 'Implementation of Mining Agreements in Australia and Canada', Aboriginal Politics and Public Management Research Paper No 13, (Brisbane: Griffith University, 2003); C O'Faircheallaigh, *A New Approach to Policy Evaluation: Mining and Indigenous People* (Aldershot: Ashgate, 2002); C O'Faircheallaigh, *Environmental Agreements in Canada: Aboriginal Participation, EIA Follow-Up and Environmental Management of Major Projects* (Canadian Institute of Resources Law, 2006); C O'Faircheallaigh, 'Aborigines,

it is appropriate that Professor O'Faircheallaigh and his colleagues express their opinions on the worth of those agreements to Indigenous people and suggest changes to policy, legislation and funding regimes to bring about 'more equitable outcomes', the apparent point of Professor O'Faircheallaigh's endeavours.[2]

However, the analysis Professor O'Faircheallaigh and Tony Corbett employed to 'unmask' the 'politics' allegedly embedded in the National Native Title Tribunal's application of the right to negotiate provisions of the Native Title Act 1993 (Cth) (NTA) is flawed.[3]

The proposition put forward in their article is that 'the Tribunal favours the interests of resource developers ahead of those of native title parties'.[4] They conclude that mining companies are afforded 'disproportionate bargaining power' by the Tribunal, which leaves native title parties with 'little hope of any positive outcomes and little prospect that they will be treated equitably in arbitration processes'.[5] Professor O'Faircheallaigh has repeated these allegations elsewhere,

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Mining Companies and the State in Contemporary Australia: A New Political Economy or "Business as Usual"?' (2006) 41 Aus J Political Sci 1; C O'Faircheallaigh, 'Denying Citizens their Rights? Indigenous People, Mining Payments and Service Provision' (2004) 63 AJPA 42; C O'Faircheallaigh, 'Environmental Agreements, EIA Follow-Up and Aboriginal Participation in Environmental Management: The Canadian Experience' (2007) 27 Environmental Impact Assessment Review 319; C O'Faircheallaigh, 'Evaluating Agreements Between Indigenous People and Resource Developers' in Marcia Langton, M Tehan, L Palmer & K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne: MUP, 2004) 303; C O'Faircheallaigh, 'Mining Agreements and Aboriginal Economic Development in Australia and Canada' (2006) 5 J Aboriginal Econ Development 74; C O'Faircheallaigh, 'Negotiating Protection of the Sacred? Aboriginal-Mining Company Agreements in Australia' (2008) 39 Development and Change 25; C O'Faircheallaigh & T Corbett, 'Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements' (2005) 14 Environmental Politics 629.

2. C O'Faircheallaigh, 'Native Title and Agreement Making in the Mining Industry: Focussing on Outcomes for Indigenous Peoples' in Australian Institute of Aboriginal and Torres Strait Islander Studies, *Land, Rights, Laws: Issues of Native Title*, Issues Paper No 25 (Native Title Research Unit, 2003) vol 2, 8.
3. T Corbett & C O'Faircheallaigh, 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions' (2006) 33 UWAL Rev 153. Mr Corbett rehearsed many of the same arguments in 'The National Native Title Tribunal's Facade of Indigenous Advocacy' (2006) 25(2) Social Alternatives 37.
4. Corbett & O'Faircheallaigh, ibid 160.
5. Ibid 172–3. This thesis appears to be based on the earlier work of other commentators who are also critical of the Tribunal, largely D Ritter 'A Sick Institution? Diagnosing the Future Act Unit of the National Native Title Tribunal' (2002) 7(2) AILR 1, and R Bartlett, 'Dispossession by the National Native Title Tribunal' (1996) 26 UWAL Rev 108. While it is beyond the scope of this article to address all the issues raised by Ritter and Bartlett, a few points are of note. Ritter's article, among other things, criticised the Tribunal's introduction of guidelines for making expedited procedure objection applications. As Corbett and O'Faircheallaigh note in their article (p 160), Ritter alleged that, in doing so, the Tribunal 'made a significant effort, unauthorised by statute, to make it more difficult' for native title parties to make objections, supporting this with an opinion given by W Martin QC (now Chief Justice of the Supreme Court of Western Australia). What Ritter did not mention was that the guidelines were largely the work

upping the ante by stating that: 'In the conduct of arbitration processes ... [the Tribunal] has shown a consistent bias towards developers [sic] interests'[6] and that the way the Tribunal 'conducts its business is heavily biased against Aboriginal people and biased in favour of mining companies'.[7]

The allegation of institutional bias made by Mr Corbett and Professor O'Faircheallaigh is considered below in the light of the Tribunal's role under the relevant provisions of the NTA, the nature of the proposed future act and the materials presented to the Tribunal in any particular case. This assessment shows that their allegation is unsupported by the materials from which it is drawn. It also demonstrates, among other things, that the two 'major factors' forming the platform for their criticisms of the Tribunal's performance are untenable.

The authors foreground their analysis in the following way:

> In principle, the NTA ... places pressure on grantees to reach agreement, because of the uncertainty that arbitration creates, given that the arbitral body might not allow a future act to occur; or might only allow it to occur under stringent conditions; or might find an absence of good faith on the part of the grantee or government parties that could set back the grantee's project development by up to six months. Thus *both* sides would be under pressure to do a deal....
>
> However, this assumes there is a real possibility that the NNTT *will not allow at least some* proposed future acts to proceed, or that in a *significant proportion* of cases where approval is given for a future act to occur *stringent* conditions will be attached, or that the Tribunal *will in some cases find an absence of good faith* and restart the RTN process. Only if these assumptions hold will grantee parties feel that going to arbitration involves a significant risk that their proposed activities will be halted or delayed or *subjected to conditions more onerous than* those likely to apply under a negotiated agreement.[8]

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of Deputy President Franklyn, a Queen's Counsel and a former judge of the Supreme Court of Western Australia. Obviously, in the Deputy President's opinion, the Tribunal was authorised to promulgate the guidelines. Further, Ritter's comment (p 8, n 2) that 'tellingly', no superior court had ever found the Tribunal was 'too generous towards Indigenous interests' was wrong: see *Strickland v Western Australia* (1998) 85 FCR 303, 320–1 (RD Nicholson J), discussed later in this article. Professor Bartlett has expressed his view of the NTA elsewhere: 'Stripped of the right to negotiate, the Native Title Act is blatantly discriminatory. The right to negotiate merely provides a crude approximation of the right that equality before the law would otherwise require': R Bartlett, *Native Title in Australia* (Sydney: LexisNexis, 2nd ed, 2004) [21.5]. Given his view of the NTA, which is shared by other prominent commentators [5.40], it is not surprising Professor Bartlett judges Tribunal determinations in relation to the right to negotiate harshly.

6. C O'Faircheallaigh, '"Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom' (2007) 11(3) AILR 28, 32. See also C O'Faircheallaigh, 'Native Title and Mining Negotiations: A Seat at the Table, But No Guarantee of Success' (2007) 6(26) ILB 18.
7. V Laurie, 'Native Title Arbitrator "Biased" Against Aborigines', *The Australian*, 21 May 2007, 6.
8. Corbett & O'Faircheallaigh, above n 3, 158 (first emphasis in original; remainder added).

The assumptions made by the authors in these paragraphs reveal that their analysis is to some extent results-oriented (ie, how often the Tribunal comes to a particular decision). This is not a sound methodology to employ when assessing the performance of an administrative decision-maker. For example, whether or not a particular outcome is achieved in a particular case will depend, importantly, on the facts of the particular case and the statutory context. Where they do analyse the Tribunal's reasoning, they often misunderstand the law on point. On other occasions, they selectively quote from the Tribunal's reasons in a particular case to support their argument.[9]

Overall, Mr Corbett and Professor O'Faircheallaigh do not seem to appreciate that the Tribunal is a public body 'entrusted with a decision on the existence or non-existence of fact' and so must be 'cognisant of the proper interpretation' of the NTA 'to be applied to the relevant facts'.[10]

In relation to the 'politics' of administrative decision-making, it is now uncontroversial to say that the exercise of administrative powers, such as those exercised by the Tribunal when conducting an inquiry, 'accord the decision-maker an ability to choose between alternative courses of action *according to that person's opinion*'. All such powers are, therefore, 'subjective in [at least] two respects, being dependent on the administrator's view of the facts and on their choice between the options available to them *on such facts*'.[11] However, the emphasised points are important in relation to any allegation of a bias in the Tribunal's exercise of that 'choice' or discretion. As is noted below, what usually leads the Tribunal to conclude that a mining lease should be granted with no, or with limited, conditions being imposed is a lack of any, or any sufficient, facts from the native title party which would enliven the subjective factors we have noted.[12]

In this context, it is also important that political scientists 'pay as much or more attention to the constraining rules'[13] applying to administrative bodies such as the Tribunal as to any 'discretion' such a body has, a warning that is particularly apposite when asking whether or not the Tribunal's conduct is determined by 'conditions outside of the ... law',[14] ie, an institutional, politically-based bias that

9. For some examples of the latter, see C Sumner, 'Getting the Most Out of the Future Act Process' (Paper presented at the 8th Native Title Conference: Tides of Native Title, Cairns, 7 Jun 2007) 45, 52.
10. *Brownley v Western Australia (No 1)* (1999) 95 FCR 152, 167 (Lee J).
11. M Aronson, B Dyer & M Groves, *Judicial Review of Administrative Action* (Sydney: Law Bok Co, 4th edn, 2009) [3.24]–[3.25] (emphasis added).
12. It is acknowledged that fact-finding is not seen as a value-free exercise in the academic literature, where it is contended that 'the application of legal rules [to the facts] ... combines both discretionary and rules-based elements': V Waye, 'Judicial Fact finding: Trial by Judge Alone in Serious Criminal Cases' (2003) 27 MULR 423, 433.
13. M Shapiro, 'Law and Politics: The Problem of Boundaries' in KE Whittington, RD Kelemen & GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford: OUP, 2008) 773.
14. R Chavez, 'The Rule of Law and Courts in Democratizing Regimes' in Whittington, Kelemen & Caldeira, ibid, ch 5, 75.

favours the interests of the government of the day and developers over native title parties.[15]

THE STATUTORY CONTEXT

Any analysis of the Tribunal's role under the future act regime[16] should begin with a consideration of the policy framework adopted by Parliament, as reflected in the statutory regime, read in the light of some of the fundamental principles of statutory interpretation.

Policy behind the right to negotiate scheme

In formulating a policy response to *Mabo v Queensland (No 2)*,[17] the Australian government accepted its interdepartmental committee's recommendation that 'the North American approach of negotiating regional settlements of native title' should not be adopted.[18] After a heated debate in the Australian Parliament (and elsewhere) 'the result ... [was] legislation' that 'suffered a torturous passage through the Commonwealth Parliament'[19] and received Royal Assent on 24 December 1993. That legislation was, of course, the NTA. In considering what Mr Corbett and Professor O'Faircheallaigh have to say about the Tribunal, it is important to first reflect on what the then Prime Minister, Paul Keating, had to say about the right to negotiate when delivering the second reading speech.

The Prime Minister's position was that, while there would be ungrudging and unambiguous recognition and protection of native title, a 'just and practical regime' governing future development that delivered 'justice and certainty' not only for Indigenous people but also for 'industry and the whole community' was required. Governments would generally be able to make grants over native title land only if those grants could be made over freehold title. The 'right to negotiate', which would apply over areas where native title had been recognised under Australian law or where there was a registered native title claim, would involve a process of negotiation and, if necessary, determination by an arbitral body or the relevant minister. It would be based on Indigenous people having 'a right to be asked about actions affecting their land but not a right to veto'. The time-frames set for notification, negotiation and arbitration would be 'tight but fair' and there would be provision for 'expedited processes where a grant would not involve major disturbance to land or interference with the life' of Indigenous communities. The integrity of the Australian land management system would be

15. Corbett & O'Faircheallaigh, above n 3, 155, 161, 172–3.
16. NTA pt 2, div 3, subdiv P.
17. (1992) 175 CLR 1.
18. Bartlett, *Native Title in Australia*, above n 5, [3.3]. See also R French, 'A Moment of Change: Personal Reflections on the National Native Title Tribunal 1995–98' (2003) 27 MULR 488, 496–8.
19. Bartlett, ibid [3.16]–[3.17].

maintained, 'but in a way which respects the profound Aboriginal connection to the land and provides appropriate protections'. However, the legislation would not 'lock land away' or set up 'complicated barriers to mining exploration operations'. Just terms compensation would be payable for extinguishment of native title and any special attachment to land would be taken into account in determining just terms. Compensation for impairment of native title, for instance, for surface disturbance caused by mining, would be 'on the basis of existing State and Territory regimes'.[20]

The major elements of this policy are embedded in the substantive provisions of the NTA. They represent the intention of the Parliament of Australia. Thus, the NTA strikes 'a delicate balance of rights between parties' involved in the native title process.[21]

Preamble to the NTA and the future act regime generally

In framing their arguments, Mr Corbett and Professor O'Faircheallaigh make much of the preamble to the NTA and link what is said there directly to the objects clause of the NTA. For example, they say that the NTA:

> [R]epresented the Commonwealth government's legislative response to the *Mabo* decision. Among its central objectives ... are 'the recognition and protection of native title', and the establishment of ways in which future dealings affecting native title [both found in NTA, section 3 – the objects clause], including the grant of mining interests, may occur so as to 'ensure that native title holders are now able to enjoy fully their rights and interests … under the common law of Australia'.[22]

Both the preamble and the objects of the NTA do, of course, reflect elements of Parliament's response to the decision in *Mabo v Queensland (No 2)*.[23] The general principles applicable to the future act regime are expressed in the preamble as follows:

> It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to

20. Commonwealth, *Parliamentary Debates*, House of Representatives, 16 Nov 1993, 2877 (Paul Keating, Prime Minister).
21. A Frith & A Foat, 'The 2007 Amendments to the Native Title Act 1993 (Cth): Technical Amendments or Disturbing the Balance of Rights?' (Research Monograph, AIATSIS Native Title Research Unit, Nov 2008) 2. We should not be taken to endorse all of the views expressed in that article.
22. Corbett & O'Faircheallaigh, above n 3, 154 (footnotes omitted). The second quote is from the preamble. The case referred to is *Mabo (No 2)*, above n 17.
23. Ibid.

> negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

The Tribunal relied on the statement in the preamble that 'every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate' to find that the government party was required to make all reasonable efforts to negotiate and reach agreement, including making realistic substantive offers and concessions, in order to discharge its duty to negotiate in good faith with the native title parties.[24]

However, in *Strickland v Western Australia*,[25] Nicholson J found the Tribunal was wrong to do so. According to his Honour, the preamble did not provide grounds for reading down the express words of the NTA:

> The reasoning of the Tribunal that negotiations in good faith require 'reasonable substantive offers' requires ... a further and unnecessary level of complexity and application to the interpretation of the words of section 31(1)(b). It is not necessary to have resort to any standard outside the words in the section itself.[26]

Further, the court took the view that it was not for the Tribunal (or, indeed, the court) to assess the reasonableness of offers made during the negotiations.[27] These findings by the court put an end to the notion that the preamble could be decisive in determining what it meant by negotiating in good faith under the NTA.

Whether or not the NTA as originally enacted was otherwise true to the principles expressed in the preamble is beyond the scope of this article. However, when the future act regime was substantially amended in 1998,[28] one of the purposes for doing so was to ensure that some future acts would *not* attract the right to negotiate.[29] The fact that the government of the day's intention had moved a

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24. See *Western Australia v Taylor* (1996) 134 FLR 211 (Member Sumner); *Minister for Lands, Western Australia/Strickland/Champion/Dimer* [1997] NNTTA 31 (Member Sumner). At the time, the obligation to negotiate in good faith was only imposed on the government party. When the NTA was amended by the Native Title Amendment Act 1998 (Cth), the obligation was imposed on all of the negotiation parties: see NTA s 31(1)(b).
25. Above n 5.
26. Ibid 321.
27. Ibid.
28. Native Title Amendment Act 1998 (Cth).
29. In O'Faircheallaigh, 'Unreasonable and Extraordinary Restraints', above n 6, the author asserts that the amendments made in 1998 removed the renewal of mining leases granted before the NTA commenced from the class of future acts attracting the right to negotiate. While he is right to say that this 'is ... significant for the ability of native title groups to capture benefits from the resources boom', it is not correct to say this was as a result of the 1998 amendments. NTA ss 25(1), 26(2)(c), 26(3), as passed in 1994, excluded renewals and certain extensions of those interests, although it is arguable that the changes made in 1998 widened this exclusion to cover other possibilities; eg, by including the re-grant or re-making, as well as the renewal or extension, of such a lease: see subdiv I. The significant amendment made in 1998 was the removal of the possibility of the right to negotiate applying to renewals, re-grants or extensions, on the same terms and over the same area, of mining leases granted *after* the NTA commenced where the right to negotiate applied to the grant of the original lease: see NTA s 26D.

considerable distance from the sentiments expressed in the preamble was clear. For example, in relation to section 7 of the NTA as amended,[30] it was said that:

> [I]f the NTA states that an act [eg, a future act] can be done, or enables such an act, then even though this may affect native title rights *differently to the way it affects other rights or even if it only affects native title rights*, the RDA cannot restrict or invalidate such acts.[31]

No changes were made to the preamble when the NTA was amended in 1998. Therefore, the result is that:

> The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title ... and provide for ... the authorisation of future acts affecting native title.[32]

Whilst cognisant of that moral foundation, the Tribunal is an administrative body and must apply the relevant provisions of the NTA in a manner that reflects the Australian Parliament's intention as expressed in the substantive provisions of the NTA.[33] In any particular matter, this may (or may not) lead to an outcome that is acceptable to a particular participant. However, only Parliament can redress any substantial power imbalance either present in the provisions of the NTA at its inception or introduced subsequently by way of amendments.

The objects of the NTA

Mr Corbett and Professor O'Faircheallaigh allege that the Tribunal's application of the arbitration provisions of the NTA 'is inconsistent with the Act's objectives'.

The four 'main' objects of the NTA are:

- to provide for the recognition and protection of native title;
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;

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30. This section deals with the relationship between the Racial Discrimination Act 1975 (Cth) (RDA) and the NTA. For a discussion of s 7(2), see *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362, [29]–[37] (Deputy President Sumner).
31. Supplementary Explanatory Memorandum (to government amendments moved in July 1998) to the Native Title Amendment Bill 1997 [No 2], 4 (emphasis added).
32. *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 461 (Wilcox, French & Weinberg JJ). The future acts so authorised include some that extinguish all native title rights and interests: see *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 237–9, 244–8, 254, 275, where Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ found that the NTA allowed for a compulsory acquisition that had the effect of extinguishing native title, even where the only interests existing in the area concerned (other than those of the Crown) were native title rights and interests, provided all of the conditions found in the NTA were met.
33. Taking account of the preamble of the NTA and extraneous aides, such as Prime Minister Keating's second reading speech (see above n 20 and associated text) where appropriate.

- to establish a mechanism for determining claims to native title; and
- to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.[34]

The first and second of these objects are the most relevant to the future act regime.[35] As to the first, the right to negotiate regime is an element of the protection of native title and, given its beneficial nature, is not to be narrowly construed.[36] The second object reflects the fact that native title parties do not have a veto in relation to future acts, in that it focuses on facilitating dealings affecting native title, provided the 'standard' set by the NTA is met.[37]

In looking to the objects clause as a guide to the interpretation of the NTA, as Mr Corbett and Professor O'Faircheallaigh attempt to do:

> It has to be borne in mind when considering an objects clause that it alone will not represent the object of the legislation. [Parliament's] intention is to be gleaned from the whole of the Act and regard must also be had to other sections.[38]

When the Tribunal conducts a future act inquiry, this means having regard to the provisions of Part 2, Division 3, Subdivision P and Part 6, Division 5 of the NTA, which express (in part) Parliament's intentions in relation to achieving two of the NTA's four finely balanced objects. Mr Corbett's and Professor O'Faircheallaigh's analysis pays little attention to what is actually required under those provisions.

The NTA is remedial legislation

The NTA is remedial legislation and so its provisions must be construed beneficially.[39] However, the interpretation adopted is 'restrained within the confines of the actual language employed and what is fairly open on the words used'. Simply 'treating all of the legislation as requiring a liberal interpretation is too simplistic an approach'.[40] The Tribunal must act in accordance with the

34. NTA s 3.
35. NTA pt 2, div 3.
36. *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141, 145 (Spender, Sundberg & McKerracher JJ).
37. There is a limitation on the facilitation of those dealings in cases where a future act attracts the right to negotiate, which is the Tribunal's power to make a determination that the future act must not be done: see NTA s 38(1)(a). This is subject to the Commonwealth Minister's power under s 42 to overrule that determination in the national interest or in the interests of the relevant state or territory and the Federal Court's jurisdiction under s 169 to set aside the determination in an appeal on a question of law.
38. DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (Sydney: LexisNexis Butterworths, 6th ed, 2006) [4.42], referring to *Municipal Officers' Assoc of Australia v Lancaster* (1981) 37 ALR 559, 579.
39. See, eg, *FMG Pilbara v Cox*, above n 36; *Kanak v National Native Title Tribunal* (1995) 61 FCR 103, 124 (Lockhart, Lee & Sackville JJ); *Gumana v Northern Territory* (2007) 158 FCR 349, 373–4 (French, Finn & Sundberg JJ); *Western Australia v Ward* (2002) 213 CLR 1, 243 (Kirby J).
40. Pearce & Geddes, above n 38, [9.2], [9.5]. This is true even in the case of 'beneficial legislation

substantive provisions of the NTA. The remedial nature of the legislation is, of course, taken into account, but subject to provisos noted here.

THE TRIBUNAL'S ROLE IN THE FUTURE ACT REGIME

The Tribunal is directly concerned with that part of the NTA's future act regime[41] which deals with right to negotiate applications.[42] The right to negotiate only applies to specified, and important, categories of future acts, ie, the grant of certain mining tenements and petroleum titles and some compulsory acquisitions of native title.[43]

The Tribunal's powers in relation to the future act regime are invoked when the relevant government gives notice under section 29 of its intention to do a future act to which Subdivision P of the NTA applies. Any registered native title body corporate and any registered native title claimant is a native title party.[44] In the notice given under section 29, the government party may state that it considers the expedited procedure is attracted to the proposed future act.[45] A native title

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par excellence': S*ecretary, Department of Social Security v Knight* (1996) 72 FCR 115, 122 (Tamberlin J).

41. NTA pt 2, div 3, subdiv P. Future acts covered by Subdivs B to N are administered by the relevant government; ie, state, territory or Commonwealth. The procedural rights afforded to native title parties under these provisions often include the 'opportunity to comment'. The Federal Court found this was neither a right to participate in the decision on whether or not to do the future act in question nor a 'right' that entitled native title parties to seek information from the decision-maker about matters of concern to them. According to the court, the NTA leaves it entirely to the decision-maker to decide whether the comments provided should cause it to change or modify its decision to do the future act: see *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 71, 73–4 (Heerey, Drummond & Emmett JJ). The native title parties' position in relation to these future acts was further weakened by the court's view that a failure to afford such procedural rights does not affect the validity of a future act (other than one that attracts the right to negotiate: see NTA s 28) because there is no express linkage in those provisions between the duty imposed on the person proposing to do the future act to afford those rights and the validity of the future act: see *Daniel v Western Australia* (2004) 212 ALR 51, 65 (RD Nicholson J); *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (1999) 95 FCR 14, 22 (Cooper J); *Lardil Peoples v Queensland* (2001) 108 FCR 453, 471–4 (French J), 477 (Merkel J), 486–7 (Dowsett J).
42. NTA s 75. It has a limited role in relation to assisting when asked with the negotiation of Indigenous Land Use Agreements, which can deal with future acts (among other things): see NTA pt 2, div 3, subdivs B–E.
43. Generally speaking: (i) tenements and titles that do not attract the expedited procedure and are not otherwise excluded from the right to negotiate provisions; and (ii) compulsory acquisitions made for the benefit of third parties and, in Western Australia, South Australia and the Northern Territory, only where the area affected is wholly outside towns and cities as defined in NTA s 251C. The right to negotiate does not apply to acts to the extent that they affect areas below the mean high water mark: see NTA s 26.
44. NTA ss 29(2), 253. Any applicant on behalf of a native title claim group who lodges a claim before the end of the three month period commencing on the notification day specified in the section 29 notice that is registered within four months of that day is also a native title party. A body corporate that becomes a registered native title body corporate after the notice period ends in relation to a claim that was registered is also a party: NTA s 30.
45. NTA ss 29(7), 32. If that procedure is attracted, then the future act can be done without the

party can lodge an objection with the Tribunal to the application of the expedited procedure within four months of the notification day specified in the section 29 notice.[46] The Tribunal must then hold an inquiry and determine whether the act attracts the expedited procedure[47] 'as speedily as possible'.[48]

Unless the expedited procedure applies to the future act, the negotiation parties (ie, the government, grantee and native title parties) must negotiate in good faith with a view to reaching agreement with the native title parties to the doing of the act.[49] The Tribunal may be requested to mediate.[50]

If at least six months elapse from the notification day and the parties have negotiated in good faith during that time but no agreement has been reached, any negotiation party may apply to the Tribunal for a future act determination.[51] The Tribunal must 'take all reasonable steps to make a determination in relation to the act as soon as practicable'.[52] If a determination is not made within six months of receipt of the application, the Tribunal must report to the relevant minister[53] and provide an estimate of when a determination is likely.[54] The minister is then empowered to make the determination in the Tribunal's stead in some circumstances.[55] There is also provision for the minister to overrule a Tribunal determination.[56]

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right to negotiate applying. A statement that the expedited procedure applies to exploration and prospecting tenements is often made because the relevant government considers that these future acts fall within the scope of s 237, which defines an 'act attracting the expedited procedure'.

46. NTA s 32(3).
47. NTA s 31(4). An inquiry is only necessary if the objection is not withdrawn and the application is not dismissed for other reasons: see NTA ss 148–149. The Tribunal regularly dismisses a large number of objection applications without holding an inquiry because of non-compliance with Tribunal directions. In many other cases, the parties reach agreement and so no inquiry is necessary.
48. *Western Australia v Ward* (1996) 70 FCR 265, 278 (Lee J), an approach confirmed by the decision of RD Nicholson J in *Little v Western Australia* [2001] FCA 1706, [84]–[85]. See also *Dann v Western Australia* (1997) 74 FCR 391, 394 (Wilcox J), 399 (Tamberlin J). Despite this directive from the court, the Tribunal has been said to have an 'ideological fixation with speed': Ritter, above n 5, 7. In fact, the Tribunal's standard practice in expedited procedure matters is to allow the parties a four month period after the s 29 closing date for the lodgement of an objection for parties to come to an agreement which could lead to disposal of the objection by consent and the Tribunal often extends that period.
49. NTA s 31(1). Since the amendments made by the Native Title Amendment Act 1998 (Cth), the obligation to negotiate in good faith found in s 31(1)(b) is imposed on all negotiation parties. However, s 36(2) provides that a native title party's failure to do so does not deny the Tribunal the power to make a future act determination. Presumably, this was to avoid giving the native title party a de facto veto that could be exercised by simply refusing to negotiate in good faith.
50. NTA s 31(3).
51. NTA s 35(1). If a future act determination application is made, the Tribunal may be called upon to decide whether the government or grantee party negotiated in good faith during the requisite period (ie, at least six months). If the Tribunal finds that either of them did not do so, the Tribunal has no power to make a future act determination: NTA s 36(2); *Walley v Western Australia* (1996) 67 FCR 366 (Carr J); *FMG Pilbara v Cox* above n 36, 143.
52. NTA s 36(1).
53. The Commonwealth Attorney-General.
54. NTA s 36(3).
55. NTA ss 36(4), 36A.
56. NTA s 42(2) (but not a determination under s 32(4), which deals with the expedited procedure).

The NTA determines who is a party to a Tribunal inquiry and directs the Tribunal (among other things) to 'ensure that every party is given a reasonable opportunity to present his or her case'.[57] The Tribunal 'may hold hearings' for the purposes of an inquiry or make a determination 'on the papers' if the matter can be adequately determined in that way.[58] Hearings are held in public unless the Tribunal otherwise directs. After holding an inquiry, the Tribunal must 'make a determination'[59] in writing about the matters covered by the inquiry and must state in the determination 'any findings of fact upon which it is based'.[60]

The Tribunal's way of operating—subsection 109(1)

Subsection 109(1) states that the Tribunal 'must pursue *the objective* of *carrying out its functions*' not only in a way that is 'fair' and 'just' but also in a way that is 'economical, informal and prompt'.[61] Following the amendments made to the NTA in 1998,[62] when pursuing that objective, the Tribunal may take into account the 'customary and cultural concerns' of Indigenous people but only to the extent that doing so does not 'prejudice unduly any party to any proceedings that may be involved'.[63] Mr Corbett and Professor O'Faircheallaigh say that subsection 109(1) of the NTA is:

> [O]f particular significance in relation to the Act's arbitration provisions, given their importance in the operation of the RTN and so in achieving the Act's objectives. Any systematic bias in favour of one or other party would be prejudicial in relation to matters that are of critical interest to them, while any bias in favour of grantees would further reduce the incentives for them to reach negotiated agreements within the RTN period.[64]

They make this point in the context of their general allegation that the Tribunal is not acting in a fair and just manner towards the native title party when acting as the

57. NTA s 142. During an inquiry, the President of the Tribunal can direct a member or officer of the Tribunal to preside over a conference to 'help in resolving any matter that is relevant to the inquiry': NTA ss 150(1)–(3). What is said and done at that conference cannot be mentioned in any hearing before the Tribunal unless the parties otherwise agree. A member who presides over a s 150 conference cannot be a member of the Tribunal as constituted for the purposes of the future act inquiry unless the parties otherwise agree: NTA s 150(4).
58. NTA ss 151–154. However, a hearing must be held if the Tribunal is of the view that 'the issues for determination cannot be adequately determined in the absence of the parties'.
59. Unless an agreement of the kind mentioned in s 31(1)(b) has been reached or the relevant Minister has already made a determination under s 36A: see s 37.
60. NTA ss 162–164. For what is required under s 162, see *Parker v Western Australia* (2008) 167 FCR 340 (Moore, Branson & Tamberlin JJ).
61. Emphasis added. The Tribunal's functions are set out in NTA s 108. The Tribunal relied upon s 109(1) to reject a document purporting to withdraw a native title party's application in circumstances where the grantee party had, in preparing the document, deliberately avoided the native title party's legal representative: *Huddleston/Northern Territory/Stroud* [2003] NNTTA 35, [109]–[117] (Member Williamson).
62. See the Native Title Amendment Act 1998 (Cth).
63. NTA s 109(2).
64. Corbett & Faircheallaigh, above n 3, 166–7.

arbitral body[65] in an inquiry. However, Mr Corbett and Professor O'Faircheallaigh do not seem to appreciate that it is a statute 'designed' standard of fairness.[66] The question is how to strike the right balance between what are often competing interests in the circumstances of the particular case before the Tribunal. This requirement, to pursue a specified objective in a prescribed way, whilst acting in a manner that is fair and just to *all* of the parties involved in the proceedings, creates tension.[67] Reasonable people might have different views as to how to strike the correct balance, as demonstrated by the comments made in *Parker v Western Australia*.[68]

Proceedings must involve a 'future act'

The Tribunal originally assumed that an act to which the right to negotiate applied was a future act unless there had been a clear and unambiguous act of extinguishment.[69] A future act is one that 'affects' native title,[70] ie, an act that extinguishes native title rights and interests or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.[71] A 'future act' 'affects' native title if it can be shown to do so, not because it arguably 'may' or 'might'.[72] However, the Federal Court later found that, if the Tribunal's jurisdiction[73] is challenged[74] (eg,

65. See NTA s 27, which defines 'arbitral body'. In South Australia, the Environmental and Resources Development Court is the arbitral body for right to negotiate applications (except in relation to gas and petroleum tenements, where it is the Tribunal): see the Environment, Resources and Development Court Act 1993 (SA), the Mining Act 1971 (SA) and the Native Title (South Australia) Act 1994 (SA).
66. D Rodriguez, 'Administrative Law' in Whittington, Kelemen & Caldeira, above n 13, 348
67. See Sumner, above n 9, 24–6
68. Above n 60. Moore J (347–8) was critical of the Tribunal's reluctance to refer to a native title claimant's evidence because it was culturally sensitive, saying it 'should have stated the finding as it was obliged to by s 162(2), notwithstanding any perceived sensitivities', whereas Tamberlin J (360) thought the Tribunal acted reasonably in not spelling out the evidence because of its 'highly confidential nature'. See also *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49, [28] (Deputy President Sumner).
69. *Western Australia v Thomas* (1996) 133 FLR 124, 163–5 (Members Sumner, O'Neil & Neate); *Alexander/Western Australia/Mineralogy Pty Ltd* [1997] NNTTA 11 (Deputy President Sumner); *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116, 127–36 (Deputy President Sumner, Members Sosso & Stuckey-Clarke).
70. NTA ss 227–233. There are other important elements of the definition but they are not relevant to the discussion at hand.
71. NTA s 227.
72. *Lardil Peoples v Queensland* above n 41, 473 (French J), 476 (Merkel J); *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467, 478–87 (Carr J).
73. 'Jurisdiction' is used here, and by the Federal Court in some cases, to describe the Tribunal's authority to conduct a right to negotiate inquiry. However, 'it would be equally accurate and perhaps clearer to characterise the question as one about the power of the Tribunal which is not a court but a statutory body carrying out an administrative function': *Hicks v Western Australia* [2002] FCA 1490, [15] (French J). The question of whether negotiations in good faith have occurred for the purposes of NTA s 36(2) goes to the Tribunal's power to conduct a future act inquiry, not to its jurisdiction: see *FMG Pilbara v Cox*, above n 36, 143.
74. In almost all cases, the Tribunal's jurisdiction is not challenged and so it proceeds with the

if an allegation is made that the act in question is not a future act), the Tribunal is duty-bound to make due inquiry and satisfy itself that the proposed act is a future act. This is so even where complex issues might arise, such as whether native title has been extinguished over the area concerned.[75]

These jurisdictional considerations serve as a salutary reminder that the foundation of the Tribunal's power to conduct a future act inquiry is the existence of a future act and (among other things) the extent to which that future act 'affects' the enjoyment of registered native title rights and interests.[76]

Criteria the Tribunal must apply – expedited procedure determination

In determining whether or not the expedited procedure is attracted to a future act, the Tribunal must refer to section 237. A future act attracts the expedited procedure if it is not likely to:

(a) interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division6 of Part 2) of native title in relation to the land or waters concerned; and

(b) interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and

(c) involve major disturbance to any land or waters concerned or create rights 'whose exercise is likely to involve major disturbance to any land or waters concerned'.[77]

According to Mr Corbett and Professor O'Faircheallaigh: 'In reality ... the "expedited procedure" is not a procedure, but rather a mechanism for avoiding a procedure that would otherwise apply,' ie, the right to negotiate.[78] Other commentators have expressed a similar view, referring to the expedited procedure

inquiry unless there is evidentiary material before it which, on its face, suggests that the Tribunal lacks, or may lack, jurisdiction.

75. *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467, 472–4, 478, 482 (Carr J). In *Risk v Williamson* (1998) 87 FCR 202, 217, 220–1, O'Loughlin J upheld the decision in *Mineralogy* that the Tribunal must make findings of fact necessary to establish that it has jurisdiction.
76. NTA s 39(1)(a)(i).
77. As noted earlier, if a future act does attract the expedited procedure, then the native title party has no right to negotiate in relation to that act.
78. Corbett & O'Faircheallaigh, above n 3, 157.

as a 'loophole'[79] and a procedure that '*presumes* native title will be overridden'.[80] This view persists despite the fact that the government of the day clearly indicated that the NTA would include an expedited process that would deny the native title party the right to negotiate.[81] It also persists in the face of a Federal Court decision made 13 years ago that the expedited procedure is not to be construed as an exception to the normal negotiation procedure found in section 31(1). In Carr J's view:

> Parliament has ... provided for two sets of circumstances. One is where there is no interference of any of the three types referred to in section 237, in which case the expedited procedure applies. The other is where there may be such interference, in which case the right to negotiate procedure must be embarked upon followed by, if necessary, a determination. There are insufficient indications in the Act to suggest that one procedure is normal and the other exceptional. They are simply different procedures to be applied depending upon the factual circumstances.[82]

While the policy embedded in the NTA as interpreted by the court (and the Tribunal) may be objectionable from a native title party's point of view, particularly in the light of the preamble, it is a matter for Parliament as to whether this policy should be changed.

As originally enacted, section 237 provided that a future act 'is an act attracting the expedited procedure' if the act 'does not' have any of the effects listed in paragraphs (a) to (c). It was the subject of judicial scrutiny which led to different views emerging at first instance as to its interpretation. In *Ward v Western Australia*,[83] Carr J saw it as involving a 'predictive assessment' (a view which accorded with that of the Tribunal at the time). In *Western Australia v Ward*,[84] Lee J disagreed. The correct interpretation of the statute was resolved by the Full Court in *Dann v Western Australia*,[85] where Lee J's approach was preferred,[86] ie, the issue was to be determined not by what was *likely* to happen but what *potentially could happen* if (in the case of a exploration licence) the grantee party exercised all the powers available to it under the licence. The court found the question was to be determined on a 'worst case' scenario.[87]

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79. T Burton & C Davies, 'Major Disturbance or Miner Disturbance? *Little v Oriole Resources Pty Ltd* (2005) 146 FCR 576' (2006) 6(19) ILB 10, 10.
80. Bartlett, above n 5, 'Dispossession by the National Native Title Tribunal', 124 (emphasis in original).
81. See above n 20 and associated text.
82. *Ward v Western Australia* (1996) 69 FCR 208, 231. (The decision on this point is unaffected by *Dann*, above n 48, where Carr J's view in *Ward* as to what was required under s 237 as it stood at time was rejected.)
83. *Ward*, ibid.
84. Above n 48.
85. Ibid.
86. Ibid 393 (Wilcox J), 399–400 (Tamberlin J), 411 (RD Nicholson J).
87. Ibid 394 (Wilcox J). It is the fact that the Tribunal adopted Carr J's view prior to the *Dann* decision that Ritter says showed the Tribunal 'had on many occasions favoured an incorrect interpretation of the NTA that favoured resource interests ahead of native title claim groups': Ritter, above n 5, 2. It should be noted that two Federal Court judges divided at first instance

In practical terms, in Western Australia, the *Dann* decision meant that, for instance, if there was a site of particular significance within the tenement area, the Tribunal found that the expedited procedure was not attracted. However, section 237 was amended in 1998[88] with the avowed intention that a predictive assessment was required.[89] It is worth noting that in 10 of the 29 objection applications the Tribunal has heard and determined between 1 July 2007 and 22 June 2009, it found the expedited procedure did not apply, ie, in more than 30 per cent of those cases, the Tribunal determined on the evidence that the native title party should have the right to negotiate.[90]

Criteria the Tribunal must apply – future act determination

In relation to a future act determination application,[91] the Tribunal must make one of the following determinations:

- the act (eg, the grant of a mining lease) must not be done;
- the act may be done;
- the act may be done subject to conditions to be complied with by any of the parties.[92]

Section 39(1) sets out the matters which the Tribunal *must* take into account in deciding which kind of determination to make. Therefore, any analysis of the Tribunal's decision as to the appropriate determination to make in a particular case must take into account that the 'direct purpose' of section 39 is to:

> [I]nstruct the Tribunal on the matters relevant to a determination in relation to a future act to be made ... under sectiion 35 [*sic*, read section 38] if the parties do not reach agreement thereon by negotiation under section 31.[93]

In deciding which type of determination to make, the Tribunal *must* take into account the *effect* of the proposed future act on:

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as to the correct interpretation. Obviously, Ritter was of the view the Tribunal should have followed Lee J, a view he was entitled to take. But the Tribunal was not applying an 'incorrect' interpretation of the law until the Full Court said it was in the *Dann* decision.

88. See the Native Title Amendment Act 1998 (Cth). There is currently no proposal to amend s 237 to return it to its original form.
89. See Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth) [20.39]; *Little v Oriole Resources*, above n 79, 586–8 (French, Stone & Siopis JJ).
90. Figures provided by the Tribunal's Operations Unit. This should not be taken to be a crude statistical reduction; ie, a 'for and against' analysis. Rather, it reflects the fact that in the small number of cases where the Tribunal was asked to adjudicate on the issue, the native title party's case was often well prepared and credible evidentiary material addressing the s 237 criteria was presented.
91. It is the Tribunal's approach to the determination to these applications that is the main focus of Mr Corbett and Professor O'Faircheallaigh's criticisms and, therefore, the main focus of this article.
92. NTA s 38(1).
93. *Brownley (No 1)*, above n 10, 166 (Lee J).

(i) the *enjoyment* by the native title parties of their *registered native title rights and interests*;[94]

(ii) the way of life, culture and traditions of any of those parties;

(iii) the development of the social, cultural and economic structures of any of those parties;

(iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.[95]

The Tribunal must also take into account the interests, proposals, opinions or wishes of the native title parties in relation to the *management, use or control* of land or waters '*in relation to which there are registered native title rights and interests*, of the native title parties, *that will be affected* by the act'.[96] Paragraphs 39(1)(a) and (b) are clearly beneficial provisions and are construed accordingly.

The other criteria found in section 39 are of a different nature. When deciding which type of future act determination to make, the economic or other significance of the act to Australia, the state or territory concerned must be taken into account. So must the economic or other significance of the act to the area in which the land or waters concerned are located and to the Aboriginal peoples and Torres Strait Islanders who live in that area.[97]

The public interest in the doing of the act must also be taken into account.[98] The Tribunal has acknowledged that, 'in the abstract', it may be in the public interest to refuse the grant of a mining tenement:

> To take an extreme example, it is unlikely that it would be in the public interest for an open cut coal mine to be approved for Kings Park in Perth.... Specifically in the native title context, there may be public interest considerations against mining over areas of special significance to Aboriginal people.[99]

When determining the effect of the proposed future act in accordance with these criteria (referred to below as the 'section 39 criteria'), the Tribunal *must* take into account:

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94. NTA s 39(1)(a) (emphasis added). This means looking to the effect of the act on the enjoyment of the rights and interests registered on either the National Native Title Register or the Register of Native Title Claims: see NTA Pts 7 & 8A.
95. NTA s 39(1)(a).
96. NTA s 39(1)(b) (emphasis added).
97. NTA ss 39(1)(c).
98. NTA s 39(1)(e). The Tribunal has a discretion to take into account any other matter it considers relevant: s 39(1)(f).
99. *Holocene*, above n 68, [182]. Kings Park is on the edge of the CBD.

- any existing non-native title rights and interests and existing use of the land or waters concerned by persons other than the native title parties; and
- any agreements between the negotiation parties.[100]

CONDITIONS IMPOSED AND TREATMENT OF THE PARTIES

Two issues said to be 'fundamental' to the Tribunal's 'conduct of its arbitral functions' are identified by Mr Corbett and Professor O'Faircheallaigh: the imposition of conditions where it is determined that a mining lease may be granted, and the Tribunal's 'treatment of grantee and native title parties in the arbitration process'.[101] The authors allege that any conditions the Tribunal does impose 'could not reasonably be described as onerous', that the Tribunal is 'reluctant to impose conditions requested by native title parties' and, where there is a dispute between the grantee and the native title parties as to whether conditions should be imposed or what those conditions should be, the Tribunal 'has tended to find in favour of the grantee or government party.[102] These allegations have been addressed at length elsewhere.[103] Therefore, only the main issues are addressed here.

Imposition of conditions requires some evidence in support

The Tribunal's task in deciding what type of determination to make is 'a discretionary one' that 'involves weighing the various factors' in section 39 'based on evidence produced'.[104] There is no common thread running through the section 39 criteria and so the Tribunal may be required to take into account diverse, and often conflicting, interests. Further, the NTA does not direct that greater weight be given to some criteria over others. Therefore, the weight given to each depends upon the evidentiary material that is before the Tribunal.[105]

A failure by the Tribunal to take into account any of the requisite matters would be an error of law. More importantly, giving weight to a matter for which there was no evidentiary material would be an error of law.[106] The material before the Tribunal is usually provided by the parties to an inquiry.[107] The Tribunal is not bound by the rules of evidence,[108] which reflects the fact that the NTA contemplates a 'desirable, flexible procedure'. However, this 'does not go so far as to justify' the making of

100. NTA ss 39(2), 39(4).
101. Corbett & O'Faircheallaigh, above n 3, 155.
102. Ibid 162.
103. See Sumner, above n 9, 35, 44–52.
104. *Thomas*, above n 69, 165–6.
105. *Holocene*, above n 68, [37]–[38].
106. See *Strickland v Western Australia*, above n 5, 323; Aronsen, Dyer, Groves, above n 11, [4.105].
107. *Thomas*, above n 69, 154–63.
108. NTA s 109(3).

a Tribunal determination 'without a basis in evidence having rational probative force'.[109] The Tribunal takes the view that weight will be given to the likely effect of the proposed act by reference to the available evidentiary material, without either assuming that there will be such an effect or establishing an evidentiary threshold test. However, there needs to be sufficient material to demonstrate, for example, how the native title party's *enjoyment* of the relevant registered native title rights and interests and the other matters set out in paragraphs 39(1)(a)–(b) *will be affected* if the future act is done.[110]

The critical point is that it is not the effect that the doing of the future act in question might possibly have but its effect in so far as this can be inferred *from the factual materials before the Tribunal* in the inquiry. In this context, it is important to note that:

> In administrative matters such as these, any party (not just the native title party) has what might be termed an evidentiary choice. They might choose not to lead any evidence on a particular issue. But that does not necessarily mean that they must fail on that issue; ie, that they have an evidential onus of proof. The Tribunal might (subject to observing the requirements of procedural fairness) make its own inquiries and satisfy itself that the particular issue should be decided in favour of the party electing not to put evidence before it. Alternatively, part of an opposing party's evidence whether in cross-examination or otherwise, may satisfy the Tribunal on the point. That party has, in colloquial terms, taken its chances and won. However, ... where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its common sense approach to evidence.[111]

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109. *Hughes v Western Australia* (2003) 182 FLR 362, 370 (Member Sosso), citing *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 256 (Brennan J).

110. NTA s 39(1)(a); see *Thomas*, above n 69, 166–7; *Re Koara People* (1996) 132 FLR 73, 81–82 (Deputy President Seaman, Members Smith and McDaniel). In cases where native title rights and interests have been recognised by the Federal Court and registered on the National Native Title Register pursuant to NTA s 193, this approach is modified appropriately: see *Holocene*, above n 68, [163]. However, the principle is that claimed native title rights and interests that are on the Register of Native Title Claims are treated on the same basis as determined native title rights and interests: *WMC Resources v Evans* (1998) 163 FLR 333, 340 (Member Sumner); *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362, 375 (Deputy President Sumner). The 1998 amendments to the NTA substituted the words 'enjoyment by the native title parties of their registered native title rights and interests' in lieu of 'any native title rights and interests' in s 39(1)(a)(i). This reinforced the view expressed by the Tribunal in *Thomas*. In *Australian Manganese Pty Ltd/Western Australia/Stock* [2008] NNTT 38, [36]–[39] (Deputy President Sumner), the Tribunal rejected the native title party's contention that it misunderstood the effect of the amendment. No appeal was made against that decision.

111. *Ward*, above n 82, 217 (Carr J). (The decision on this point is unaffected by *Dann*, above n 48, where Carr J's view in *Ward* as to what was required under s 237 as it stood at time was rejected.) The same may be said in cases where there is 'a good deal of evidence pointing in one direction' before the Tribunal and 'any intelligent observer could see that unless contrary material comes to light that is the way the decision is likely to go': *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 358 (Woodward, Northrop & Jenkinson JJ).

It should be obvious that much of the material relevant to paragraphs 39(1)(a) and (b) will be peculiarly within the knowledge of the native title party. For example, no other party would usually be in a position to produce material going to how the future act in question would, if done, affect the native title parties' enjoyment of their registered rights, their way of life, culture and traditions or the development of their social, cultural and economic structures.[112] Similarly, the native title parties are in the best position to provide materials relevant to their interests, proposals, opinions or wishes in relation to the management, use and control of any area where their registered native title rights and interests would be affected by the doing of the future act.[113]

The problem the Tribunal most often faces when conducting a future act inquiry is either that there is no material on point or the material provided is insufficient to allow inferences favourable to the native title party to be drawn.

An analysis of 30 future act determinations[114] made other than by consent illustrates the point. The native title party produced factual material going to the section 39 criteria in only eight of the 30 cases. In another eight of those cases (28%), at least one of the native title parties either refused to participate in the inquiry or produced no factual material at all. In 22 of those cases (76%), at least one of the native title parties produced no factual material addressing the section 39 criteria. In 19 cases (66%), no factual material addressing the section 39 criteria was produced by any of the native title parties.[115]

While material going to the section 39 criteria is usually provided by the parties, it may be obtained as a result of the Tribunal making its own inquiries. Therefore, it might be said that the Tribunal should take a more inquisitorial approach.[116] In appropriate cases, the Tribunal has done so. For example, in *Western Australia v Daniel*,[117] the Tribunal advertised for submissions from the public on the economic or other significance of the proposed future act (which was the compulsory

112. NTA s 39(1)(a)(i)-(iii).
113. NTA s 39(1)(b).
114. Mr Corbett and Professor O'Faircheallaigh based their analysis on only 17 cases which, from a statistical perspective, is problematic. The Tribunal carried out a wider analysis; ie, 30 determinations involving 29 cases in total, including the 17 considered by Mr Corbett and Professor O'Faircheallaigh. These are listed in Appendix 1.
115. A legal practitioner outside of the future act process may find these figures incredible, ie, that a matter would go to a hearing before a tribunal with little or no factual material on the relevant criteria being presented on behalf of a party with so much at stake. But it has been relatively commonplace and, to some extent, is encouraged by commentators such as Mr Corbett and Professor O'Faircheallaigh, who find it unsurprising that a native title party would choose not to participate in the process: above n 3, 172. This is despite the fact that a lack of evidence from the native title party is the most likely reason for the Tribunal to determine that the future act (eg, the grant of a mining lease) can be done, often without any conditions being imposed. See Sumner, above n 9, 30–6.
116. See above n 110 and associated text.
117. (2002) 172 FLR 168 (Deputy President Sumner).

acquisition of native title over part of the Burrup Peninsula in Western Australia) and the public interest in the doing of the act for the purposes of paragraphs 39(1)(c) and 39(1)(e). This was done over the objections of the State of Western Australia. The state's contention that any submissions received should be taken into account for limited purposes was also rejected, with the Tribunal receiving the submissions on the basis that they could be used for whatever purpose the Tribunal considered appropriate.[118]

However, as noted earlier, the evidentiary material relevant to many of the section 39 criteria is peculiarly within the knowledge of the native title party. If that party exercises its 'evidentiary choice', to use Carr J's expression, by lodging little or no relevant material, it is difficult to see how a more inquisitorial approach by the Tribunal would assist.

Unwilling to impose conditions requested by native title parties

Mr Corbett and Professor O'Faircheallaigh allege that the Tribunal is unwilling to impose conditions requested by native title parties.[119] They give *WMC Resources Ltd v Evans*[120] as an example. However, in that matter, the Tribunal imposed limited conditions in favour of the native title party. This was done despite an assertion from the grantee party that to do so would show the Tribunal was biased in favour of the native title party because of the paucity of the evidence to support the imposition of any conditions.[121]

Mr Corbett and Professor O'Faircheallaigh are also critical of the Tribunal for refusing to impose conditions to enhance the protection available for cultural heritage sites.[122] Whether such conditions should be imposed will depend on the evidence, the applicable statutory regime for cultural heritage protection and the attitude of the grantee party. The Tribunal can (and does) take into account the operation of other legislation such as the Aboriginal Heritage Act 1972 (WA) (AHA) when making a future act determination and, depending on the facts of the case, may leave issues arising under subparagraph 39(1)(a)(v) to the relevant site protection regime.[123]

However, the Tribunal will not do so if that would amount to avoiding its responsibilities under subparagraph 39(1)(a)(v) to properly consider the effect of

118. Ibid 172–3, 176–9.
119. Corbett & O'Faircheallaigh, above n 3, 163–6.
120. (1999) 163 FLR 333 (Member Sumner).
121. Ibid 359–62.
122. Corbett & O'Faircheallaigh, above n 3, 164.
123. The relevance of the AHA has been raised in several s 169 appeals and the court has repeatedly endorsed the Tribunal's view: see eg *Parker*, above n 60, 353 (Branson J); *Parker v Western Australia* [2007] FCA 1027, [18] (Siopsis J); *Little*, above n 48, [70], [77], [88]. These cases dealt with s 237 (ie, the factors relevant to an expedited procedure objection inquiry) but it appears that the same principles would apply in relation to future act determination inquiries.

the grant of a mining lease on any area or site of particular significance to the native title parties.[124] Indeed, in a case where it was clear that the grantee party would require approval from the relevant minister under section 18 of the AHA to destroy or interfere with such a site in order to commence mining, the Tribunal found that the state regime could not be relied upon.[125] This factor, when weighed with evidence going to subparagraph 39(1)(b) and the other section 39 criteria, led the Tribunal to determine for the first time that the mining lease must not be granted.[126]

Mr Corbett and Professor O'Faircheallaigh allege that the Tribunal is disinclined to impose conditions on the grant of a mining lease 'even where the conditions ... have ... been accepted' by the grantee party, and that, when it does impose such conditions, it needlessly expresses reservations about the extent of the evidence to support them.[127] However, they have misunderstood the law. Subsection 39(4) relieves the Tribunal of its duty to consider the section 39 criteria where there is agreement on issues relevant to its determination but only to the extent of any such agreement and only if *all* parties agree. In the case the authors use to support their allegations, one of the native title parties did not agree. Hence, the section 39 criteria had to be considered and there was little or no evidence from the native title parties going to those criteria. Further, some of the conditions agreed to by the other parties were beyond the scope of the Tribunal's powers.[128]

The authors also assert that 'in only one instance has the Tribunal imposed substantive conditions not already agreed by the parties', a reference to *Koara (No 1)*.[129] However, while noting *Koara (No 2)*[130] was a determination which followed a successful appeal to the Federal Court in relation to *Koara (No 1)*, the authors do not mention that the matter was eventually resolved by a determination that the grant of the lease might be done subject to conditions, including a condition sought by the native title party that a socio-economic impact assessment be conducted. The Tribunal imposed this condition despite strong objections from the government and grantee parties, who argued that it was not justified on the evidence, was not within the scope of the NTA and was invalid.[131]

124. *Holocene*, above n 68, [145].
125. Ibid.
126. Ibid [216], [218]. It must be noted that this decision was made in 2009, long after Mr Corbett and Professor O' Faircheallaigh wrote their article. However, it is referred to at some length here, and later in this article, because it illustrates the Tribunal's approach in a case where there was a body of materials before it that addressed the s 39 criteria.
127. Corbett & O'Faircheallaigh, above n 3, 165–6
128. *Western Australia/Strickland/Plutonic (Baxter) Pty Ltd* [1999] NNTTA 46 (Member Sumner) 13–15, 21.
129. (1996) 132 FLR 73 (Deputy President Seaman, Members Smith & McDaniel).
130. *Minister for Mines (WA) v Evans* (1998) 163 FLR 274 (Members Sumner, Smith & McDaniel).
131. Ibid 302.

Conditions imposed justified because not onerous

The authors allege that the Tribunal 'often' justifies the imposition of conditions on the grant of a mining lease on the basis that they are not onerous on the grantee party,[132] citing only two cases in support. In the first of those cases, *WMC Resources Ltd v Evans*,[133] the comment was made in the face of the grantee party's strenuous opposition to the imposition of any conditions. The reasons the Tribunal did so were not confined to the fact that they were not onerous.[134] In the other case, *Western Australia/Strickland/Crook*,[135] one of the native title parties chose not to provide any evidentiary material. The other verbally consented to the lease being granted subject to the imposition of only one condition (ie, that the grantee party give the native title party notice if the lease was later sold). The Tribunal merely noted that attaching the condition sought by the native title party would not be onerous because the grantee party would be required to notify other interest holders in that event. The Tribunal then found that, because of the lack of evidence from the native title parties, it was unable to impose any conditions other than the notification condition requested by one of those parties.[136] In the circumstances, neither of these cases supports the authors' allegation.

Standards of evidence

The allegation that the Tribunal demands a higher standard of evidence from native title parties than from grantee parties does not hold up when considered in the circumstances of the Tribunal decisions relied upon.

In relation to *Bissett v Mineral Deposits (Operations) Pty Ltd*,[137] Mr Corbett and Professor O'Faircheallaigh say that the Tribunal 'required specific evidence regarding the potential impact of mining on particular native title rights' and found that there was 'no solid material submitted to this inquiry to demonstrate that the enjoyment of a number of the registered rights and interests will be deleteriously impacted upon by the proposed act'.[138] However, the quote has been foreshortened. What the Tribunal actually said was that there was no solid material that demonstrated that:

> [T]he enjoyment of a number of the registered rights and interests will be deleteriously impacted upon by the proposed act *due to the fact that it is not clear what the nature of their enjoyment by the native title party actually is*.[139]

Member Sosso went on to note that:

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132. Corbett & O'Faircheallaigh, above n 3, 163.
133. Above n 120.
134. Ibid 358–9.
135. [1999] NNTTA 167 (Member Wilson).
136. Ibid 6–7.
137. (2001) 166 FLR 46 (Member Sosso).
138. Corbett & O'Faircheallaigh, above n 3, 167.
139. *Bissett v Mineral Deposits*, above n 137, 65 (emphasis added).

> [T]he focus of section 39(1)(a)(i) is directed towards determining the effect of the future act on the *enjoyment* of registered rights and interests. The preponderance of material before the Tribunal fails to illustrate how the *enjoyment* by the native title party of the bulk of its registered rights and interests *in the area of the proposed tenement* will be effected in an immediate and real manner by the proposed future act.[140]

The authors also say the Tribunal did not request specific evidence of what the grantee party contended was its 'longstanding Aboriginal employment policy'.[141] However, what they do not grasp is that the Tribunal sought no evidence of the policy because the Tribunal did not rely on it. The references to 'employment'[142] in the member's reasons are references to employment within the community generally. The Tribunal was not referring to the alleged Aboriginal employment policy.[143] Nothing in these findings demonstrates any different standard was applied by the Tribunal to the evidence required from the parties.[144]

There is also an allegation that different standards were applied in *Townson Holdings Pty Ltd/Harrington-Smith/Western Australia*.[145] Again, it cannot be sustained. In that matter, the Tribunal determined that the mining leases in question might be granted. No specific evidence as to the economic significance of the grant of those leases was given because of uncertainty as to whether a viable ore body existed. The criticism was that 'the Tribunal did not see the lack of specific evidence ... as a basis on which to question ... the grantee's request that a lease be issued'.[146] In *Townson*, the grantee party had no current proposal for productive mining. It intended to use the leased area for further exploration.[147] In those circumstances, what the Tribunal actually said was:

> The grantee party has not provided any evidence of the extent of the economic significance of the proposed mining leases noting that it is difficult to predict because of the uncertainty about whether a viable ore body will be discovered. Nevertheless, I can at least accept that continuing exploration will have some positive economic effect in the locality and there is potential for this to be increased if mining occurs.[148]

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140. Ibid (emphasis in original).
141. Corbett & O'Faircheallaigh, above n 3, 167.
142. Made when considering the 'economic or other significance' of the act: NTA s 39(1)(c).
143. See *Bissett v Mineral Deposits*, above n 137, 79–81. The native title party alleged there was no such policy.
144. The allegations in Corbett and O'Faircheallaigh, above n 3, 169 in relation to the 'striking example of disparity between the Tribunal's initial consideration of evidence and its decision' and the Tribunal's apparently uncritical acceptance of an anthropological report tendered by the grantee party in *WMC Resources v Evans*, above n 120, are dealt with in Sumner, above n 9, 45, 46
145. [2003] NNTTA 82 (Deputy President Sumner): see Corbett & O'Faircheallaigh, above n 3, 168.
146. Corbett & O'Faircheallaigh, ibid 168.
147. This was, at the time, permissible under the Mining Act 1975 (WA).
148. Above n 145, [93].

It is clear from the full quote that little weight was given to this factor by the Tribunal in coming to its decision and, in any case, it is not indicative of the application of a different standard of evidence.[149] In any event, the major problem in this case was the paucity of evidence from the native title party.

THE TRIBUNAL'S 'CONDUCT' REFLECTS TWO 'MAJOR FACTORS'

Mr Corbett and Professor O'Faircheallaigh allege that the Tribunal's 'conduct', which they say demonstrates a bias in favour of grantee parties, 'reflects two major factors', namely:

- the Tribunal's arbitral function 'bears little resemblance to the conventional concept of arbitration'; and
- the Tribunal is 'not an independent judicial body but ... constitutes part of the executive' which makes Tribunal members 'responsive to government priorities'.[150]

However, these criticisms of the Tribunal are either based on a misunderstanding of the task the Tribunal is performing under the NTA or more properly characterised as criticisms of the policy choices made by the Australian Parliament.

Tribunal arbitration v 'conventional' arbitration

One of the 'major' factors Mr Corbett and Professor O'Faircheallaigh say affects the Tribunal's conduct of future act inquiries is that Tribunal arbitration 'bears little resemblance to the conventional concept of arbitration'.[151] They go on to say that the term 'arbitration' is 'in fact a misnomer' because:

> In other circumstances parties submit themselves to an arbitration process they have willingly agreed to in advance, usually as part of a contractual arrangement, and commit to accept a decision by an arbitrator they choose or who is appointed by a neutral and mutually agreed third party. Arbitration occurs on the basis of explicit, well-defined rules designed to ensure equitable treatment of each party.

149. It is interesting that Mr Corbett and Professor O'Faircheallaigh do not point out that there are consequences for grantee parties who choose not to produce material on a point relevant to a Tribunal inquiry. In an expedited procedure objection inquiry, if a grantee party does not submit material explaining its intentions as to heritage protection, the Tribunal conducts the predictive assessment required by s 237 on the basis that grantee party will exercise rights available under the proposed tenement to the full, ie a worst case scenario. This has, in some cases, been the very reason why the Tribunal has decided that the expedited procedure should not apply to the tenement concerned and that the native title party should have the right to negotiate. See, eg, *Freddie/Western Australia/ Povey* [2001] NNTTA 162, [49] (Member Stuckey-Clarke); *Ward v Northern Territory of Australia* (2002) 169 FLR 303, 318, 328 (Member Sosso); *Ward/ Ausquest Limited/Northern Territory* [2002] NNTTA 41, [62] (Member Sosso); *Parry/Buchanan Exploration Pty Ltd/Northern Territory* [2002] NNTTA 221, [66] (Member Sosso).
150. Corbett & O'Faircheallaigh, above n 3, 155.
151. Ibid.

> Arbitration decisions are final and binding and cannot be set aside by an external party.... As is clear from the earlier discussion, 'arbitration' by the NNTT is a very different process.[152]

It may be that the authors do not understand that what the Tribunal conducts is a particular type of 'conventional' arbitration, best described as 'statutory arbitration'. This is:

> A method of deciding issues by arbitral tribunals otherwise than by agreement between the parties, resort to which may be optional or compulsory, and in the constitution of which the disputants have no choice.[153]

If it becomes necessary to make a future act determination, the NTA prescribes the matters to which the Tribunal must have reference – ie, the section 39 criteria. Clearly, Parliament was not prepared to leave it to the parties to first agree to go to arbitration and then determine what might be relevant to resolving any issues preventing agreement between them or who might best arbitrate in relation to those issues. Further, by comparison with the 'conventional' arbitration to which the authors refer (where decisions are 'final and binding'), the NTA provides that:

- the relevant minister can override the Tribunal's determination in certain circumstances or step in and make a future act determination without awaiting a Tribunal determination in certain circumstances; and
- any party can 'appeal', as of right, to the Federal Court on a question of law from any decision or determination of the Tribunal.[154]

The authors' understanding of the Tribunal's role colours their consideration of the Tribunal's 'conduct' of future act determination inquiries and is identified as a 'major factor' supporting the implication made in the title to their article that there are politics embedded in the Tribunal's conduct.[155] While it is not entirely clear as to why they think this is the case, if they have misunderstood the nature of the inquiry the Tribunal is conducting under the NTA, then the foundation upon which both their analysis and their criticisms of that process rests is undermined. If they do not misunderstand and, instead, simply reject the model adopted by the legislature, then their criticisms should be directed at the choice Parliament made

152. Ibid 174–5.
153. LexisNexis online, *Encyclopaedic Australian Legal Dictionary*.
154. See NTA ss 36A, 42, 169. The jurisdiction conferred by s 169 is original jurisdiction because 'it is an appeal against a decision or determination of an administrative body': *Hicks*, above n 73 [12].
155. They are also are critical of the fact that the Tribunal does not use the term 'arbitration' in identifying determinations: Corbett & O'Faircheallaigh, above n 3, 161. The Tribunal uses the term 'inquiry' instead. There is nothing sinister in this. It is simply that the relevant Tribunal functions are identified in NTA s 108(1) as being 'in relation to applications, inquiries and determinations', not arbitration. Also, ss 139(b) and 169 direct the Tribunal to *hold an inquiry* into a right to negotiate application and make a determination on that application. No mention is made of arbitration.

and their energy spent on proposing amendments to the NTA to introduce what they call a 'conventional' arbitration process.

Tribunal members are on fixed term appointments

The other 'major factor' Mr Corbett and Professor O'Faircheallaigh say affects the Tribunal's conduct of future act inquiries is that the Tribunal is 'not an independent judicial body but ... constitutes part of the executive'. This, they say, results in Tribunal members being 'responsive to government priorities, which in Australia privilege the interests of resource developers over those of native title parties'.[156] Later in the article, they expand on this point:

> Unlike the judiciary its [the Tribunal's] members are on fixed-term appointments, and the relevant government minister determines whether or not their appointments will be renewed. In this situation it is not surprising that Tribunal members may be responsive to government policy priorities. ... This helps to explain the fact that while the Tribunal claims publicly to pursue as its only strategic goal 'the recognition and protection of native title', ... in performing its arbitration function it regularly highlights the value of the mining industry to the Australian economy and stresses that the 'public interest' is served by the grant of mining interests. Against this background the NNTT's application of the arbitration provisions of the NTA is certainly explicable.[157]

This criticism of Tribunal members is unsupported by any evidence, other than a comment in a footnote that two of the three members who imposed 'substantive conditions [on the grant of a mining lease] not already agreed by the parties' were not re-appointed 'when the Howard government came to office in 1996'.[158] Putting that to one side, the authors do not seem to appreciate that 'government policy priorities' do not prompt Tribunal members to consider the economic value of the mining industry to Australia or any public interest involved in the doing of the future act (ie, the grant of the lease). The NTA does. It mandates[159] that the Tribunal take into account these matters (along with the other section 39 criteria)

156. Corbett & O'Faircheallaigh, above n 3, 155.
157. Ibid 175 (footnotes omitted). When the Corbett and O'Faircheallaigh article was published in 2006, 'recognition and protection of native title' was not the Tribunal's outcome statement. It was (and had been since June 2005) the 'resolution of native title issues over land and waters'. Mr Corbett again neglects to mention this in 'The National Native Title Tribunal's Facade', above n 3, also published in 2006, despite the fact that most of the criticisms levelled against the Tribunal in that article were bolstered by the former outcome statement. All Commonwealth agencies are required to report on the basis of an outcomes and outputs framework. For a helpful discussion of this framework, see *Combet v Commonwealth of Australia* (2005) 224 CLR 494.
158. Corbett & O'Faircheallaigh, ibid, 162–63, n 42. They refer to *Koara (No 1)*, above n 129. However, it should be a reference to *Koara (No 2)*, above n 130. The Hon CJ Sumner was the member reappointed. There are other reasons why a member is not reappointed besides the displeasure (if any) of the government of the day; eg, the member may not seek reappointment. It should also be noted that, for most Tribunal members, the administration of the future act process comprises only a small proportion of their work.
159. See NTA ss 39(1)(c), 39(1)(d).

when deciding what kind of future act determination to make in any particular case. Failure to do so would be an error of law.

Fundamentally, this 'major factor' is actually an attack on Parliament's decision that an administrative tribunal, rather than a body with judicial powers, should determine these matters,[160] a preference confirmed by relevant minister's capacity to intervene in the process or overrule a Tribunal determination.[161] A debate as to whether or not the Parliament should revisit that policy decision is legitimate. An unsubstantiated intimation that Tribunal members do the government of the day's bidding in order to keep their appointments is not.

THE TRIBUNAL'S APPROACH STRENGTHENS GRANTEE PARTY'S BARGAINING POSITION

Mr Corbett and Professor O'Faircheallaigh argue that the way in which the Tribunal performs its role as the arbitral body gives mining companies no incentive to reach agreement with native title parties. They support this by pointing to the fact that (at the time they were writing) the Tribunal had never made a determination that a mining lease must not be granted. This, they say, means there is no pressure on the company to reach agreement because the outcome of the arbitration process is not uncertain, ie, the mining company will get its lease.[162] This point requires some further analysis.

The Tribunal never says no to the grant of a mining lease

In the Tribunal's experience, it has been the rare case where the native title party argues that the Tribunal should determine the future act must not be done.[163] On one occasion when this contention was made, it was not supported by reference to the section 39 criteria. Rather, it was argued that:

- the native title party had 'evinced a strong preference' that the mining project not proceed until a 'mutually beneficial agreement' (which had almost been reached during the negotiations) with the grantee party was struck;

160. This can be contrasted with the choice made by the Parliament of South Australia, where the Environmental and Resources Development Court is the arbitral body for right to negotiate applications (except in relation to gas and petroleum tenements, where it is the Tribunal): see the Environment, Resources and Development Court Act 1993 (SA), the Mining Act 1971 (SA) and the Native Title (South Australia) Act 1994 (SA).
161. NTA ss 36A, 42. This would not be permissible in relation to a federal court established under Chapter III of the Australian Constitution.
162. Corbett & O'Faircheallaigh, above n 3, 155, 172.
163. Usually, the native title party argues that the future act should not be done unless certain conditions are imposed. While we have not done a search of the determinations on this point, we are aware of only three occasions when the native title party simply sought a determination that the act must not be done: *Bissett v Mineral Deposits*, above n 137; *Holocene*, above n 68; *Australian Manganese*, above n 110.

- a determination that the act must not be done should be made because this would be 'in the interests of promoting' the native title party's 'rights and aspirations toward self-determination'.[164]

It would be an improper exercise of power for the Tribunal to make such a determination solely on the basis that an agreement satisfactory to the native title party had not been reached and that this adversely affected their aspirations to self-determination. It would, in effect, give the native title party the power to veto the grant of the lease, which is clearly not the law.[165]

However, subsequent to that decision, the Tribunal determined for the first time that a mining lease must not be granted in *Western Desert Lands Aboriginal Corporation (Jamukurnu–Yapalikunu)/Western Australia/Holocene Pty Ltd*.[166] In that case, after assessing the materials before it, the Tribunal determined that most of the factors raised by section 39 were evenly balanced. The main issue was the effect of the grant of the mining lease in question on a site of particular significance[167] (Lake Disappointment) in the context of 'the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land'.[168]

It needs to be emphasised that this case was well prepared and presented. There was a substantial amount of evidence from the Martu people, including oral evidence given by 12 people at a hearing held on country and a connection report prepared in support of their native title claim. The grantee party submitted a considerable body of evidence going to the details of its project for developing the resource in question (25 million tonnes of potash identified during the exploration phase). All of the parties engaged experienced legal counsel and made extensive submissions that addressed the section 39 criteria.

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164. *Australian Manganese*, above n 110, [56]. This might be said to be a contention going to NTA s 39(1)(b). However, that would only be the case if the 'interest, proposals, opinions or wishes' of the native title party were shown to be 'in relation to the management, use or control of land and waters in relation to which there are registered native title rights and interests ... that *will be affected* by the act' (emphasis added). Something more than a bare statement as to the promoting self-determination is required for the purposes of s 39(1)(b). It should also be noted that, while lengthy contentions as to the application of the law were filed on the native title party's behalf, the native title party's evidence going to the s 39 criteria consisted of two witness statements, each approximately a page in length: see [27]–[28].
165. Ibid [57].
166. Above n 68. Western Desert Lands Aboriginal Corporation (Jamukurnu–Yapalikunu), the native title party, is a registered native title body corporate that holds the Martu People's native title on trust: see *James v Western Australia* [2002] FCA 1208 (French J); *James v Western Australia (No 2)* [2003] FCA 731 (French J). The registered native title rights and interests relevant to this matter include the right to possess, occupy, use and enjoy the area concerned to the exclusion of all others (ie, 'exclusive' native title).
167. NTA s 39(1)(a)(v).
168. NTA s 39(1)(b).

On the evidence, the Tribunal was satisfied that there was 'no doubt' that Lake Disappointment was of spiritual significance to the native title party and that:

> Although it is not so sacred or dangerous that it needs to be avoided in all circumstances, the evidence overwhelmingly establishes it [the lake] as an important place which is integrated into Martu culture and connection to country generally.[169]

It was also clear that, if the lease was granted, mining operations could not be conducted in accordance with the lease without interfering with that site and that any such interference would be 'considerable'.[170]

In relation to paragraph 39(1)(b), the 'clear inference' from the evidence was that the native title party would not have agreed to exploration or continued to negotiate with the grantee party if the only result was going to be an entitlement to compensation under the NTA and not the other benefits (which would have seen them 'and particularly their children involved in the mainstream economy') that were clearly in contemplation during negotiations. According to the Tribunal:

> The expectation of the Martu ... would have been that, in return for mining on a place that is very special to them, benefits of this kind could be negotiated. What they now say is that the substantial interference with one of their important traditional sites is not acceptable in the light of the limited benefits available to them i.e. effectively for the upgrading of a road and the possibility of some employment and business opportunities.[171]

In the circumstances, based on the evidence produced, the Tribunal found that 'the interests, proposals, opinions and wishes of the native title party in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest' in the mining project (of which the lease in question formed part) proceeding.[172] This decision has put grantee parties on notice that they are not always 'assured of obtaining a mining lease' or 'likely to benefit from favourable treatment by the Tribunal'[173] in future act determination proceedings.[174]

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169. *Holocene*, above n 68, [141], [149].
170. Ibid [144], [151].
171. Ibid [214].
172. Ibid [216].
173. Corbett & O'Faircheallaigh, above n 3, 172. Holocene's parent company, Reward Minerals Ltd, asked the Commonwealth Attorney-General (the relevant minister) to exercise the discretion available under NTA s 42 to overrule the Tribunal's determination. This was the first time such application had been made to the minister: see Reward Minerals Ltd, 'Request to Commonwealth Minister Over NNTT Decision: ASX Release' (10 June 2009) <www.infomine.com/index/pr/Pa755431.pdf> accessed 25 June 2009. In a letter dated 27 July 2009, the Attorney-General informed the parties and the Tribunal that he had decided not to overrule the Tribunal's determination because he was of the view it was neither in the national interest nor in the interests of Western Australia to do so. He also said that, even if it had been, he would not have exercised his discretion to overrule the Tribunal's determination.
174. We recognise that a cynic might say that the Tribunal 'changed its tune' in this case because of

The Tribunal's approach weakens native title party's bargaining position

The authors allege that the Tribunal's approach to its future act inquiry function places a native title party in a lesser bargaining position during negotiations.[175] It is acknowledged that the provision of the NTA to which they refer is one of several that place the native title parties in a less than ideal bargaining position when it comes to making agreements about future acts that attract the right to negotiate. The first, and most obvious, is that they have no right of veto.[176] The second is that, while the NTA contemplates royalty-type payments to native title parties in negotiated agreements,[177] the NTA denies the Tribunal the power to impose such a condition as part of its determination.[178] Thirdly, the Tribunal cannot make a determination of compensation for loss or impairment of native title as a result of the doing of the future act in question.[179] All of these provisions reflect Parliament's policy choices. Whether or not there should be amendments to address them is a matter for Parliament. However, none of these provisions support an allegation that it is the Tribunal's approach to the discharge of its duties that gives rise to any inequality in bargaining power.

NEGOTIATION IN GOOD FAITH

Mr Corbett and Professor O'Faircheallaigh state that the Tribunal has only made one finding that a party did not negotiate in good faith and only in a situation where the grantee party in question not only made little attempt to engage with the native title party but made it clear it was participating in the negotiation process only so as to proceed to a Tribunal inquiry.[180] This ignores *Western Australia v Taylor*,[181]

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the criticisms made by Mr Corbett, Professor O'Faircheallaigh and others of its performance previously. But this not only does a great disservice to the Martu People, the other parties and their legal representatives, it ignores the fact that, in this case, the evidence went to the s 39 criteria.

175. Corbett & O'Faircheallaigh, above n 3, 172 referring to NTA s 38(2).
176. See above n 20 and associated text.
177. NTA s 33(1).
178. NTA s 38(2).
179. NTA ss 41(3), 52; see *Evans v Western Australia* (1997) 77 FCR 193 (RD Nicholson J). As from 1 September 2007, when Items 58 & 59 of Schedule 1, Part 1 of the Native Title (Technical Amendments) Act 2007 (Cth) commenced, what the Tribunal can do is impose a condition that an amount determined by the Tribunal must be secured by bank guarantee. Prior to this, the Tribunal could only impose a condition for monies to be paid into trust. For a full discussion of this issue, see Sumner, above n 9, 36-44.
180. Corbett & O'Faircheallaigh, above n 3, 161, referring to *Western Australia v Dimer* (2000) 163 FLR 426. For a similar finding in another matter that post-dates their article, see *Cosmos/ Alexander/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35 (Unreported, Deputy President Sosso, 17 April 2009). For a finding that the native title party did not negotiate in good faith, see *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aborginal Corporation/ Western Australia* [2009] NNTTA 62 (Member O'Dea); *FMG Pilbara Pty Ltd/ Wintawari Guruma Aborginal Corporation/Western Australia* [2009] NNTTA 63 (Member O'Dea).
181. (1996) 134 FLR 211 (Member Sumner).

where the Tribunal found the State of Western Australia had not negotiated in good faith. The decision resulted in the dismissal of the future act application in question and the withdrawal of a large number of others.

Their prediction that there was 'little chance' that the Tribunal would find that a grantee party had not negotiated in good faith 'unless their behaviour has been patently uncooperative'[182] was proven wrong when the Tribunal found that FMG Pilbara Pty Ltd had not discharged its duty to negotiate in good faith in circumstances where it *could not* be said that the company's behaviour was 'patently uncooperative'.[183]

Finally, as noted earlier, the court's rejection of the Tribunal's beneficial interpretation of what it meant to negotiate in good faith (ie, that it entailed making of substantive offers to the native title party) is also ignored.[184]

ARBITRATION USED AS A THREAT TO FORCE A SETTLEMENT ON NATIVE TITLE PARTY

Mr Corbett and Professor O'Faircheallaigh assert that native title parties are pressured to reach agreement because any other party can make a future act determination application to the Tribunal after six months from the notification day specified in the section 29 notice.[185] However, grantee parties are not lining up to go to arbitration as soon as the six month negotiation period is finished. Tribunal statistics as at 12 June 2009 show that there have been 286 applications determined by the Tribunal. Of those, 54 were lodged within six to 12 months of the section 29 notification day, 42 within 12 to 18 months and 190 (or 66%) more than 18 months after the section 29 notification day.[186] It will be interesting to see whether this pattern changes following the Full Court's finding (among others) that the Tribunal can make a future act determination once the prescribed six-month period expires regardless of the stage negotiations have reached, provided negotiations were conducted in good faith during that period with a view to reaching agreement with the native title parties.[187]

182. Corbett & O'Faircheallaigh, above n 3, 172.
183. *Cox v Western Australia* (2008) 219 FLR 72 (Deputy President Sosso). However, the Full Court set aside the Tribunal's decision: see *FMG Pilbara v Cox* above n 36, 149 (Spender, Sundberg & McKerracher JJ). On 25 May 2009, one of the native title parties applied for leave to appeal to the High Court against the whole of that judgment.
184. *Strickland v Western Australia*, above n 5, 321, discussed above.
185. Provided they have negotiated in good faith: NTA s 36(2).
186. Figures provided by the Tribunal's Operations Unit. In 244 of those 286 applications, the Tribunal made a determination by consent, usually because an agreement had been reached but could not be formalised for various reasons; ie, the parties chose to use the Tribunal's power to make a determination to finalise their agreement.
187. See *FMG Pilbara v Cox*, above n 36, 146–7.

The authors also give two examples, drawn from their own experience, where they say grantee parties used the threat of a Tribunal determination as a means to place inappropriate pressure on the native title party to accept the terms of an agreement. In one example, the grantee party is alleged to have said that, unless the offer was accepted by close of business on the day of a particular meeting, 'the company would go to the NNTT and the Tribunal would give it a mining lease'.[188] It is difficult to comment on these matters without more information as to the circumstances. Generally speaking, simply expressing an intention to exercise the right to make an application for a future act determination once the statutory six month period has passed cannot be relied upon to demonstrate a lack of good faith in negotiating.[189] However, if it could be shown that, in doing so, the grantee party had improper motives or had adopted a negotiating position so unreasonable as to indicate a lack of sincerity in its desire to reach agreement with the native title party, then this would support a finding that the grantee party had not negotiated in good faith. Clearly, behaviour that was shown to amount to a threat or an attempt to intimidate the native title party would not indicate that the party in question was negotiating in good faith. As in any other matter, it would all depend on the facts.[190]

APPEALS TO THE FEDERAL COURT AGAINST TRIBUNAL DETERMINATIONS

Mr Corbett and Professor O'Faircheallaigh argue[191] that native title parties have not challenged Tribunal future act determinations because:

- native title representative bodies have such limited resources that appealing to the Federal Court under section 169 is simply not an option in most cases;
- native title parties may believe that the courts 'would be no more likely to treat their interests equitably' because of the High Court decisions in *Western Australia v Ward*[192] and *Yorta Yorta*.[193]

The inadequacy of the funding available to representative bodies is a real issue.[194] However, native title parties have found the resources necessary to appeal against

188. Corbett & Faircheallaigh, above n 3, 173.
189. *FMG Pilbara v Cox*, above n 36, 145; *Strickland*, above n 5, 319; *Daniel*, above n 117, 199.
190. *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87, [30] (Member Sumner); *Dimer*, above n 180, 430–1. The practical effect of NTA s 36(2) is that the native title party would have to demonstrate a lack of good faith in the negotiations: *Daniel*, above n 117, [47].
191. Above n 3, 173–4. See also O'Faircheallaigh, 'Unreasonable and Extraordinary Restraints', above n 6, 31–2.
192. *Ward*, above n 39.
193. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
194. It is, to some extent, being addressed. An increase of $45.8 million to be provided over four years to Native Title Representative Bodies (NTRBs) and bodies funded under s 203FE to perform NTRB functions was announced on 12 May 2009: see Commonwealth Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Additional $50 Million for Native Title System*, Joint Media Release (12 May 2009).

(or seek judicial review of) a Tribunal determination on a right to negotiate application in more than 14 cases. Only one involved an appeal against a future act determination and it was determined more than a decade ago.[195] In circumstances where the Tribunal is perceived as biased against their clients, it seems odd to say that representative bodies could not fund a test case to the Federal Court to allow the law to be developed through the normal processes.[196] That said, the failure to exercise the right to appeal might also be explained by the fact that subsection 169(1) confines the appeal to a question of law, something that the Parliament could address if it chose to do so.

If the right to appeal is not being exercised because of a perception that the courts are not likely to treat the native title party 'equitably', then it is difficult to see what recourse there would be other than for them to advocate for substantial changes to the NTA.[197] In the meantime, the argument seems to concede that, at least in the conventional sense, the Tribunal applies the law correctly.

CONCLUSION

We acknowledge what has been said by others, namely that:

> If it is only the Native Title Act that is authorized to provide the terms of engagement, then the playing field is already capitulated to the whitefella law and the lived experience – the emotional, procedural and substantive issues arising within indigenous lives – is once again marginalized.[198]

It can also be said that the right to negotiate process enshrined in the NTA is far from perfect, particularly when viewed through the prism of the economic and social disadvantage suffered by many Indigenous Australians.

However, as we hope we have shown, the analysis of the Tribunal's role in that process conducted Mr Corbett and Professor O'Faircheallaigh was flawed.[199] Their

195. *Evans*, above n 179. The remainder concerned either the application of the expedited procedure or whether negotiation in good faith had occurred.

196. One issue that might be considered for an appeal is the Tribunal's view that the effect of a future act on the enjoyment of registered native title rights and interests is not to be considered on a worst case scenario but by looking at the actual effect of the future act in question on those rights and interests as they exist, or are exercised, in the locality concerned. For a discussion of relevant Tribunal decisions, see *Australian Manganese Pty Ltd/Western Australia/Stock* [2008] NNTTA 38, [36]–[39] (Deputy President Sumner).

197. Representative bodies and others have made submissions seeking substantial changes to the NTA: see <www.ag.gov.au/www/agd/agd.nsf/Page/RWP73DB7F92B8E8CE99CA25723A00803C08> (accessed 26 June 2009).

198. P Agius, R Howitt, S Jarvis & R Williams, 'Doing Native Title as Self-Determination: Issues from Native Title Negotiations in South Australia' (Paper presented at the International Association for the Study of Common Property Conference, Brisbane, 7–9 Sep 2003.)

199. As has been noted elsewhere: 'Political scientists devoting themselves to specialized study of ... administrators ought to be ... advised to do law and political science. But most of them don't': Shapiro, above n 13, 770. Doing so would certainly assist those who endeavour to analyse the administration of a statute as complex and, some might say, as controversial as the NTA.

doomsday 'policy' conclusion is that that the Tribunal's application of the right to negotiation provisions of the NTA will, in the long term:

> [R]esult in hostility towards mineral development from native title groups, ... preclude development of positive relationships between native title parties and mining companies and ... generate instability for resource developers. Given the scale of investment involved in modern mining projects and their demonstrated vulnerability to disruption by hostile local populations, this prospect should be of serious concern to shareholders of the companies concerned.[200]

While it is hardly a flattering portrayal of the process, commentators looking at it more from a grantee party's perspective have expressed the opposite view.

> The 'right to negotiate' process has also, in an ironic manner, further encouraged the development of lasting community relationships. As Hunt has stated, the process's very 'unworkability' with regard to obtaining grants of title has encouraged agreements: 'If used in conjunction with commercial negotiations, the 'right to negotiate' procedure has benefit in a negative sense because, in my experience, neither the native title claimants nor the … company really want to follow the whole tortuous process right through to the final conclusion of a determination in the NNTT'.[201]

Other commentators coming from the perspective of native title parties acknowledge that:

> Importantly, it [the NTA] provided a set of procedural rights relating to 'future acts' including ... the development of natural resources ... . While, for mining companies, the issue is one of gaining access to areas under Aboriginal-owned titles or subject to claim by Aboriginal people, the potential for indigenous people to obtain benefits from agreements is considerable.[202]

Therefore, those representing native title parties in right to negotiate matters need to ensure that those potential benefits are realised to the greatest extent possible. This means being aware of the legal regime within which the right to negotiate arises, maximising the opportunities it presents for native title parties and minimising the risks. Experience shows that negotiations that do not take proper account of the underlying legal principles can and do lead to a result which is 'detrimental to the

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200. Corbett & O'Faircheallaigh, above n 3, 176, see also 155.
201. P Gillies, B Cleworth & G Kapterian, 'Gove: Forgotten Catalyst for Native Title or Are We Just Where We Started? Native Title and the Mining Industry Issues in Australia from Gove to the Present Day' (2008) 1 Int'l J Private Law 137, 145.
202. M Langton & O Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and Australia's Mining Boom' (2008) 26 J Energy & Natural Resources Law 31, 40–1. It has also been said that: '[T]he NTA [through the right to negotiate process] created the ability for native title claim groups to pro-actively intervene in order to preserve their own heritage': D Ritter, 'Many Bottles For Many Flies: Managing Conflict Over Indigenous People's Cultural Heritage In Western Australia' (2006) 13 Public History Rev 125, 165.

native title party' and 'inferior to that [which] the grantee party ... placed on the negotiating table'.[203]

It is trite to say that getting the best out of the right to negotiate for native title parties is no easy task. However, if a matter does come before the Tribunal for a future act determination, the best results will be obtained in cases when credible, relevant materials are presented by the native title party that fully address the relevant criteria found in the NTA.[204] Unfortunately, this is not usually the case, in the Tribunal's experience. As has been said elsewhere:

> It may be that if grantee parties in some cases have nothing to fear from the Tribunal this is because of the terms of the NTA, the nature of the project and lack of evidence [from the native title party] of native title rights and interests or sites or other section 39(1)(a) factors.[205]

203. Sumner, above n 9, 51; Corbett & Faircheallaigh, above n 3, 172–3. *Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia* [2006] NNTTA 19 (Deputy President Sumner,) is a particularly sobering example of this phenomenon. It is discussed extensively in Sumner, above n 9, 47–51.
204. The same can be said in relation to expedited procedure objection inquiries and a 'negotiation in good faith' inquiry.
205. Sumner, above n 9, 53.

APPENDIX I

1. *Western Australia v Thomas* (1996) 133 FLR 124
2. *Re Koara People* (1996) 132 FLR 73 *(Koara (No 1))*
3. *Minister for Mines (WA) v Evans* (1998) 163 FLR 274 *(Koara (No 2))*
4. *Western Australia/Champion/Resolute Ltd* [1999] NNTTA 219
5. *Western Australia/Strickland/Crook* [1999] NNTTA 167
6. *Western Australia v Thomas* (1999) 164 FLR 120
7. *Western Australia/Strickland/Plutonic Pty Ltd* [1999] NNTTA 46
8. *Western Australia v Evans* (1999) 165 FLR 354
9. *Western Australia/Thomas/Allen* [1999] NNTTA 103
10. *Western Australia/Champion/Coumbe* [1999] NNTTA 245
11. *WMC Resources Ltd v Evans* (1999) 163 FLR 333; [1999] NNTTA 372
12. *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116
13. *Townson Holdings Pty Ltd/Harrington-Smith/Western Australia* [2003] NNTTA 82
14. *Wongatha People/Down/ Western Australia* [2004] NNTTA 106
15. *Western Australia/Strickland/Glengarry Mining NL* [1999] NNTTA 3
16. *Wongatha People/Western Australia/Andrei* [2004] NNTTA 81
17. *Western Australia/Strickland* [1998] NNTTA 2
18. *Northern Territory/Risk/Phillips Oil Company Australia* [1998] NNTTA 1
19. *Hunter/Western Australia/Gulliver Productions Pty Ltd* [2004] NNTTA 105
20. *Western Australia/Daniel/ North* [1999] NNTTA 58
21. *Placer (Granny Smith) Pty Ltd/Western Australia/Harrington-Smith* [2000] NNTTA 67
22. *Western Australia/West Australia Petroleum Pty Ltd/Hayes* [2001] NNTTA 41
23. *Bissett v Mineral Deposits (Operation) Pty Ltd* (2001) 166 FLR 46
24. *Victorian Gold Mines NL v Victoria* (2002) 170 FLR 1
25. *Summons v Victoria* (2003) 176 FLR 1
26. *Western Australia/Hughes /Rough Range Oil Pty Ltd* [2004] NNTTA 108
27. *Cameron/ Hoolihan/Queensland* [2006] NNTTA 3
28. *The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia* [2006] NNTTA 19
29. *Gulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Hunter/Karajarri Traditional Lands Association (Aboriginal Corporation)/Western Australia* [2006] NNTTA 33
30. *Borinelli/Western Australia/Empire Oil Company (WA) Limited* [2007] NNTTA 9

National Native Title Tribunal

Getting the most out of the future act process

Presentation to the AIATSIS 2007 Native Title Conference, Cairns

C J Sumner, Deputy President, 7 June 2007

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Getting the most out of the future act process
by C J Sumner

AIATSIS 2007 Native Title Conference
7 June 2007 - Cairns[1]

1. Introduction

(a) Overview of the future act scheme under the *Native Title Act 1993*

There have been more than 13 years of experience with the operation of the right to negotiate provisions of the *Native Title Act* 1993 (Cwlth) (NTA).[2] During this time a considerable body of law and practice has been developed by the Federal Court and National Native Title Tribunal. The law is now reasonably well settled and readily accessible. Lawyers and others representing native title parties should be aware of the legal foundations of the right to negotiate provisions when negotiating agreements about future acts covered by them, whether as part of the expedited procedure[3] or as covered by the normal right to negotiate process.[4]

Experience has shown that most Aboriginal people are not opposed to mining and want agreements. Except where the expedited procedure applies, if an agreement is not reached between parties within six months after notification of a future act, the NTA permits any of the parties to apply for arbitration and requires the Tribunal to hold a right to negotiate inquiry to determine the matter.

One provision of the NTA can operate to put a native title party in a lesser bargaining position for certain types of negotiations. In the course of negotiating some agreements, royalty-type payments can be included and voluntarily agreed upon[5] but, if the negotiations do not result in agreement and the future act process moves to an arbitral inquiry, the requirement to pay these benefits cannot be imposed as a condition of the Tribunal's determination.[6] The Tribunal also cannot make a determination of compensation. Until the amendments to the NTA which came into effect on 1 September 2007, the Tribunal could only impose a condition for monies to be paid into trust pending a final determination of native title by the Federal Court (since 1 September 2007 this involves a bank guarantee condition not monetary payments into trust).[7]

Aboriginal people's rights at the negotiating table can be improved with a greater knowledge of the future act system and ways to develop policy based agreements.

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[1] This paper was delivered as a power point presentation at the AIATSIS Native Title Conference, Cairns on 7 June 2007. It has been finalised as a Paper and updated with statistics to 30 June 2007.
[2] *Native Title Act 1993* Part 2, Division 3, Subdivision P, ss 25-44.
[3] See 2. Expedited procedure, below.
[4] See 3. Future act determination applications, below.
[5] *Native Title Act 1993* s 33(1).
[6] *Native Title Act 1993* s 38(2)
[7] *Native Title Act 1993* ss 41(3), 52.

The provisions of the NTA in relation to right to negotiate processes and the Tribunal's interpretation and administration of them have been the subject of some criticisms. It is said that many agreements between Aboriginal people and mining companies are not satisfactory, that the provisions of the NTA dealing with royalty-type payments and the manner in which the Tribunal conducts its inquiries disadvantages Aboriginal people.

This paper provides an overview of the operation of the right to negotiate provisions by reference to their original policy objectives, the leading cases decided by the Federal Court and Tribunal, the process of negotiation, expedited procedure and future act determination inquiries (including the law applied and evidence required), and deals with some of the criticisms made of the administration of the scheme and agreements negotiated under it.

(b) Policy and legislative background

The protective provisions of the 'future act'[8] regime of the NTA were explained by Prime Minister Paul Keating[9] in his second reading speech, in which he said :

- there would be the ungrudging and unambiguous recognition and protection of native title
- there would be a just and practical regime governing future grants and acts affecting native title, a system that delivers justice and certainty for Aboriginal and Torres Strait Islander people, industry, and the whole community
- generally governments may make grants over native title land only if those grants could be made over freehold title
- the right to negotiate applies while there is a determination of native title or a registered claimant and involves a process of negotiation and, if necessary, determination by the Tribunal or Minister
- the right to negotiate is based on Aboriginal people having a right to be asked about actions affecting their land but not a right to veto
- the timeframes set for notification, negotiation and arbitration are tight but fair and provision is made for expedited processes where a grant would not involve major disturbance to land or interference with the life of Aboriginal communities
- the integrity of the land management system will be maintained but in a way which respects the profound Aboriginal connection to the land and provides appropriate protections
- the legislation would not lock land away and does not set up complicated barriers to mining exploration operations

[8] For the definition of 'future act' see *Native Title Act 1993* s 233.
[9] *Hansard, House of Representatives*, Tuesday, 16 November 1993, p 2877.

- just terms compensation will be payable for extinguishment of native title and any special attachment to land will be taken into account in determining just terms

- compensation for impairment of native title, for instance for surface disturbance caused by mining, will be on the basis of existing State and Territory regimes.

The general principles of the future act regime were expressed in the preamble to the NTA:

> 'It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.'

A future act is one which 'affects' native title,[10] i.e. it extinguishes native title rights and interests or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.[11]

The relevant objects of the NTA are:[12]

- to provide for the recognition and protection of native title; and

- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings.

Although the NTA permits the establishment of State based alternative future act regimes which are consistent with the NTA,[13] only South Australia now rely upon this provision and then only with respect to the grant of mining tenements and compulsory acquisition of native title rights and interests (that is, the grant of petroleum titles are still dealt with under the NTA). At present all other States and Territories use the provisions of the NTA to deal with future acts covered by the right to negotiate process[14] and there are no present proposals for the situation to change.[15]

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[10] *Native Title Act 1993* s 233.

[11] *Native Title Act 1993* s 227.

[12] *Native Title Act 1993* ss 3(a), 3(b), see also ss 4(1), 10.

[13] *Native Title Act 1993* ss 43, 43A.

[14] In respect of NSW Ministerial determinations have been made in relation to approved exploration acts (s 26A *Native Title Act*) and opal or gem mining (s 26C *Native Title Act*) which vary the normal procedures in relation to certain exploration and opal or gem mining.

[15] Queensland experimented with alternative future act procedures between September 2000 and March 2003. The validity of certain of these actions was struck down by Wilcox J in February 2002—*Central Queensland Land Council Aboriginal Corp v Attorney-General (Cth)* (2002) 116 FCR 390. Notwithstanding that the Full Court subsequently reversed Wilcox J's decision—*Queensland v Central Queensland Land Council Aboriginal Corp* (2002) 125 FCR 89, the Queensland Government decided to revert to the Commonwealth scheme administered by the Tribunal. The state's Land and Resources Tribunal continues to have jurisdiction as the arbitral body in respect of matters dealt with under the alternative provisions, between 2000 and 2003, and the Tribunal is the arbitral body in all other circumstances in accordance with the NTA.

The right to negotiate provisions of the NTA[16] apply to specified and important categories of future acts, being the grant of mining tenements and petroleum titles and certain compulsory acquisitions of native title rights and interests (generally those made for the benefit of third parties outside cities and towns). The provisions do not apply to acts to the extent that they affect areas below the mean high water mark and not to grants of mining tenements or compulsory acquisitions for the purpose of mining or other infrastructure facilities respectively.[17] The NTA also deals with future acts not covered by the right to negotiate and specifies procedural rights which attach to them.[18]

The Tribunal is only directly concerned with administering future acts covered by the Commonwealth right to negotiate procedures. These procedures in summary provide for the following matters and if they are not complied with the act will be invalid to the extent that it affects native title.[19]

First, the relevant government must give notice of the proposed future act to the public, to any registered native title body corporate or registered native title claimant who are native title parties in the right to negotiate proceedings. Notice is also given to the grantee, to the arbitral body and to any representative Aboriginal/Torres Strait Islander body where there is no registered native title body corporate for the whole of the area.[20] The notice is given under s 29 of the NTA and is often referred to as a s 29 notice. Any native title claim group that lodges a claim before the end of the three month period commencing on the notification day specified in the notice, and whose claim is registered within four months of that day, is also a registered native title claimant and native title party for the purposes of the right to negotiate provisions.[21] Unless the expedited procedure[22] applies to the grant, the negotiation parties (the Government, grantee and native title party) must negotiate in good faith with a view to reaching agreement with the native title parties to the doing of the act.[23] The Tribunal may be requested to mediate.[24] If six months elapses from the notification date and after negotiation in good faith has taken place but no agreement is reached any negotiation party may apply to the Tribunal for a future act determination.[25] Once an application is made, the Tribunal is obliged to take all reasonable steps to make a determination as soon as practicable[26] and must report to the Minister (the Commonwealth Attorney-General) if a determination is not made within six months from when the application was made and provide an estimate of when a determination is likely.[27] There is also provision for the Minister to overrule the Tribunal's determination.[28]

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[16] *Native Title Act 1993* Part 2, Division 3, Subdivision P, ss 25-44.
[17] *Native Title Act 1993* s 26.
[18] *Native Title Act 1993* Part 2, Division 3, Subdivision G to Subdivision O, ss 24GA-24OA.
[19] *Native Title Act 1993* ss 25(4), 28.
[20] *Native Title Act 1993* s 29.
[21] *Native Title Act 1993* s 30.
[22] *Native Title Act 1993* ss 29(7), 237. See also 2. Expedited procedure, below.
[23] *Native Title Act 1993* s 31(1).
[24] *Native Title Act 1993* s 31(3).
[25] *Native Title Act 1993* s 35(1).
[26] *Native Title Act 1993* s 36(1).
[27] *Native Title Act 1993* s 36(3).
[28] *Native Title Act 1993* s 42(2) (other than a determination under s 32(4) which deals with the expedited procedure).

Second, the Government may include in the s 29 notice a statement that it considers the expedited procedure is attracted to the proposed grant. That means that the grant could be made without the normal negotiations provided for in s 31(1) of the NTA.[29] Governments usually assert that the expedited procedure applies in the case of exploration and prospecting tenements on the basis that they are low impact future acts.[30] A native title party may object to the expedited procedure within four months of the notification day in the notice.[31]

Third, the principal functions of the Tribunal under the right to negotiate provisions are the following:

- to mediate between the parties if requested by any of the negotiating parties to assist in obtaining their agreement to the future act being done[32]

- to conduct an inquiry to determine whether or not the expedited procedure is attracted when an objection to it has been lodged by a native title party[33]

- where no agreement can be reached between the negotiation parties, to conduct an inquiry and make a determination that the act must not be done or may be done with or without conditions.[34] As part of a future act determination application inquiry the Tribunal may be called on to decide whether the Government or grantee party has negotiated in good faith. If the Tribunal finds that one or both have not negotiated in good faith then it has no power to make a determination.[35]

Outside of the right to negotiate scheme the Tribunal may also be asked to provide assistance to facilitate Indigenous Land Use Agreement ('ILUA') negotiations where parties decide to deal with the grant of mining tenements by way of ILUA rather than using the right to negotiate procedures of the NTA.[36] The current negotiations between BHP Billiton and the Kokatha, Barngala and Kuyani Peoples over the expansion of the Olympic Dam copper/uranium mine in South Australia are an example of that approach. An ILUA might be preferred for more complex projects where there are multiple future acts but the respective merits of each option needs to be considered in the circumstances of particular cases.[37]

It should be noted from the outset that the procedural provisions of the NTA in relation to negotiation or arbitration relate to those native title rights and interests that are entered either on the National Native Title Register (following a determination of native title) or on the Register of Native Title Claims (after a claim passes the registration test). A determination of native title might include recognition:

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[29] *Native Title Act 1993* ss 29(7), 32.
[30] See the definition of 'act attracting the expedited procedure'; *Native Title Act 1993* s 237.
[31] *Native Title Act 1993* s 32(3).
[32] *Native Title Act 1993* s 31(3).
[33] *Native Title Act 1993* ss 32(4), 75, 139(b).
[34] *Native Title Act 1993* ss 35(1), 38(1), 75, 139(b).
[35] *Native Title Act 1993* s 36(2); *Walley v WA* (1996) 67 FCR 366.
[36] *Native Title Act 1993* Part 2, Division 3, Subdivision B to Subdivision E, ss 24BA-24EC.
[37] National Native Title Tribunal '*ILUA or the right to negotiate process? A comparison for mineral tenement applications*' (www.nntt.gov.au – Indigenous Land Use Agreement – Information Material)

- of specified native title rights and interests,[38] or
- that 'native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others'[39]

in relation to some or all of the determination area.

In applying the registration test to native title claimant applications, the Native Title Registrar (or the Registrar's delegate) must, among other things:

- be satisfied that the description contained in the claimant application is sufficient to allow the native title rights and interests claimed to be readily identified[40]
- be satisfied that there is sufficient factual basis to support the assertion that the native title rights and interests exist[41]
- consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.[42]

The Register of Native Title Claims must contain a description of the native title rights and interests in each registered claim that the Registrar considered, prima facie, could be established.[43]

As the note to s 190B(6) in the NTA states, only the native title rights and interests entered on the Register are taken into account for the purposes of:

- s 31(2) - which deals with negotiation in good faith in a right to negotiate process
- s 39(1) - which deals with criteria for making arbitral body determinations in a right to negotiate process.

Since 1995, when the first future act notices were given by the Western Australian Government, the law and practice relating to future acts has been developed by the Federal Court and Tribunal. Comprehensive information in relation to the right to negotiate scheme is available on the Tribunal's website. [44]

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[38] Section 225(c) of the *Native Title Act 1993* provides that a determination of native title includes a determination of 'the nature and extent of the native title rights and interests in relation to the determination area'.

[39] *Native Title Act 1993* s 225(e).

[40] *Native Title Act 1993* s 190B(4).

[41] *Native Title Act 1993* s 190B(5).

[42] *Native Title Act 1993* s 190B(6).

[43] *Native Title Act 1993* s 186(1)(g).

[44] Guide to future act decisions made under the Commonwealth right to negotiate scheme (updated 30 September 2006) (http://www.nntt.gov.au/facasesguide/index.html) and Determinations (http://www.nntt.gov.au/futureact/Determinations.html). Tribunal determinations are also found on Austlii.

(c) The National Native Title Tribunal's jurisdiction in relation to mediation and inquiries under the right to negotiate scheme

Mediation: The NTA encourages the negotiation of agreements about future acts. Once a government has decided to give a s 29 notice and follow the right to negotiate procedures to ensure the validity of the future act the NTA provides in essence that, unless the expedited procedure applies, the negotiation parties must negotiate in good faith 'with a view to obtaining agreement of each of the native title parties to … the doing of the act' or 'the doing of the act subject to conditions to be complied with by any of the parties'.[45]

By contrast with the scheme for the resolution of native title claimant applications, where the applications are referred to the Tribunal to mediate between the parties,[46] the Tribunal is involved in future act mediation only at the request of a negotiating party. If any negotiation party requests it to do so, the Tribunal 'must mediate among the parties to assist in obtaining their agreement'[47] to the doing of the act, with or without conditions.

Inquiry: If at least six months have passed since the notification day and an agreement is not made in relation to the future act, any negotiating party may apply to the Tribunal for a determination that the future act must not be done, may be done, or may be done subject to conditions to be complied with by any of the parties.[48] The Tribunal must hold an inquiry into a right to negotiate application.[49]

The Tribunal originally took the view that, where there is a registered native title claimant, the right to negotiate scheme required the Tribunal to assume that an act which was to take place in the area of the registered claim was a future act (i.e. an act which affects native title) unless there had been a clear and unambiguous act of extinguishment. Accordingly the Tribunal was not required to examine in every case whether the proposed act did in fact 'affect' native title, particularly given the potentially complex legal and factual issues involved in deciding whether a future act existed. [50] For instance, where a claim had been registered over a pastoral lease but there was continuing uncertainty about whether native title rights had been extinguished, the Tribunal's view was that it was not required as a matter of jurisdiction to determine whether or not extinguishment of native title had occurred.[51]

The Federal Court took a different view in the *Mineralogy* case and held that, when any party challenges the Tribunal's jurisdiction, the Tribunal has a duty to make due inquiry about whether it has jurisdiction and is required to be satisfied that the proposed act is a future act (i.e. one which affects native title) to which the right to negotiate provisions applied. That

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[45] *Native Title Act 1993* s 31(1)(b).
[46] *Native Title Act 1993* s 86B(1).
[47] *Native Title Act 1993* s 31(3).
[48] *Native Title Act 1993* ss 35, 38, 75-77.
[49] *Native Title Act 1993* s 139(b).
[50] *Red Alexander/Western Australia/Mineralogy Pty Ltd*, NNTT WO96/46, [1997] NNTTA 11 (18 April 1997), The Hon C J Sumner.
[51] *Western Australia v Thomas* (1996) 133 FCR 124 at pp 163, 168-169.

approach is to be taken despite what might be the potential complexity of the issues, including whether native title has been extinguished.[52]

The practical consequences of the Federal Court's decision were revealed in a subsequent case.[53] The Tribunal was required to give detailed consideration to whether native title had been extinguished over pastoral lease areas where mining leases were proposed to be granted, because of the decision of the Full Federal Court in *Western Australia* v *Ward,*[54] which held that native title was extinguished by virtue of improvements or enclosures of pastoral leases in Western Australia. The Tribunal had to embark on this exercise despite the fact that the Federal Court *Ward* decision was on appeal to the High Court. After receiving quite detailed evidence of historical enclosures and improvements, the Tribunal determined that native title had been extinguished over areas of land or waters covered by some of the proposed mining leases because of the enclosure of the pastoral leases and hence the Tribunal had no jurisdiction to conduct an inquiry in relation to those matters. Although the High Court subsequently decided that enclosures and improvements did not have any further extinguishing effect on native title than had the grant of the pastoral leases (although they may create rights that prevail over native title),[55] the Tribunal had dealt with the jurisdictional challenge based on the law as it existed at the time. This difficulty could have been avoided without the authority of the Federal Court in *Mineralogy*, i.e. if the Tribunal had been able to assume the existence of native title because of the existence of a registered claim.[56]

As a matter of practice, where the Tribunal's jurisdiction is not challenged (which is the situation in virtually all cases), it will proceed with an inquiry unless there is evidence before it which prima facie suggests that the Tribunal lacks or may lack jurisdiction because there is no future act. The above cases demonstrate that, despite the fact that there is a registered native title claim in relation to an area in which it is proposed to grant a mining tenement, this does not necessarily mean that a future act is involved. This does not, in practice, mean in expedited procedure inquiries, for instance, that the Tribunal must, in effect, make a determination about the existence of native title before it can conduct an inquiry.[57] Neither is the existence of the jurisdictional gate based on the existence of a future act often an issue. However, these jurisdictional considerations serve as a salutary reminder that the foundation of the right to negotiate provisions of the NTA is the existence of a future act and the extent to which that future act 'affects' native title.[58]

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[52] *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467.

[53] *Anaconda Nickel Ltd & Ors v Western Australia* [2000] NNTTA 366; (2000) 165 FLR 116 at [17]-[69].

[54] *Western Australia* v *Ward* [2000] FCA 191; 99 FCR 316 at 401-403.

[55] *Western Australia v Ward* [2000] HCA 28; (2002) 213 CLR 1 at 126-131, [179]-[196].

[56] See discussion in *Anaconda Nickel Ltd & Ors v Western Australia* [2000] NNTTA 366; (2000) 165 FLR 116 at 145-149; [56]-[69].

[57] *Andrews v Northern Territory* [2002] NNTTA 170; (2002) 170 FLR 138 at 156-157; [66].

[58] *Andrews v Northern Territory* [2002] NNTTA 170; (2002) 170 FLR 138 at 153-154; [45], [47]. See also *Lardil Peoples v Queensland* (2001) 108 FCR 453 at 476 per Merkel J.

(d) Future act right to negotiate - statistical overview

A statistical overview of the operation of the future act right to negotiate provisions from when they commenced on 1 January 1994 to 30 June 2007 shows the key features to be:[59]

- the overwhelming majority of future act notices under s 29 of the NTA (40,034 out of 40,405 or more than 99%) relate to mineral or petroleum tenements
- the great majority of s 29 notices (35,419 out of 40,405 or 87.7%) have been given in Western Australia
- 32,249 s 29 notices (80.5%) asserted that the expedited procedure applies (mainly exploration or prospecting licences)
- of the s 29 notices which asserted the expedited procedure applies to the future acts and for which the closing date has passed, 63% did not attract an objection application
- of the 10,446 tenements in relation to which expedited procedure objections were made (9,146 applications), the objection was upheld (that is the expedited procedure did not apply) in relation to 1,837 (17.6%) of the tenements (1,530 by consent determination and 307 by normal determination)
- of the mineral or petroleum tenement s 29 notices which did not assert that the expedited procedure applied i.e. 7,785 (19.4% of the total), 273 tenements were cleared for grant where the Tribunal determined the future act may be done or may be done subject to conditions (209 by consent determination), and
- 1,442 s 31 agreements have been lodged with the Tribunal (318 after mediation by the Tribunal) relating to approximately 3,000 tenements.

2. Expedited Procedure

(a) The legislative scheme

The NTA provides that where a Government party gives notice of a future act, the notice may include a statement that 'the Government party considers the act is an act attracting the expedited procedure'.[60]

A native title party may, within a period of four months after the notification day, lodge an objection with the Tribunal against the inclusion of a statement that the Government party considers the act is an act attracting the expedited procedure.[61] If such an objection is lodged, the Tribunal must determine whether the act is an act attracting the expedited procedure.[62] If the Tribunal determines that:

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[59] NNTT Operations Unit – Future act cumulative workload summary 1 January 1994 to 30 June 2007.
[60] *Native Title Act 1993* s 29(7), see also ss 31(1), 32.
[61] *Native Title Act 1993* s 32(3).
[62] *Native Title Act 1993* s 32(4).

- the act attracts the expedited procedure, the Government party may do the act[63]

- the act is not one attracting the expedited procedure, the parties must negotiate in good faith 'with a view to obtaining agreement of each of the native title parties to … the doing of the act' or 'the doing of the act subject to conditions to be complied with by any of the parties'.[64]

Section 237 of the NTA provides that the expedited procedure is attracted if:

- the act *is not likely* to interfere directly with the carrying on of the community or social activities of the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and

- the act *is not likely* to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and

- the act *is not likely* to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned. (emphasis added)

The 1998 amendment to the NTA inserted the current words 'is not likely to' in lieu of the words 'does not', thus incorporating the interpretation of s 237 made by the Tribunal in its test cases on the issue in 1995. [65] In these cases the Tribunal decided the task of the Tribunal was to determine whether the type of interference or disturbance to which s 237 refers was likely to occur, i.e. a predictive assessment was to be made based on the grant of an exploration licence and the exercise of rights conferred by it and that the grantee party would act lawfully within the overall regulatory regime applicable to the grant, principally the *Mining Act* 1978 (WA) and *Aboriginal Heritage Act* 1972 (WA).

In *Re Waljen* Deputy President Seaman found, after receiving further evidence of the regulatory regime under the *Aboriginal Heritage Act 1972* and particularly the 'Guidelines for Aboriginal consultation by Mineral & Petroleum Explorers' which are sent to each grantee, that the protective provisions of that Act were sufficient to ensure that interference with sites of particular significance to the native title party was unlikely. The Full Federal Court in *Dann v Western Australia*[66] disagreed with this interpretation and held that the issue was to be judged not by what was *likely* to happen but what *potentially could happen* if the grantee exercised all the powers available to it. In practical terms the decision in *Dann* meant that in

[63] *Native Title Act 1993* s 32(4).

[64] *Native Title Act 1993* ss 32(5), 31(1)(b).

[65] *Irruntyju-Papulankutja/Broadmeadows Pty Ltd/Western Australia*, NNTT WO95/7, [1995] NNTTA 20 (6 October 1995), Hon P Seaman QC; *Re Irruntyju-Papulankutja Community* (1996) 1 AILR 222 and *Roberta Thomas on behalf of the Waljen People/Western Australia/Sons of Gwalia Ltd & Ors*, NNTT WO95/17, [1995] NNTTA 28 (24 November 1995), Hon P Seaman QC; Re Waljen People (1996) 1 AILR 227.

[66] *Dann v Western Australia* [1997] FCA 332; (1997) 74 FCR 391.

Western Australia, for instance, if there was a site of particular significance within the tenement area, then the expedited procedure was not attracted.[67]

Since the 1998 amendments to the NTA the Federal Court has confirmed that the predictive approach (based on the likelihood of interference or disturbance) is required and that this applies to all three paragraphs of s 237 and to both limbs of s 237(c).[68] This means that the task of the Tribunal is to assess whether, as a matter of fact, the proposed future act is likely to give rise to the interference or disturbance referred to in paragraphs (a), (b) and (c) of s 237. That involves a predictive assessment not confined to a consideration of the legal rights conferred by the grant of the proposed tenement. It is no longer the case that the expedited procedure is to be assessed by reference to what could possibly occur from exploration carried out using the full extent of the rights available under the *Mining Act* but what is likely to occur in the circumstances of each particular case. What is likely to occur is not an assessment based on the balance of probabilities but on whether there is a real chance or risk that the interference or major disturbance will occur.[69] The Federal Court confirmed that a grantee party's intention with regard to its proposed exploration activities was relevant to the question of the likelihood of s 237 interference or disturbance.[70] It also confirmed that a relevant factor is the protective provisions of State based regimes, including for the protection of sites of particular significance to the native title party.[71]

The current approach has generally meant that the Tribunal has found exploration activity is not likely to interfere directly with the community or social activities of a native title party, or interfere with sites of particular significance or cause major disturbance to land. However, this is not an inevitable finding and each case must be assessed on its particular facts.[72]

(b) Expedited procedure experience – Western Australia

In Western Australia, after some experience with objections to the expedited procedure, it became obvious that grantees and native title parties usually wanted to negotiate about whether the objection could be disposed of by agreement. In practice this usually means agreement about heritage protection and withdrawal of the objection where the native title party is satisfied that the agreement meets their concerns in relation to s 237(b) of the NTA. The Tribunal acknowledged the reality of this situation by changing its procedures to allow a period of 16 weeks from the closing date for objections during which the grantee and

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[67] WO95/19 (No 2), *Jack Dann & Ors/Western Australia/GPA Distributors Pty Ltd*, [1997] NNTTA 20 (10 June 1997).

[68] *Little & Ors v Oriole Resources Pty Ltd* [2005] FCAFC 243; (2005) 146 FCR 576 (per French, Stone and Siopis JJ at 586 -589, [41]–[50]); *Smith v Western Australia* (2001) 108 FCR 442 at [23]; *Little v Western Australia* [2001] FCA 1706 at [69].

[69] *Smith v Western Australia* (2001) 108 FCR 442 at [23].

[70] *Little and Ors on behalf of the Badimia People v Oriole Resources Pty Ltd* [2005] FCAFC 243; (2005) 146 FCR 576 at [55]-[57].

[71] *Little v Western Australia* [2001] FCA 1706 at [77]; *Parker on behalf of the Martu Idja Banyjima People v Western Australia* [2007] FCA 1027 at [10]-[14], [18].

[72] For example *Banjo Wurrunmurra and Others on behalf of Bunuba Native Title Claimants; Butcher Cherel and Ors on behalf of the Gooniyandi Native Title Claimants/Western Australia/Bernfried Gunter Wasse, James Ian Stewart, Paul Winston Askins*, NNTT WO04/136 & WO04/137, [2005] NNTTA 90 (2 December 2005) and cases cited in *Champion v Western Australia* [2005] NNTTA 1; (2005) 190 FLR 362 at [77].

native title parties would be given the opportunity to negotiate an agreement.[73] The Western Australian Government and Native Title Representative Bodies ('NTRBs') have supported this process. If no agreement is possible within that time (or any justified extensions) then the matter proceeds to inquiry in the normal way. In changing its procedures, the Tribunal acknowledged that the Federal Court has held that expedited procedure objection inquiries are to be conducted promptly and with expedition[74] or 'as speedily as possible'[75] but considered that because the NTA prefers negotiation over litigation time should be given to resolve matters by agreement where the parties agree to negotiate even within the context of the expedited procedure. Although the Tribunal has been criticised for accepting that expedited procedure inquiries should in a procedural sense be dealt with expeditiously,[76] the Tribunal is applying the approach of the Federal Court which is clearly mandated by the policy as expressed in the Prime Minister's second reading speech (of tight but fair timeframes) and supported by the provisions of the NTA which contain timeframes for various stages of the right to negotiate process.

Some other criticisms have been made of the Tribunal's approach to the administration of the expedited procedure. In 2001 Western Australian NTRBs objected to the promulgation by the Tribunal of guidelines for the acceptance of objections to the expedited procedure. It was said that there was no legal basis for these guidelines.[77] The Tribunal disputed this view. The guidelines were introduced by the Tribunal following comments by Deputy President Franklyn (a former Justice of the Supreme Court of Western Australia).[78] The Tribunal decided that ss 75 and 76 of the NTA and related Regulations were mandatory and required the Form 4 expedited procedure objection application to do more than merely recite the provisions of s 237 before it could be accepted, something which had been a common practice before the guidelines. Deputy President Franklyn said the Form 4 should contain some detail of the material upon which the objector relied as a basis for lodging the objection and areas or sites of particular significance should be identified in some way. The Tribunal took the view that whether any community or social activities or sites of particular significance exist and may be interfered with by prospecting or exploration is something which the native title party (as a registered claimant) will have some knowledge about in order to sustain the objection. The guidelines were developed to facilitate the production of such information to give the other parties notice of what the objection was based on and assist in the conduct of the inquiry in a timely manner.[79]

After receiving submissions on behalf of the Western Australian NTRBs, the guidelines were modified. They still required certain levels of information which went beyond the mere recitation of the sections of the NTA. Although some still assert that these guidelines are

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[73] Information Document – Procedures under the Right to Negotiate (Consolidated September 2004).

[74] *Little v Western Australia* [2001] FCA 1706 at [82]-[85].

[75] *Western Australia v Ward* [1996] 993 FCA 1; (1996) 70 FCR 265 at 278.

[76] David Ritter, 'A sick institution? Diagnosing the Future Act Unit of the National Native Title Tribunal (2002) 7(2), *Australian Indigenous Law Reporter* 1 at 7.

[77] Ritter at 4-6, Tony Corbett and Ciaran O'Faircheallaigh, Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions (2006), *University of WA Law Review* at 160.

[78] *Dixon v Northern Territory* [2001] NNTTA 29; (2001) 166 FLR 29 at 43-44.

[79] NNTT Explanation of Guidelines on Acceptance of Expedited Procedure Objection Applications, 16 October 2001 (as amended to December, 2004).

onerous and create significant problems for native title parties,[80] this is not the case and the reasons given by the native title party in the Form 4 in support of the objection are now largely formulaic. Despite that, applications usually comply with the modified guidelines and are accepted by the Tribunal. While it is the case that evidence of the details of community and social activities and sites of particular significance or major disturbance to land is often not obtained before an objection is lodged, the Tribunal's practice permits a reasonable time for evidence to be gathered after the application is lodged if no agreement is reached.

One other practice probably not anticipated by Parliament is adopted by the Widji native title party in Western Australia,[81] which customarily lodges objections and then attempts to negotiate an agreement. If negotiations are unsuccessful, the group does not comply with the Tribunal's directions or participate in the Tribunal's inquiry. The standard directions for the conduct of an inquiry require the Government party to provide evidence relating to the proposed grant including maps, current and past mining activities and Aboriginal sites on the Register kept under the *Aboriginal Heritage Act 1972* (WA) and location of Aboriginal communities before the native title party's evidence relating to the issues in s 237 is required. Given the practice of the Widji native title party of habitual non-compliance, the order of the directions in Widji objections is reversed and a springing order made which dismisses the objection automatically on non-compliance.[82]

It is reasonable to assume that Parliament when enacting the expedited procedure provisions of the NTA expected that when an objection was lodged there would be evidence readily available to support it and that an inquiry could proceed expeditiously. In practice this has not been the case and the Tribunal has adapted its procedures to the reality of the manner in which the expedited procedure process has evolved in practice. Something akin to a de facto right to negotiate has been incorporated into the procedures to facilitate agreement and reasonable time is allowed after an objection has been lodged for evidence to be gathered where no agreement is possible.

The following statistics give a picture of how the expedited procedure operates in Western Australia and demonstrate that:

- the great majority of matters are resolved by agreement, and
- where objections are the subject of an inquiry it is usual for a finding to be made that the expedited procedure is attracted but there are exceptions demonstrating that each case depends on the nature of the evidence produced.

With respect to contested objections, in 2001-2002 the expedited procedure was held to apply for 10 tenements, in 2002-2003 for 12, in 2003-2004 for 11, in 2005-2006 for 10 and in 2006-2007 for 7. In 2001-2002 the expedited procedure was held not to apply for

[80] Tony Corbett and Ciaran O'Faircheallaigh at 159-160.
[81] NNTT Claim No WC98/27.
[82] *Native Title Act 1993* s 148(b); *Leonne Velickovic on behalf of the Widji People/Western Australia/Frederick Saunders*, NNTT WO05/564, [2006] NNTTA 76 (15 June 2006), Hon C J Sumner.

10 tenements, in 2002-2003 for 7, in 2003-2004 for 3, in 2004-2005 for none, in 2005-2006 for 3 and in 2006-2007 for 7.

The following table[83] helps explain the current situation (including in Western Australia).

Table 13 Objection application outcomes (by tenement) 2005–06

Tenement outcome	NT	QLD	WA	Total 2005–06
Consent determination— expedited procedure applies	0	0	5	5
Consent determination —expedited procedure does not apply	0	0	10	10
Determination —expedited procedure applies	0	0	10	10
Determination—expedited procedure does not apply	0	0	3	3
Dismissed—s 148(a) no jurisdiction*	0	6	14	20
Dismissed—s 148(a) tenement withdrawn*	0	11	108	119
Dismissed—s 148(b)	0	1	128	129
Expedited procedure statement withdrawn—s 31 agreement lodged	0	49	0	49
Objection not accepted	0	1	1	2
Objection withdrawn— agreement	5	48	931	984
Objection withdrawn—no agreement	0	50	78	128
Objection withdrawn prior to acceptance	0	3	64	67
Tenement withdrawn*	0	11	0	11
Tenement withdrawn prior to acceptance*	0	0	3	3
Total	**5**	**180**	**1,355**	**1,540**

* Not counted for output reporting purposes.

It can be seen that in the 2005-2006 financial year in Western Australia objections in relation to 1,355 tenements were finalised. Most significantly, objections in respect of 931 tenements were withdrawn by the objectors because agreements with the grantees about heritage surveys had been reached in the period allowed for negotiations. The number of contested matters (13) is very small.[84]

Another initiative taken in Western Australia between the Government, some NTRBs and peak industry bodies has been the development of Regional Standard Heritage Agreements ('RSHA'). Where such agreements are applicable the Government requires the grantee party to agree to the RSHA before it will give notice asserting that the expedited procedure

[83] National Native Title Tribunal *Annual Report 2005-2006*, p 78.

[84] Statistics prepared for the *2006-2007 NNTT Annual Report* reveal the same pattern. In WA of a total of 885 objections, 507 were resolved by agreement. There were 14 contested matters.

applies. In this situation native title parties who are represented by NTRBs and have agreed to the RSHA do not normally object to the expedited procedure.[85]

(c) Expedited procedure experience - Northern Territory

In 2000, following the failure of its proposals to establish an alternative regime, the Northern Territory Government commenced using the right to negotiate provisions of the NTA including the expedited procedure. Between 6 September 2000 and 30 June 2007, 310 objections were lodged. From 1 February 2002 to 25 March 2003, 81 objection determinations were made, 78 that the expedited procedure was attracted and three that it was not. The Tribunal generally found that the regulatory regime put in place by the Northern Territory to deal with the issues in s 237 were such that the interference and disturbance referred to therein was unlikely to occur from exploration activity.[86] Since 25 March 2003 14 objection applications have been lodged, 13 of which were resolved by agreement and one dismissed because the tenement application was withdrawn.

(d) Expedited procedure experience - Queensland

After initial attempts to introduce an alternative regime the Queensland Government is also now using the right to negotiate provisions of the NTA.[87] It gives notice asserting the expedited procedure is attracted for exploration tenements. It has established Native Title Protection Conditions to deal with the issues in s 237 of the NTA. The Government imposes those conditions on the grant of any exploration tenement if there is no agreement to an alternative approach between the native title and grantee parties to deal with the grant. In practice in Queensland, although a considerable number of objections to the expedited procedure have been lodged, all of them have been resolved without inquiry and determination. Most have been resolved by agreement of the parties which leads to a withdrawal of the statement that the expedited procedure is attracted and lodging of a section 31 agreement (between the Government, grantee and native title parties). From November 2003 to 30 June 2007, 583 objections were lodged and 305 were recorded as resolved by agreement. At 30 June 2007 there were 89 active objections. Most of the other 189 objections were withdrawn by the native title party on the basis that a side agreement between the grantee and native title parties had been entered into or because the native title party had decided not to proceed with the objection.

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[85] *Champion v Western Australia* [2005]NNTTA 1; (2005) 190 FLR 362 AT [15]-[35].

[86] The major test cases were *Silver v Northern Territory of Australia* [2002] NNTTA 18; (2002) 169 FLR 1, J Sosso and *Gabriel Hazelbane and Others on behalf of the Warai and Angwinmil Peoples/Northern Territory/Rodney Johnston*, NNTT DO01/40 & DO01/41, [2002] NNTTA 34 (27 March 2002), Hon EM Franklyn QC. An example of a case where the expedited procedure was not attracted is *Ben Ward and Others on behalf of the Miriuwung & Gajerrong People/Ausquest Limited/Northern Territory*, NNTT DO01/63, [2002] NNTTA 41 (8 April 2002), J Sosso.

[87] For example, *Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland)*, [2006] NNTTA 3, J Sosso, 30 January 2006. See above, fn 5.

3. Future Act Determination Applications

(a) Good faith negotiations

Section 31 of the NTA sets out the negotiating procedures to be followed in circumstances where the expedited procedure does not apply:

> **Normal negotiation procedure Government party to negotiate**
>
> (1) Unless the notice includes a statement that the Government party considers the act attracts the expedited procedure:
>
> (a) the Government party must give all native title parties an opportunity to make submissions to it, in writing or orally, regarding the act; and
>
> (b) the negotiation parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:
>
> (i) the doing of the act; or
>
> (ii) the doing of the act subject to conditions to be complied with by any of the parties.
>
> Note: The native title parties are set out in paragraphs 29(2)(a) and (b) and section 30. If they include a registered native title claimant, the agreement will bind all of the persons in the native title claim group concerned: see subsection 41(2).
>
> *Negotiation in good faith*
>
> (2) If any of the negotiation parties refuses or fails to negotiate as mentioned in paragraph (1)(b) about matters unrelated to the effect of the act on the registered native title rights and interests of the native title parties, this does not mean that the negotiation party has not negotiated in good faith for the purposes of that paragraph.
>
> *Arbitral body to assist in negotiations*
>
> (3) If any of the negotiation parties requests the arbitral body to do so, the arbitral body must mediate among the parties to assist in obtaining their agreement.

The 1998 amendments to this section of the NTA imposed the obligation to negotiate in good faith on all parties (not just the Government party) and inserted subsection 36(2).

The Tribunal originally found that it was not empowered to make a decision that the Government party had not negotiated in good faith and dismiss a future act determination application on the basis that the Tribunal did not have jurisdiction to hear the application. The Tribunal's view was that such an issue would need to be dealt with by the Federal Court.[88] This decision was overturned by the Federal Court which held that it was a jurisdictional precondition to the conduct of a future act determination inquiry that the Government had negotiated in good faith;[89] a position confirmed in respect of both the Government and grantee parties by the 1998 amendments to the NTA.[90] The Tribunal then decided, in the test case of *Western Australia v Taylor* (the *Njamal* case), that the Western Australian Government had not negotiated in good faith based on its usual practice and

[88] *Minister for Mines (WA)/Johnson Taylor on behalf of the Njamal people/Garry Mullan*, NNTT WF96/4, [1996] NNTTA 10 (8 March 1996), Hon. C.J. Sumner, citing Olney J sitting as a Deputy President of the Tribunal in *Re Associated Gold Fields NL and Another* [1995] NNTTA 3; (1995) 125 FLR 1.

[89] *Walley & Ors v Western Australia & Ors* [1996] FCA 490; (1996) 67 FCR 366.

[90] *Native Title Act 1993* s 36(2).

dismissed the future act determination application.[91] The consequence of this decision was that the Western Australian Government could not proceed with a large number of future act determination applications that had already been lodged until it had established a protocol for negotiation in good faith and complied with its obligation. The *Njamal* case set out in detail the principles involved in negotiation in good faith. In particular, the Tribunal decided that the issue must be judged by reference to the negotiating behaviour of the parties overall and there is an overarching obligation to act both honestly and reasonably in an attempt to reach agreement.[92]

Subsequent Federal Court decisions confirmed the Tribunal's approach with the following exception. The Tribunal found in *Njamal*[93] that negotiation in good faith required the Government party to make all reasonable efforts to negotiate and reach agreement with the native title parties (it interpreted the obligation in this way by reference to the Preamble of the NTA). The Tribunal then went on to say that making a reasonable effort involves the Government party taking necessary procedural steps as well as making realistic substantive offers and concessions in the circumstances.[94] In *Strickland & Anor v Western Australia*[95] the Federal Court disagreed with the Tribunal and said the reference to 'every reasonable effort' being made to secure the agreement of the native title parties is no grounds for reading down the express words of s 31(1)(b) itself. It held that it was not for the Tribunal to assess the reasonableness of offers made during the negotiations. Subsequent Federal Court decisions have modified this approach such that, while there is no obligation on a Government party (and now grantee party) to make reasonable substantive offers or concessions or any obligation on the Tribunal to consider whether they are reasonable or not, the Tribunal may do so if it assists in the overall assessment of whether the Government party (and now grantee party) has negotiated in good faith.[96]

In considering whether negotiations in good faith have occurred it is important to note that there is no requirement to negotiate at large but only in relation to matters related to the effect of the act on the registered native title rights and interests of the native title party .[97] The Tribunal has interpreted s 31(2) to mean that the obligation to negotiate in good faith extends to all matters referred to in s 39(1)(a) of the NTA on the basis that it would be anomalous if negotiations in good faith was only confined to s 39(1)(a)(i) (effect on the enjoyment of registered native title rights and interests) but a determination after inquiry could cover potentially broader issues referred to in other parts of s 39(1)(a) such as the

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[91] *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211, Hon. C.J. Sumner (sometimes referred to as *Njamal*).

[92] *Western Australia v Taylor* at 217-225. *Western Australia v Dimer & Ors* [2000] NNTTA 290, P.M. Lane; (2000) 163 FLR 426. *Placer (Granny Smith) Pty Ltd & Anor v Western Australia* [1999] NNTTA 361, Hon CJ Sumner; (1999) 163 FLR 87 at [30].

[93] *Western Australia v Taylor* at 225.

[94] *Minister for Lands, State of Western Australia/Strickland (Maduwongga) & Ors*, NNTT WF97/4, [1997] NNTTA 31 (10 December 1997), Hon. C. J. Sumner (Reported—*Re Minister for Lands, State of Western Australia and Marjorie Strickland & Ors* (1997) 3 AILR 260 at 21).

[95] (1998) 85 FCR 303.

[96] *Brownley v Western Australia* [1999] FCA 1139; (1999) 95 FCR 152; *Walley v Western Australia* [1999] FCA 3; (1999) 87 FCR 565 at 577 [15].

[97] *Native Title Act 1993* s 31(2), *Walley v Western Australia* [1999] FCA 3; (1999) 87 FCR 565 at 577 [14]; *Brownley v Western Australia* at [24].

effect on the way of life, culture and traditions or on the development of the social, cultural and economic structures of the native title party for instance.[98]

With the exception of negotiations about s 33 royalty type payments there is probably no requirement to negotiate about matters which exceed the legal rights of a native title party.[99] While there is an obligation to consider any proposals for s 33 royalty type payments[100] made by a native title party, there is no obligation to agree to them and a grantee party may propose an alternative means of providing for compensation for the effect of the future act.

The Government party is not obliged to negotiate in good faith about payments of compensation when a State Parliament has used the provisions of s 24MD(4)(b) of the NTA to transfer responsibility for the payment of compensation to a grantee party, as has happened in Western Australia.[101]

While there must be genuine efforts made to reach agreement, there is no obligation on a party to accept the other party's position or reach agreement.[102]

(b) Matters relevant to a future act determination

As noted earlier, if at least six months have passed since the notification day and an agreement is not made in relation to the future act, any negotiating party may apply to the Tribunal for a determination that the future act must not be done, may be done, or may be done subject to conditions to be complied with by any of the parties.[103]

Subsection 39(1) sets out the matters which the Tribunal must take into account when making a future act determination.

> **'39 Criteria for making arbitral body determinations**
>
> (1) In making its determination, the arbitral body must take into account the following:
>
> (a) the effect of the act on:
>
> (i) the enjoyment by the native title parties of their registered native title rights and interests; and
>
> (ii) the way of life, culture and traditions of any of those parties; and
>
> (iii) the development of the social, cultural and economic structures of any of those parties; and
>
> (iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and

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[98] *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100, Hon C J Sumner; (2005) 196 FLR 319 at [31]-[35].

[99] *Risk v Williamson*[1998] FCA 640; (1998) 87 FCR 202 at 224; *Griffin Coal* at [36]-[47].

[100] *Brownley v Western Australia* at 168-170 [48]-[56]; *Griffin Coal* at [39]-[47] and cases cited therein.

[101] *Mining Act 1978* (WA) s 125A, *Petroleum Act* 1967 (WA) s 24A - *Gulliver Productions Pty Ltd and Others v Western Desert Lands Aboriginal Corporation and Others* [2005] NNTTA 88, Hon C J Sumner; (2005) 196 FLR 52 at [38]-[48]; - *Griffin Coal* at [38].

[102] *Western Australia v Taylor* at 222-223; *Strickland v Western Australia* at 312; *Western Australia v Dimer* at 41.

[103] *Native Title Act 1993* ss 35, 38

(v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions;

(b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;

(c) the economic or other significance of the act to Australia, the State or Territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area;

(e) any public interest in the doing of the act;

(f) any other matter that the arbitral body considers relevant.'

The Tribunal must also take into account:

- any existing non-native title rights and interests and existing use of the land or waters concerned by persons other than the native title parties,[104] and
- any agreements between the negotiation parties.[105]

Importantly, although an agreement following good faith negotiations can include payments worked out by reference to the amount of profits made, any income derived or any things produced by a grantee party (royalty type payments)[106] the Tribunal is prohibited from imposing a condition for such payments in a future act determination.[107]

The Tribunal cannot actually determine compensation for the effect of the act on native title or make the payment of compensation a condition of a future act determination. Prior to technical amendments made to the NTA operating from 1 September 2007 any condition for 'compensation' payments was limited to the payment of an amount into trust pending a final determination of native title and compensation by the Federal Court.[108] This provision has now been amended to replace the provision for a monetary trust condition with one empowering the Tribunal to impose a condition for an amount to be secured by a bank guarantee.[109]

In 1996 the Tribunal established two panels of three Members to deal with test cases relating to future act determination applications:

- *Re Koara People* [1996] NNTTA 31; (1996) 132 FLR 73 (Deputy President Paul Seaman QC, Members Smith & McDaniel) (*Koara No 1*)
- *Western Australia v Thomas* [1996] NNTTA 30; (1996) 133 FLR 124 (Members Sumner, Neate & O'Neill) (some times referred to as *Waljen*)

[104] *Native Title Act 1993* s 39(2).
[105] *Native Title Act 1993* s 39(4).
[106] *Native Title Act 1993* s 33.
[107] *Native Title Act 1993* s 38(2).
[108] *Native Title Act 1993* s 41(3).
[109] *Native Title Amendment (Technical Amendments) Act 2007*, Schedule 1, Item 59. *Native Title Act* 1993 s 41(3)

Together these cases provided a comprehensive overview of the issues relating to future act determination applications. Because it is an administrative body, the Tribunal decided that, rather than developing the law in the traditional common law manner by only dealing with the specific issues before it, it would be of benefit to provide guidance in relation to the law and the right to negotiate process generally. Aspects of the *Koara No.1* decision were reversed by the Federal Court on appeal and remitted to the Tribunal:

- *Evans & Another v Western Australia & Others* [1997] FCA 741; (1997) 77 FCR 193

In particular, the Federal Court held that the Tribunal could not make a determination with a condition that required a period of further negotiation in the circumstances where a grantee party initially only obtained a mining lease for exploration purposes but subsequently gave notice of its intention to establish a productive mine, a practice common in Western Australia at the time. The Federal Court said a determination must be final and deal with all issues, something which the Tribunal's conditions mandating further negotiation did not achieve. On remittal the Tribunal received additional evidence and made a determination that the mining leases could be granted with conditions:

- *Minister for Mines (WA) v Evans & Ors* [1998] NNTTA 5; (1998) 163 FLR 274 (Members Sumner, Smith and McDaniel) (*Koara No 2*)

See Appendix 1 for the conditions to deal with the situation if productive mining was to proceed. Apart from provisions for compensation these conditions cover many of the topics which are customarily now included in right to negotiate agreements.

(c) Consent determinations

Although there is no specific provision in the NTA relating to determinations by consent, the Tribunal has decided that it has the power to make future act determinations with the consent of all three negotiation parties.[110] Consent determinations have been made:

- where a hearing has commenced and evidence been produced
- when there are logistical difficulties in obtaining the signatures of all persons who are named as part of the applicant for native title (i.e. the registered native title claimant and native title party) to a s 31 agreement (referred to as a State Deed in Western Australia)
- where there is difficulty obtaining independent witnesses to signatures, or
- where there are difficulties obtaining evidence that a person named as part of the applicant may be deceased.

The Tribunal has also made a consent determination where there are persons named as part of the applicant who have refused to sign a State Deed even though the native title party collectively has reached agreement that the grant can be made.[111] Each individual person

[110] *Monkey Mia Dolphin Resort Pty Ltd v Western Australia*; [2001] NNTTA 50, Hon C J Sumner; (2001) 164 FLR 361 at 12-14 [17]-[18].

[111] *Monkey Mia* at 14-16 [19]-[22]; *Foster and Others v Copper Strike Ltd and Another* [2006] NNTTA 61, J Sosso; (2006) 200 FLR 182.

named as part of the registered native title claimant is not a native title party but the registered native title claimant (and native title party) is all the named persons acting collectively.[112]

The Tribunal will not make a consent determination unless satisfied that the native title party has consented to the determination in accordance with its appropriate decision making processes (that is according to traditional law and custom or as agreed).[113]

Consent determinations can usually be obtained quickly when compared with the process of signature collection for a State Deed particularly where there are large numbers of named applicants dispersed in remote locations. The evidentiary requirements for the consent are not burdensome and ordinarily the Tribunal will accept the undertaking from solicitors acting for the claimant that the consent has been properly given, especially when the solicitor is engaged by a NTRB.[114] Even though the Tribunal's jurisdictional limits constrain what condition can be attached to a determination, the Tribunal has worked with the parties to craft solutions that both give effect to the agreement reached but respect those limits.[115] The consent determination procedure provides a simple effective means of giving effect to agreements between the parties and significantly reduces the resources that NTRBs would otherwise need to devote to obtaining signatures.

This process has now become a significant feature of the Tribunal's work. In 2005-2006, of 74 future act determinations made in Western Australia, Queensland and South Australia (counted by tenement rather than s. 35 application), 68 were made by consent (65 of them were made in Western Australia).[116] In 2006-2007 of 175 future act determinations made in Western Australia and Queensland (counted by tenement), 174 were made by consent (169 of them were made in Western Australia).

4. National Native Title Tribunal's future act procedures

(a) Overview

Some criticism has been made that the Tribunal is overly formal, legalistic and bureaucratic in the manner in which it performs its functions.[117] This critique largely ignores the fact that the Tribunal in its adjudication role in expedited procedure and future act determination inquiries must act on probative evidence and ensure that procedural fairness is accorded to all parties.

Section 109 of the NTA says the Tribunal:

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[112] *Monkey Mia* at 14-16 [19]-[22]; *Mt Gingee Munjie v Victoria and Others* [2003] NNTTA 125, Hon C J Sumner; (2003) 182 FLR 375.

[113] *Native Title Act 1993* s 251B.

[114] *Albert Little and Others on behalf of Badimia/Tantalum Australia NL and Mawson West Ltd/State of Western Australia*, NNTT WF06/10, [2006] NNTTA 22 (10 March 2006), Hon C J Sumner at [11].

[115] *Enmic Pty Ltd v Borinelli and Others* [2006] NNTTA 29, Hon C J Sumner; (2006) 199 FLR 38.

[116] National Native Title Tribunal *Annual Report 2005-2006,* p 76.

[117] David Ritter, 'A sick institution? Diagnosing the Future Act Unit of the National Native Title Tribunal (2002) 7(2), *Australian Indigenous Law Reporter* 1 at 4 to 5.

- must pursue the objective of carrying out its functions in a fair, just, economical, informal and prompt way

- may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any party to the proceedings, and

- is not bound by technicalities, legal forms or rules of evidence.

While there is a natural tension between carrying out its functions in an economical, informal and prompt way as well as being fair and just to all parties, the Tribunal has in a procedural sense attempted to fulfil the requirements of s 109 by adopting an informal and non-technical approach to carrying out its functions. The Tribunal has avoided as far as possible sitting in a formal Court room, particularly where Indigenous witnesses are involved, and usually arranges for hearings to take place in a conference room setting where all participants, including native title party witnesses, are seated around a table. Arrangements for substantive hearings are made in consultation with the parties and attempts made in particular to address any concerns raised by the native title party.

When hearings have been conducted 'on country' procedures have been developed to take evidence in a meeting environment where the evidence given has been accepted without the need for speakers to be sworn but an expectation expressed by the Tribunal that people will speak the truth.[118] On occasions, in my experience, evidence has been taken and recorded on country under bough huts or in creek beds without the trappings usually associated with a tribunal. Extensive use is made of telephone conferences, including permitting the use of mobile phones, despite the inconvenience which this sometimes causes. At the present time it is usual for most inquiries (expedited procedure or future act determination) to be conducted on the papers without the need to resort to oral hearings. Almost always this is done with the consent of the parties.

While the hearings usually commence and are generally conducted in public,[119] the Tribunal's procedures, including directions given for the production of evidence, make it clear that evidence, particularly that of a culturally sensitive nature, can be the subject of non-disclosure directions[120] and the hearing can be conducted in private.[121] Although the statutory provisions in the NTA are not identical to those in the *Federal Court of Australia Act* 1976 (Cwlth), the Tribunal has generally followed the principles espoused by the Full Federal Court in *Western Australia v Ward*[122] under that Act. This has meant that not all requests for confidentiality by native title parties have been agreed to. Confidentiality orders were not justified in the following circumstances:

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[118] *Re Smith and Others* [1995] NNTTA 31; (1995) 128 FLR 300.

[119] *Native Title Act 1993* s 154.

[120] *Native Title Act 1993* s 155.

[121] *Native Title Act 1993* s 154(3). *Irruntyju-Papulankutja Community/Western Australia/Broadmeadow Pty Ltd*, NNTT WO95/7, [1995] NNTTA 20 (6 October 1995), Hon P Seaman QC.

[122] *Western Australia v Ward* [1997] FCA 585; (1997) 76 FCR 492**;** *Linda Champion/Maincoast,* NNTT WO04/389, [2005] NNTTA 35 (30 May 2005), Hon C J Sumner.

- for tactical reasons where there are overlapping claims and a dispute between different native title parties[123]

- where the direction proposed restricted evidence being taken but not recorded in any way and not being provided to the Federal Court (for instance, if an appeal were lodged)[124]

- where the direction proposed that restricted evidence not be made available to the Federal Court for the purposes of the claim application[125]

- where one faction of a native title party sought to give evidence in the absence of members of the other faction.[126]

Cross-examination is only permitted by leave which may be withdrawn.[127] Cross-examination was permitted by Deputy President Seaman in the *Irruntyju-Papulankutja* test case[128] on expedited procedure objections on the basis that it was the first hearing of its kind; the concise fashion in which counsel were conducting their cases; and the understanding of cultural concerns demonstrated by counsel for the Government party. The Tribunal's authority to grant leave to cross-examine will be exercised taking account of the cultural and customary concerns of the native title party and also the possible prejudice to other parties if the cross-examination is not permitted.[129]

Cross-examination has normally been allowed where its purpose is to elicit information or seek clarification of evidence.[130] There is no presumption in favour of cross-examination, and the Tribunal has refused leave on the basis that the inquiry was an expedited procedure inquiry and that information elicited by cross-examination was not going to be fundamental to the Tribunal's capacity to make a determination. The Tribunal did not see any need to permit cross-examination of native title party witnesses for the purpose of testing the credibility of witnesses, dealing with contrary evidence to be produced by other parties or for the purposes of clarifying evidence.[131] In my experience no cross–examination of an Indigenous witness has occurred in an oppressive manner or which would be contrary to their cultural or customary concerns.

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[123] *Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People; Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families; Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga) People*, NNTT WF97/4, [1998] NNTTA 2 (20 February 1998), Hon C J Sumner.

[124] *Western Australia v Thomas* [1999] NNTTA 99, Hon C J Sumner; (1999) 164 FLR 120 (*Anaconda 1*).

[125] *Yallourn Energy Pty Ltd v Bull* [1999] NNTTA 237, Hon CJ Sumner; (1999) 170 FLR 369.

[126] *Summons v Victoria and Others* [2003] NNTTA 66 Hon C J Sumner; (2003) 176 FLR 1.

[127] *Native Title Act 1993* s 156(5).

[128] *Irruntyju-Papulankutja Community/Western Australia/ Broadmeadow Pty Ltd*, NNTT WO95/7, [1995] NNTTA 20 (6 October 1995), Hon P Seaman QC.

[129] *Native Title Act 1993* s 109(2).

[130] *Re Smith and Others* [1995] NNTTA 31, Hon. C.J. Sumner; (1995) 128 FLR 300.

[131] *Goolburthunoo (Waljen) People/Western Australia/Acacia Resources Ltd; Mining Corporation of Australia Ltd; Sons of Gwalia Ltd*, NNTT WO96/12, [1996] NNTTA 23 (13 June 1966) K. Wilson.

(b) Case Study - the Burrup Peninsula case

Although most future act determination applications have involved the grant of mining tenements some have dealt with the compulsory acquisition of native title rights and interests for the benefit of third parties.[132]

One of the most important cases was the proposal of the Western Australian Government to compulsorily acquire native title rights and interests on the Burrup Peninsula (near Karratha) for the purposes of an industrial estate. There were three registered claims which overlapped the area and, because agreement had only been reached with two of them, the Tribunal was required to conduct an inquiry. The Tribunal also conducted a s 31 mediation by a Member who was not involved in the inquiry. The Tribunal decided that the Government party had negotiated in good faith with the native title party with whom agreement had not been reached.[133] A hearing of the substantive issues was conducted on country but prior to the making of a determination a substantial agreement was entered into and the future act determination application was taken to be withdrawn.[134]

One interesting feature of this case was that, over the objection of the Western Australian Government, the Tribunal advertised for submissions from the public in relation to two of the criteria in s 39 of NTA namely the economic or other significance and public interest in the doing of the act.[135] The Tribunal also rejected a submission from the Government party that the public submissions should only be taken into account as evidence of the opinions held and not as proof of their contents unless the content were verified on oath and the Government party given an opportunity to seek leave to cross-examine. The submissions were received into evidence for whatever purpose the Tribunal considered appropriate.[136] The Tribunal observed that, as an administrative body, it was required as far as possible to carry out its functions in a non adversarial manner and that it was customary to receive evidence (unless clearly irrelevant) and then make decisions about its weight and relevance after receiving parties' submissions on it. Parliament has said that the Tribunal is capable of making judgements of this kind without resorting to technicalities.[137] The Tribunal said it was normally entitled to accept documents as evidence of the facts referred to therein while noting that evidence which is central to a decision will need to be scrutinised more carefully than evidence of a peripheral nature. If the documents reveal a dispute critical to any findings of fact them oral evidence and cross-examination may be needed to help resolve it.[138]

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[132] For example *Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People and Others*, NNTT WF97/4, [1997] NNTTA 31 (10 December 1997) (good faith decision); *Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People and Others*, NNTT WF97/4, [1998] NNTTA 2 (20 February 1998), Hon C J Sumner (substantive future act determination).

[133] *Western Australia v Daniel* [2002] NNTTA 230, Hon CJ Sumner; (2002) 172 FLR 168 ('Burrup Good Faith')

[134] *Western Australia/David Daniel & Ors (Ngarluma and Yindjibarndi and Others,* NNTT WF02/17, WF02/18, WF02/27, [2003] NNTTA 4 (21 January 2003), Hon C J Sumner ('*Burrup*') at [14]-[16].

[135] *Burrup* 21 January 2003 at [24]-[31].

[136] *Burrup* 21 January 2003 at [27]-[28].

[137] *Native Title Act 1993* s 109(1) and (3).

[138] *Burrup* 21 January 2003 at [27]-[29].

5. Criticisms of aspects of the future act scheme

(a) Adequacy of negotiated agreements

There has been recent publicity of Professor Ciaran O'Faircheallaigh's criticism of the adequacy of agreements entered into between Aboriginal people and mining companies.

An article in *The Australian* newspaper referred to a five year detailed examination by Prof. O'Faircheallaigh of 45 mining company contracts with Indigenous people which failed to deliver significant outcomes for the majority of Indigenous people.[139] The story drew on a number of studies and articles written by Prof. O'Faircheallaigh over the past few years.[140] The article quoted Prof. O'Faircheallaigh as saying that his analysis of the agreements had found that a quarter were strong agreements, another quarter delivered minor benefits and half were basket cases. The following points (among others) were made.

- Many agreements were poorly constructed and deprived Aborigines of a share of the resources boom.
- Agreements provided Aboriginal people some ability to control environmental damage but this rarely happened.
- A large number of agreements offered little by way of heritage protection.
- Agreements often required Aboriginal landowners to suspend or surrender native title rights.
- There was a lack of resources available to deal with the complexity of land use agreements.
- In NSW, some agreements between local Indigenous parties and mining companies had offered a total of less than $100,000 to local Indigenous groups over the life of a highly profitable mining operation.
- The successors to Anaconda Nickel in Western Australia have reneged on an agreement to pay $1 million per annum to native title claimants.

The arguments have surfaced in a number of media stories. For example on ABC Radio, Prof. O'Faircheallaigh said:[141]

- a quarter of the agreements should not have been signed;

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[139] Victoria Laurie, *The Australian*, 30 June 2007 'Land use contracts fail to deliver'.

[140] Ciaran O'Faircheallaigh '*Native Title and Agreement Making in the Mining Industry: Focussing on Outcomes for Indigenous Peoples*', Land, Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, pps 6-10; Ciaran O'Faircheallaigh & Tony Corbett, *Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements*, November 2005, Environmental Politics, Vol.14, No.5, 629-647; O'Faircheallaigh C, *Creating* Opportunities for Positive Engagement: Aboriginal People, Government and Resource Development in Australia (unpublished); Ciaran O'Faircheallaigh, Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economy or 'Business as Usual'?, March 2006, *Australian Journal of Political Science*, Vol. 41, No. 1, pp. 1-22.

[141] ABC AM Program, 30 January 2007.

- a lot of the weakest agreements were negotiated under the NTA;
- the NTA puts Aboriginal people in a weak negotiating position because after six months the mining company can go to the Tribunal for a determination; and
- over the last 10 years the Tribunal has allowed mining in 16 cases and companies know that if they go to the Tribunal they will get an outcome good for the companies.

The criticisms of the Tribunal are addressed in the next part of the paper.

With respect to the effectiveness of the right to negotiate scheme under the NTA, the most concern arises from the assertion that agreements under the right to negotiate are generally weaker than others. This could readily be explained if this conclusion had been reached by comparing right to negotiate agreements with those under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) where the grants occur over Aboriginal freehold land and there are certain veto rights. However, Prof. O'Faircheallaigh asserts that right to negotiate agreements are even weaker than policy-based agreements. The argument appears to be that mining companies are prepared to offer better agreements because they have good corporate citizen policies than under negotiations they are legally required to undertake under the right to negotiate provisions of the NTA. On the face of it this assertion is questionable. It points to a possible failure of Prof. O'Faircheallaigh to compare like with like. Because of confidentiality provisions, the detail of the agreements surveyed is not available.

An explanation for his conclusion might be that there are different companies involved. Those that adopt a policy-based approach don't need to resort to the right to negotiate because they are prepared voluntarily to negotiate beneficial agreements. The less cooperative and perhaps smaller companies take a harder line. One would also expect the size of the company, its financial resources and the nature of the project (marginal or otherwise) to be a relevant factor. With respect to agreements negotiated under the right to negotiate procedures, some companies may take the view that the native title parties have no or only a limited legal entitlement to compensation for the effect of exploration or mining on their registered native title rights.

Prof. O'Faircheallaigh's analysis may also not take account of the aspirations of different native title parties who may not all want the same thing from an agreement. Some may prefer immediate, lower value returns to staged benefit payments or community development commitments.

The following comments can be made about Professor O'Faircheallaigh's criticism of mining agreements with Aboriginal people:

(1) There is likely to be a difference between agreements negotiated because of the different legal regimes under the *Aboriginal Land Rights (Northern Territory) Act 1976* where freehold title has been granted and a veto applies, and under the NTA where for instance native title has not been determined or non-exclusive native title has been determined.

(2) The analysis does not seem to take account of the legal environment under the NTA and particularly (as discussed above) whether there is a future act involved and if so, the extent to which the grant of the mining lease will affect native title generally or particular native title rights and interests.

(3) For the reasons outlined above the law covering agreements made under the right to negotiate means that there is a strong incentive on native title parties to reach agreement, particularly because royalty type payments can be voluntarily agreed (s 33(1)) but can not be determined as a condition of a determination (s 38(2)) and the Tribunal cannot impose a condition determining compensation but (since the 2007 amendments) only a bank guarantee condition as security for a future determination of compensation (s 41(3)).

(4) Prof. O'Faircheallaigh makes no comparison between the agreements reached and legal entitlements under the NTA particularly in relation to compensation (see discussion below).

(5) The analysis does not appear to distinguish between agreements involving large projects and those involving small projects, or take into account the extent of native title rights and the evidence of them in the particular locality.

(6) Prof. O'Faircheallaigh makes no analysis of agreements made prior to the introduction of the NTA (when there was no right to negotiate or potential legal entitlement to compensation) and afterwards. It is difficult to imagine some of the policy-based agreements being entered into before the decision of the High Court in *Mabo (No 2)*[142] and the NTA. *Mabo (No 2)* and the NTA introduced rights which have given Aboriginal people a place at the table and imposed an obligation on governments and mining companies to negotiate with registered claimants and determined holders of native title if they want to ensure the future act will be valid. The right to negotiate process has provided a foundation upon which agreements which may exceed legal entitlements under the NTA can be negotiated. Since the High Court decision in *Mabo No 2* and NTA there have been a number of substantial mining agreements (eg. Century Zinc (Qld), The Argyle agreement (WA) [an ILUA which primarily deals with mining] and Yandi Land Use Agreement (WA)) which may not have been negotiated without the legal framework of the NTA.

The difficulty with Prof. O'Faircheallaigh's approach is that his analysis seems to be based on what he considers to be an ideal agreement in the best negotiating environment, without reference to the legal entitlements which a registered claimant group or determined native title holder may or may not have to compensation for the extinguishment of native title (which occurs if there is the compulsory acquisition of native title rights and interests) or impairment of native title (in the case of mining tenements).[143]

Since the judgment in *Mabo (No 2)* many mining companies (particularly the large ones such as Rio Tinto and BHP Billiton) have been prepared to provide substantial benefits to holders

[142] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.
[143] See discussion of Compensation below.

(or claimants) of native title in order to gain access to land. Not all mining or exploration companies are as large as these companies and, particularly in Western Australia, many smaller companies are engaged in mining or exploration and there are many individual prospectors. In the absence of judicial authority on the topic, it appears highly likely that the negotiated benefits in many cases exceed the legal entitlement to compensation. Negotiators for native title parties should not fall into the trap of assuming that benefits offered by large mining companies will be on the table in all cases. Rather they should enter the negotiations bearing in mind which grantee company is involved, the nature and size of the project including whether it involves exploration or mining and the effect of the project on native title. An analysis of the *Griffin Coal* determination (see below)[144] points to some of the issues which need to be considered in negotiations. It is legitimate to start negotiations based on an industry standard or with an ideal position in mind, but this approach may not be applicable in all circumstances and may need to be modified by NTRB negotiators in the interests of their clients to get the best deal available in the circumstances.

(b) Tribunal inquiries

Tony Corbett and Ciaran O'Faircheallaigh have expanded on the argument that the approach of the Tribunal to its arbitral inquiry functions places a native title party in a lesser bargaining position in negotiations.[145] This has turned into an allegation from Prof. O'Faircheallaigh that the Tribunal 'is heavily biased against Aboriginal people and biased in favour of mining companies'[146] The Corbett/O'Faircheallaigh article draws on previous criticism of the Tribunal in relation to the expedited procedure.[147] The article says that:

- there are strong incentives for native title parties to negotiate agreements because, if the matter goes to arbitration, the Tribunal cannot determine royalty type payments; and
- there is no incentive on grantee parties to reach agreement because in practice the Tribunal does not decline requests for mining tenements to be granted (the bias allegation).

The first point is accepted for the reasons analysed elsewhere in this paper. There is no doubt that the NTA generally favours negotiation and mediation over litigation and the compensation provisions of the NTA (based on the similar compensable interest test i.e. what freeholders might get under the relevant mining legislation – see below) provide significant incentives for agreement to be reached rather than resort to a Tribunal arbitral inquiry.

The second point cannot be accepted without further analysis of the reasons for the Tribunal declining to make determinations that the future act may not be done.

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[144] *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100; (2005) 196 FLR 319; *The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia*, NNTT WF05/10, [2006] NNTTA 19 (28 February 2006).

[145] Tony Corbett & Ciaran O'Faircheallaigh 'Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions' (2006) 33 *UWAL Rev* p 153.

[146] Victoria Lawrie, "Native title arbitrator 'biased' against Aborigines" *The Australian*, 21 May 2007, p 6.

[147] David Ritter, 'A sick institution? Diagnosing the Future Act Unit of the National Native Title Tribunal (2002) 7(2), *Australian Indigenous Law Reporter* 1 at 7. Richard Bartlett, 'Dispossession by the National Native Title Tribunal, *Western Australia Law Review* Vol 26, July 1996, 108..

At the outset it should be noted that most Aboriginal people are not opposed to mining and want agreements, something that is recognised by Prof. O'Faircheallaigh in a number of articles.[148] The substantial number of future act consent determinations made by the Tribunal and agreements about the expedited procedure in WA is further evidence of this position. Most of the Tribunal's inquiries have involved a situation where the native title party was not totally opposed to mining or was only opposed if conditions satisfactory to them could not be imposed.

As discussed above it is fundamental to any examination of the Corbett/O'Faircheallaigh position to recognise that a right to negotiate inquiry is based on the existence of a future act, i.e. one which 'affects' native title. Central to any arbitral inquiry is the effect of exploration or mining on the enjoyment of native title rights and interests and other matters such as sites of significance referred to in s 39(1)(a) of the NTA. It is not open to the Tribunal to make a determination that the act may not be done unless there is evidence which demonstrates the effect of the act on the enjoyment by the native title parties of their registered native title rights and interest and the other specified matters.

Much of the Corbett/O'Faircheallaigh criticism of the Tribunal stems from a failure to recognise that the Tribunal must act on the basis of evidence before it, usually provided by the parties to an inquiry. The requirements were explained in *Western Australia v Thomas* in and summarised as follows: [149]

> '(1) The Tribunal's determination must be based on logically probative evidence and by application of the law.
>
> (2) The Act recognises the interests of the negotiation parties in the outcome of the inquiry and gives them various procedural rights, including a reasonable opportunity to present their case.
>
> (3) There is no onus of proof as such but there is a common sense approach to evidence which in practical terms means that parties will produce evidence to support their contentions, especially when the facts are peculiarly within their own knowledge. Ordinarily the parties have the primary responsibility for presenting evidence and, in general, if they fail to do so, they cannot complain if the Tribunal gives little or no weight to their contentions: see *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356-358 per Woodward J; *Ward v Western Australia* (1996) 69 FCR 208 at 215-217 per Carr J.
>
> (4) Although the Tribunal may conduct its own inquiries and obtain evidence itself, it is not generally required to do so and, as a matter of general practice where parties are represented before the Tribunal, would not do so. In other words, the Tribunal is not required as a matter of general practice to make out a party's case for it where that party chooses not to produce relevant evidence.
>
> (5) The Tribunal is able to suggest to the parties other evidence which might be obtained and the consequences of not doing so. …'

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[148] For example Aborigines, Mining Companies & the State in Contemporary Australia: A new political economy or 'Business as Usual'.' Ciaran O'Faircheallaigh, *Australian Journal of Political Science* Vol 41, No 1, March 2007 - 'It follows that Aboriginal people are often not opposed to mineral development in principle and may indeed strongly support it, though there are certainly important exceptions to this generalisation.'.

[149] *Western Australia v Thomas* [1996] NNTTA 30, Hon. C.J. Sumner, P. O'Neil and G. Neate; (1996) 133 FLR 124 at 154-163 (*Waljen*).

The Tribunal attempts, as far as possible, to ensure that its inquiries are conducted in a non-adversarial manner, and often requests further information about an issue where the evidence is not clear. However, the structure of the NTA gives parties a central role to play in any inquiry (including in the production of evidence) and this must be recognised in the conduct of its proceedings. The NTA has not established an inquisitorial form of inquiry for future act determinations where the Tribunal would be obliged to gather evidence itself on behalf of the parties or in lieu of them providing evidence.

In *Western Australia v Thomas*[150] the Tribunal also described its task when considering the effect of any grant on native title rights and interests (then under the provisions of the NTA prior to the 1998 amendments) as follows:

> 'In our view it is not appropriate to establish any test which must be met before the Tribunal can take account of the effect of the act on any native title rights and interests. We will give weight to the effect of the proposed act on those rights and interests by reference to the evidence with respect to native title and the proposed act, without either assuming that there will be an effect just because certain rights and interests are claimed or establishing an evidentiary threshold test which must be met.
>
> It is clear that by giving the right to negotiate to claimants as well as holders of native title, the Act requires us to accept the possibility that each of the native title rights and interests described in the application exists. That does not mean that we can assume that all the native title rights and interests which are so described necessarily exist, and even less so, that they will be affected in a particular way. There may be some elements of native title claimed which could not be affected by the proposed act. There are number of different future acts to which the right to negotiate procedures apply. Further, native title 'is given its content by the traditional law acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'. *Mabo v Queensland (No.2)* (1992) 175 CLR 1 per Brennan J at 42. See also definition of 'native title' in s.223. Clearly the content of native title can differ significantly from group to group depending on those traditional laws and customs. The question of whether a particular proposed act has an effect on the native title rights and interests of the particular native title party (or parties) is a matter of fact to be determined on the evidence in each case and will depend on the nature of the act and the native title rights and interests which are capable of being affected. Depending on the case, the effect on native title rights and interests which are affected might be quite minimal or quite extensive.
>
> The affidavit accompanying the application is evidence which can be considered, but if it is the only evidence, it is difficult to see how the Tribunal could make any sensible findings about the effects of the act on any of the native title rights and interests claimed therein. As a matter of practice, where evidence of effects is produced, there would also have to be evidence of those native title rights and interests which it is claimed exist and will be affected. The law does not require that there be comprehensive evidence of native title so that it is established in its broadest possible terms. There needs to be sufficient evidence to demonstrate which native title rights and interests will be affected and how they will be affected.'

A similar finding was made in *Koara No 1*[151] and these principles, established in 1996 and reaffirmed in numerous cases since, have not been challenged in the Federal Court.

The 1998 amendments to the NTA substituted the words 'enjoyment by the native title parties of their *registered* native title rights and interests' in lieu of '*any* native title rights and interests' in s 39(1)(a)(i) which reinforced the view expressed in *Thomas* of the Tribunal's

[150] *Waljen* at 166-167.
[151] at pp 81, 82.

task. An approach argued for by some native title parties (and apparently adopted by Corbett and O'Faircheallaigh) is that the Tribunal should assume for the purposes of a future act determination inquiry that all the claimed (and registered) native title rights and interests exist and could potentially be affected, a position with which the Tribunal agrees. However, the argument then says that the effect of the proposed grant on the whole of the area of the tenements can be assessed by reference to those registered native title rights and interests on a worst case scenario without reference to how those rights and interests are enjoyed or exercised and hence affected by the mining project under consideration in the particular locality.

The Tribunal has not accepted the second part of the argument. In the Tribunal's view, the 1998 amendments to s 39(1)(a)(i) confirmed the Tribunal's interpretation. Consistent with the *Thomas* decision, the Tribunal considers there is still a need for there to be some evidence of how the native title rights and interests are exercised or enjoyed over the areas of the proposed mining leases and how they will be affected by the grant of the relevant tenement.[152]

It may also be that more generally the Corbett and O'Faircheallaigh's critique is guided by the wording of the NTA prior to the 1998 amendment when the obligation to take into account the cultural and customary concerns of Aboriginal people was not qualified by reference to undue prejudice to other parties.[153]

Corbett and O'Faircheallaigh also assert that one of the incentives and pressures for the native title parties to reach agreement is the fact that a Government or grantee party can (provided they have negotiated in good faith) make a future act determination application to the Tribunal after six months from the notification day specified in the s 29 notice or threaten to do so. However practice does not suggest that grantees are lining up to go to arbitration as soon as the six month negotiation period is finished. Tribunal statistics[154] to 30 June 2007 show that of 211 future act determination applications made and determined (of which 171 were made by consent), 37 were lodged within 6-12 months of the s 29 notification day, 38 within 12-18 months and 136 (or 64%) over 18 months after the s 29 notification day.

Corbett and O'Faircheallaigh base their analysis on only 17 cases which, from a statistical perspective, is problematic. The Tribunal has carried out a somewhat wider analysis of a further 12 future act determinations which were made other than by consent (i.e. 29 cases in total). The cases analysed are listed in Appendix 2.

Included in the Tribunal's list are cases relating to the Wongatha claimants in Western Australia and the Larrakia claimants in the Northern Territory whose claims for determinations of native title were not successful. Eight cases involved the Wongatha People's claim which was dismissed by the Federal Court on 5 February 2007.[155] Another eight involved Koara or Maduwongga, which the Court dismissed to the extent of overlap

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[152] *WMC Resources v Evans* [1999] NNTTA 372, Hon CJ Sumner; (1999) 163 FLR 333 at 340-341; *Western Australia v Evans* [1999] NNTTA 231, Hon C J Sumner; (1999) 165 FLR 354 at 361-362 (*Anoconda 2*).

[153] *Native Title Act 1993* s 109(2).

[154] NNTT Operations Unit.

[155] *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* [2007] FCA 31 (5 February 2007.

with Wongatha, thereby casting doubt on their overall claims. Approximately one third of the area of the Maduwongga and Koara applications overlaps the Wongatha application area. In all these applications, the claimants failed to establish that native title exists west of the 'Menzies–Lake Darlot line. Although the Wongatha claim was resolved by dismissal of the claim and not by a determination that native title does not exist it remains the case that after extensive litigation no native title has yet been established over the area of the Wongatha claim or the overlapping Koara and Maduwongga claims. It may be the case that a reformulated Wongatha claim (or claims) may eventually see a determination recognising the existence of native title. However, the fact that no native title has yet been determined to exist despite the evidence presented to the Court diminishes the force of the O'Faircheallaigh/Corbett criticisms of the Tribunal's future act determinations. One case, in the Tribunal's list, involved the Larrakia People's claim, where a determination was made that native title did not exist over the relevant area by Mansfield J on 13 April 2006.[156]

An analysis of all 29 cases, examined for the purpose of this Paper, shows the following:

- 17 cases (59%) were in claim areas where native title has been found not to exist or the claimants after extensive litigation failed to establish that native title exists (or in the case of the Koara and Maduwongga matters, doubt cast).

- In 8 cases (28%) at least one of the native title parties refused to participate in the inquiry, or produced no evidence at all.

- In 22 cases (76%) at least one of the native title parties produced no evidence capable of supporting the requirements of s 39 of the NTA.

- In 19 cases (66%) no evidence capable of supporting the requirements of s 39 of the NTA was produced by any of the native title parties.

- In 8 cases (28%) limited evidence only was produced.

The registration test for native title claimant applications became a requirement following the 1998 amendments to the NTA and replaced a more limited acceptance test. In order to possess procedural rights (such as the right to negotiate), native title claimants must have their application accepted for registration through the application by the Native Title Registrar of a 'test' based on satisfying specific conditions related to both the merits of the application and whether the application had fulfilled certain procedural and other requirements.[157]

The registration test is an administrative exercise and is applied at a prima facie level. It is not intended in any way to be some form of 'pre-hearing' or to be definitive about whether native title exists. Rather the test is used to establish whether an application complies with certain requirements of the NTA and that the claims made in it are in accordance with the law as the courts have expressed it from time to time. It should, however, be noted that the recent amendments to the NTA provide for the Court to consider the dismissal of an

[156] *Risk v Northern Territory of Australia* [2006] FCA 404.
[157] *Native Title Act 1993* ss 190A, 190B, 190C.

application which fails to meet the merit requirements of the registration test (the conditions in s 190B), after all avenues of review have been exhausted.[158]

A number of the claims which were the subject of future act determinations are no longer on the Register of Native Title Claims. The Maduwongga application was not accepted (after amendment) on 12 September 2005 for failing to meet both 'merit' and 'procedural' conditions for registration. The Gubrun claim (NNTT WC95/27) was not accepted for registration on 26 July 1999 because of a failure to produce necessary evidence. The Koara application has also not been on the Register since August 2003 when it was not accepted for registration because the Registrar's delegate was not satisfied that the application was properly authorised, a decision upheld by the Federal Court.[159]

Fundamental to any future act determination is the affect of the proposed development on native title. The above analysis of cases determined by the Tribunal shows that a substantial number (17 out of 29) involved either the Wongatha claimants and Larrakia claimants (who have failed before the Federal Court to establish native title) or the Koara, Maduwongga and Gubrun claims (which are no longer on the Register). This tends to suggest that the Tribunal's findings in relation to these cases about the affect of the future acts on native title were correct and there was no case for making a determination that the act may not be done.

There are also a number of errors or omissions in the Corbett/O'Faircheallaigh analysis. First, one of the major test cases decided by the Tribunal (*Thomas*) is omitted from their list of cases despite the fact that it and the other major future act determinations are available on the Tribunal's website.[160] While this case adds to the Corbett/O'Faircheallaigh list of cases where a determination was made that the act may be done without conditions (albeit over an area covered by the pre-combination Wongatha and Koara claims), it also sets out in detail the legal principles upon which the Tribunal has operated unchallenged by any appeal to the Federal Court. As explained, some of the problems with the Corbett/O'Faircheallaigh analysis stems from a misunderstanding of the NTA as interpreted by the Tribunal.

Second, no reference is made to *Koara No.2*. The authors assert that 'in only one instance has the Tribunal imposed substantive conditions not already agreed by the parties' (i.e. *Koara No.1*). However, while noting *Koara No.2* was a determination which followed a successful appeal in relation to *Koara No.1,* the authors have overlooked the fact that the matter was eventually resolved by a determination with conditions (see Appendix 1). Conditions 5.1-5.7 dealing with the conduct of a socio-economic impact assessment were strongly objected to by the Government and grantee parties on the basis they were not justified on the evidence, were not within the scope of the NTA and invalid.[161]

Third, Corbett and O'Faircheallaigh say that in only one case was a decision made that 'good faith' negotiations had not occurred and this involved a situation where the grantee party

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[158] *Native Title* Act *1993* ss 190F(5), 190F(6).
[159] *Evans v Native Title Registrar* [2004] FCA 1070.
[160] Guide to future act decisions made under the Commonwealth right to negotiate scheme http://www.nntt.gov.au/facasesguide/index.html.
[161] *Minister for Mines (WA) v Evans* (1998) FLR 274 at p 302 (Koara No.2).

had made little attempt to engage with the native title party and had made clear it was participating in the right to negotiate process only so that it could proceed to arbitration by the Tribunal.[162] This statement ignores the major test case on good faith negotiations referred to above where the Tribunal found that the WA Government had not negotiated in good faith resulting in dismissal of the application and withdrawal of a large number of others.[163]

6. Compensation for future acts affecting native title

(a) Policy of the *Native Title Act 1993*

In any consideration of the desirability of entering into an agreement or proceeding to an arbitral inquiry it is important to understand the policy of the NTA in respect of compensation for the effect of the grant of mining tenements on native title rights and interests.

Consistently with Prime Minister Keating's Second Reading Speech, compensation for the effect of a future act which impairs but does not extinguish native title rights and interests is based on State and Territory regimes to compensate other land owners. For example, in Western Australia the 'freehold test' applies to the grant of mining tenements because such grants may be made over private land which includes freehold title.[164] The 'similar compensable interest' test under s 240 of the NTA is satisfied if compensation is payable for the grant of mining tenements to holders of ordinary (freehold) title. If the law mentioned in s 240 of the NTA does not provide for compensation to native title holders, compensation is determined in accordance with Division 5 of Part 2 (ss 48 – 54) of the NTA.[165] Subsection 51(1) of the NTA says that subject to subsection (3), the entitlement to compensation is to be 'on just terms to compensate' the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests'. Subsection 51(3) deals with acts which are not the compulsory acquisition of native title rights and interests and says that if the similar compensable interest test is satisfied in relation to the acts (as it is in the case of mining tenements in Western Australia by virtue of s 123 of the *Mining Act 1978*) then, in making a determination of compensation, a Court must apply the principles or criteria for determining compensation (whether on just terms or not) set out in the law mentioned in s 240 (that is, in Western Australia, s 123 of the *Mining Act*).

The Tribunal has held that the *Mining Act 1978* did not provide for compensation to native title holders for grants made under that Act because the native title holders did not on the facts of that case (which dealt with a registered native title claim over areas of pastoral lease) fall within the definitions of 'owner' or 'occupier' of land.[166] However, subsequently in

[162] Corbett/O'Faircheallaigh, p 161.
[163] *Western Australia v Taylor* [1996] NNTTA 34; (1996) 134 FLR 211 (*Njamal*).
[164] *Mining Act 1978* (WA) ss 8, 27.
[165] *Native Title Act 1993* s 24MD(3).
[166] *Western Australia v Thomas* [1996] NNTTA 30, Hon. C.J. Sumner, P. O'Neil and G. Neate; (1996) 133 FLR 124 (*Waljen*) at 180-182.

Western Australia v Ward, the High Court left open the possibility that determined native title holders may be encompassed within the definition of 'owner' or 'occupier' of land.[167]

In summary, the legislative policy on compensation for the effect of the grant of a mining tenement on native title is achieved because either:

- the relevant State or Territory mining legislation directly provides for compensation to native title holders which must be accorded in a non discriminatory manner; or
- if that is not the case, the NTA operates to give a right to compensation based on the entitlement to compensation given to the holders of freehold title under that State or Territory legislation. In Western Australia this means s 123 of the *Mining Act 1978* (WA).

Section 123(1) of the *Mining Act* confirms that minerals are the property of the Crown and that no compensation is payable:

- for permitting entry on the land for mining purposes;
- in respect of the value of any mineral;
- by reference to any rent, royalty or other amount assessed in respect of the mining of the mineral; or
- in relation to any loss or damage for which compensation can not be assessed according to common law principles in monetary terms.

Section 123(2) says that the owner and occupier are 'entitled according to their respective interests to compensation for all loss and damage suffered or likely to be suffered by them resulting or arising from the mining'.

Section 123(4) says that the amount payable under s 123(2) may include compensation for:

> '(a) being deprived of the possession or use, or any particular use, of the natural surface of the land or any part of the land;
>
> (b) damage to the natural surface of the land or any part of the land;
>
> (c) severance of the land or any part of the land from other land of, or used by, that person;
>
> (d) any loss or restriction of a right of way or other easement or right;
>
> (e) the loss of, or damage to, improvements;
>
> (f) social disruption;
>
> …
>
> (h) any reasonable expense properly arising from the need to reduce or control the damage resulting or arising from the mining, and where the use for mining purposes of aircraft over or in the vicinity of any land (whether or not private land) occasions damage that damage shall be deemed to have been occasioned by an entry on the land thereby affected.'

[167] *Western Australia v Ward* (2002) 213 CLR 1 at 167-169 [312]-[318].

While there has been considerable non judicial comment which provides some guidance on the principles involved in assessing compensation for native title holders it is still difficult to say what this entitlement will amount to in practice as there is no specific judicial authority available.[168] It is beyond the scope of this paper to delve into all the arguments surrounding compensation for the effect of mining on native title. However, lawyers advising native title parties need to be aware of the parameters of the arguments when advising on whether an offer of compensation is adequate or whether there should be resort to a Tribunal arbitral inquiry in the knowledge that the Tribunal cannot make a determination of native title or compensation but only determine a bank guarantee condition on account of a future determination of compensation. Consideration also needs to be given to whether it is in the interests of native title parties who are claimants to await Court proceedings for a determination of native title and compensation (which may be some time away) and in respect of which there may or may not be a strong case.

(b) Assessing compensation for the acquisition of native title

Section 51(2) of the NTA deals with compensation for future acts which are the compulsory acquisition of all or any native title rights and interests and says that in determining compensation on just terms regard may be had to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place. Section 51(2) has assumed some relevance in relation to compensation payable under s 51(3) because of an argument that compensation for the compulsory acquisition of all native title rights and interests (which extinguishes native title) will be capped at the freehold value and that compensation for non-extinguishing acts such as the grant of mining tenements will always be less than this cap.

The President of the Tribunal (Mr Graeme Neate) has identified three options for compensation for the extinguishment of native title by the grant of freehold:[169]

- on a fee simple value basis (i.e. the same as for owners of ordinary title); or
- on a fee simple value basis plus an amount or proportion for special attachment to land; or
- on a full compensation basis, valuing the native title irrespective of the market value of the land.

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[168] National Native Title Tribunal 1999, Compensation for native title Issues and challenges, Papers from Workshops held in 1997 sponsored jointly by the Australian Property Institute and the National Native Title Tribunal.
Western Australia v Thomas & Ors [1996] NNTTA 30, Hon. C.J. Sumner, P. O'Neil and G. Neate; (1996) 133 FLR 124 *(Waljen)* at 171-205, 218; *Western Australia v Thomas* [1999] NNTTA 99, Hon C J Sumner; (1999) 164 FLR 120 (*Anaconda* 1) at 187-287; *Western Australia v Evans* [1999] NNTTA 231, Hon CJ Sumner; (1999) 165 FLR 354 (*Anaconda 2*) at 364-373; *Gulliver Productions Pty Ltd and Others v Western Desert Lands Aboriginal Corporation and Others* [2005] NNTTA 88, Hon C J Sumner; (2005) 196 FLR 52 (at 66-68 [40]-[48]; *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100, Hon C J Sumner; (2005) 196 FLR 319 at 329-334 [36]-[47].

[169] Graeme Neate, 'Determining compensation for Native Title: Legislative Issues and Practical Realities' in National Native Title Tribunal *Compensation for native title. Issues and challenges* (1999) at 53-57.

In both of the test cases referred to above, the Tribunal has said that there are difficulties in comparing native title with fee simple.[170] The Tribunal has observed that market value provided a very uncertain guide to the true value of the loss of native title rights and interests and could be a capricious guide, especially if the land is otherwise worthless. At best, the land value is a starting point for want of a better yard stick.[171] Despite these difficulties, in practice the freehold value has been regarded as relevant. In an agreement reached between the NSW Government and the Dunghutti People in relation to the compulsory acquisition of native title rights and interest over land at Crescent Head near Kempsey in NSW an uplift factor of 50% over the freehold market value for special attachment was agreed.[172]

With respect to the third option there appears to be little evidence of agreement being entered into on that basis and no judicial authority available.

The 1998 amendments to the NTA inserted s 51A(1) which provides that the total compensation payable for an act that extinguishes all native title 'must not exceed the amount that would be payable if the act were instead a compulsory acquisition of freehold estate in the land or waters'. Subsection 51A(2) says that the section is subject to s 53 which deals with the requirement to provide 'just terms' compensation.

Subsection 51A(1) does not refer to freehold market value but to what would be payable in the case of compulsory acquisition of a freehold estate in the land. Presumably if market value based on the compulsory acquisition of freehold is regarded as an appropriate starting point for considering compensation for the compulsory acquisition of native title rights and interests then there should be no impediment to factoring in matters relevant to the compulsory acquisition of freehold in a particular State or Territory such as compensation for severance, injurious affection, disturbance, special value and solatium or other non-economic loss where relevant to the particular circumstances of the acquisition of native title rights and interests.[173] Again, however, there is no judicial guidance on this point.

It may also be that the requirement for just term compensation for the acquisition of property means that any special attachment to land must be taken into account where native title is compulsorily acquired and, if this is the case, then the freehold cap in s 51A(1) would need to be exceeded to take this into account.[174] Prime Minister Keating's Second Reading Speech suggests that this should be the case. The existence of Aboriginal peoples' special attachment to land has been well recognised but there is no authority on how this is to be valued in monetary terms.

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[170] *WA v Thomas (Waljen)* at 202; *Re Koara* at 87- 88.

[171] *Northern Territory of Australia/Bill Risk on behalf of the Larrakia People (DC 96/7); Tibby Quall on behalf of the Danggalaba Clan (DC 96/4)/Phillips Oil Company Australia*, NNTT DF97/1, [1998] NNTTA 11, D Williamson QC (29 September 1998).

[172] Graeme Neate at 57.

[173] Graeme Neate at 74-75.

[174] Graeme Neate at 75.

(c) Assessing compensation for the grant of a mining tenement

With respect to compensation for a future act which is the grant of a mining tenement, the Western Australian Government has argued that in no circumstances could the amount of compensation payable to native title holders assessed in accordance with s 123 of the *Mining Act* exceed the compulsory acquisition value of the land (i.e. the purchase price for freehold title) on the basis that acquisition of the fee simply meant acquisition of all legal rights and interests in the land.[175] The Tribunal in the two 1996 test cases referred to above rejected this submission.[176] In *Western Australia v Thomas (Waljen)* the Tribunal concluded that compensation for grants of mining tenements in Western Australia is assessed by reference to s 123 of the *Mining Act*, not limited by the freehold value and assessed in a way which may take into account any special or unique aspects of a native title party's links to the land.[177]

Following that determination, s 51A was inserted in the NTA. In *Western Australia v Thomas (Anaconda 1)* the Western Australian Government renewed its argument on the freehold value cap in the light of s 51A in the following way:[178]

- Because native title is not extinguished by the grant of mining leases the amount of compensation will always be less than for compulsory acquisition of land.
- Compensation will be assessed according to the criteria in s 123 of the *Mining Act* but capped at the freehold value.
- If the future act is the acquisition of property then additional compensation should be paid to ensure that the acquisition is made on just terms in accordance with s 51(xxxi) of the Australian Constitution.
- That s 53 of the NTA has no application to the grant of mining leases because the grant of a mining lease does not involve the acquisition of property.

The mining leases were for the Murrin Murrin Project located between Leonora and Laverton. The capital expenditure , at that time, was estimated to be over $1 billion.

In support of its argument the Western Australian Government provided the Valuer General's assessment of the notional freehold value of the eight mining leases unencumbered and unimproved and without any particular attributes of the owner which needed to be taken into account which amounted to a total of $24,000. In a subsequent matter *Western Australia v Evans* (*Anaconda 2*)[179] in relation to the grant of another 12 mining leases for this project the WA Government provided a valuation of $40,000. In both these matters the Tribunal, for various reasons, declined to impose a trust condition but the evidence indicates the quite limited amount of compensation that one State Government

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[175] *Western Australia v Thomas* (1996) 133 FLR 124 *(Waljen)*, Hon. C.J. Sumner, P. O'Neil and G. Neate at 195.
[176] *Re Koara People* (1996) 132 FLR 73, Seaman QC, Smith and McDaniel at 87-88; *Western Australia v Thomas* (1996) 133 FLR 124 *(Waljen)*, Sumner, O'Neill and Neate at 195-196 .
[177] *Western Australia v Thomas* (1996) 133 FLR 124 (*Waljen*) at 196.
[178] *Western Australia v Thomas* [1999] NNTTA 99, Hon CJ Sumner; (1999) 164 FLR 120 at 189 (*Anaconda 1*).
[179] *Western Australia v Evans* (1999) 165 FLR 354, Hon C J Sumner *(Anaconda 2).*

considers a native title party would be legally entitled to even in relation to a very large project which involved significant ground disturbance.

With respect to compensation for the impairment but not extinguishment of native title, there is also no judicial authority on whether native title holders' traditional attachment to land can be taken into account. It is probable that the grant of a mining lease does not amount to the acquisition of property and is not covered by the just terms compensation provisions of the Constitution. If just terms compensation is not required for the grant of mining leases it is not clear whether special attachment to land is a compensable factor under State or Territory legislation. Presumably this would require an examination of the terms of State or Territory legislation to ascertain if the special attachment to the land of native title holders falls within one of the criteria for assessing compensation.

Deputy President Kingham of the Queensland Land and Resources Tribunal considered this issue in *RAG Australia Coal and Anor v Barada Barna Kabalbara and Yetimarla People and Others*.[180] That case, among other things, dealt with whether a condition for the grant of mining leases should include a compensation trust decision (i.e. a condition for monies to be paid into trust on account of a future determination of compensation). The QLR Tribunal (Koppenal P, Kingham DP (dissenting)) decided that no condition was justified because of the lack of evidence of how the registered native title rights and interests would be affected by the proposed grant. It was agreed that the principles for deciding an amount of compensation included those in s 281 of the *Mineral Resources Act* 1989 (Qld) ('MRA') which also applied to holders of freehold land. In summary compensation can be provided for:

- deprivation of possession of the surface of land of the owner;
- diminution of the value of the land of the owner or any improvements thereon;
- diminution of the use made or which may be made of the land of the owner or any improvements thereon;
- severance of any part of the land from other parts thereof or from other land of the owner;
- any surface rights of access;
- all loss or expense that arises;
- reasonable costs for obtaining replacement land, resettlement and the relocation of the owners livestock;
- a premium depending on the status and current use of the land; and
- loss of profits.

No compensation is payable for any minerals that are or may be on or under the surface of the land (s 281(4)(b) MRA).

[180] *RAG Australia Coal and Anor v Barada Barna Kabalbara and Yetimarla People and Others* [2003] QLRT 65.

In addition DP Kingham held that s 707 of the MRA, dealing with native title compensation, permits compensation to be awarded on a basis not available to non-indigenous land owners under s 281 being for the hurt and emotional distress for the impact on the native title party's spiritual connection to the land. This was said to be encompassed within diminution of the value of the land of the owner (s 281(3)(a)(ii) MRA) and to be for the effect of the grant on native title rights and interests (s 707(1) MRA). DP Kingham made the following observations.

- Freehold value was not an appropriate basis for assessing compensation but that it was to be assessed by reference to the unimproved value of the leasehold interest with which the native title rights and interest co-exist.

- Compensation is to be determined for the expected effect of mining on native title rights and interests not on their enjoyment of them. This would mean, if correct, under the NTA that, while the effect on the enjoyment of native title rights is a factor that must be taken into account (s 39(1)(a)(i) NTA) when considering whether the grant can go ahead, the right to compensation is not so limited.

- The valuer assessed an amount of $25,000 for loss of spiritual connection while acknowledging the difficulty in doing so in a 'hard scientific way'.

- It was not appropriate to award an amount for loss of spiritual connection, or an additional amount for hurt and distress while there was a dispute about who were the traditional owners as overlapping claimants were involved.

- The valuer on the evidence provided made no allowance for severance or injurious affection to the balance of the claimed lands on the basis that there were no permanent features on the tenement application area not present on the balance of the claimed lands, the grant would not prevent hunting or fishing or native title activities on the balance of the land claimed, the grant would not sever links to the native title party's ancestors, there were no special features such as artworks and no areas of special importance and sensitivity within the mining lease areas.

In the circumstances DP Kingham would have made a compensation decision totalling $156,500 for the five mining leases involved.

The effect of the future act on native title rights and interests and consequent right to compensation will also depend on whether the grant is to be made over pastoral lease land or land where native title has been determined to exist to the exclusion of all others. In the former case any native title rights to control access, for instance, will already have been extinguished by the grant of the pastoral lease and would not be compensable. Mining may also occur in a way which avoids sites of significance and be subject to conditions to minimise disturbance to the land and to rehabilitate it on completion. A very large open cut mine will have a different effect (to the point of effectively extinguishing native title) to a small underground production facility or a petroleum well where the footprint might be relatively small.

While there is a paucity of judicial authority on the topic some relevant comments have been made. In *Western Australia v Ward* the High Court said that compensation for 'social disruption' (under s 123 of the *Mining* Act 1978 (WA)) may be particularly apposite in respect of native title holders.[181] The Federal Court in *Jango v Northern Territory of Australia*[182] was expected to shed some light on the issue in the context of the extinguishment of native title over the Town of Yulara and associated infrastructure in the Northern Territory but the claim for compensation was dismissed because the applicants could not establish that they held native title at the time extinguishment occurred. Although the Court did not deal in detail with the principles applicable to an assessment of compensation it observed, in passing, that if there was in existence a women's site of significance this would bear on the quantum of compensation payable.[183]

(d) Criticisms of compensation agreements

It appears that Prof. O'Faircheallaigh in his analysis of the adequacy of agreements entered into between Aboriginal people and mining companies has ignored the law and considerations relating to compensation. He criticises one agreement on the basis that only $100,000 was paid for the life of a very profitable mine despite the fact that the profitability or otherwise of a mine is not a relevant factor in deciding whether under the NTA a native title holder is entitled to compensation. What is clear from the above analysis is that the amount of compensation for a grant of a mining tenement will depend very much on the circumstances of individual cases – the nature and size of the mine and its locality and the native title rights and interests which will be affected by it.

Prof. O'Faircheallaigh also seems to overlook that the prohibition in s 38(2) of the NTA on the Tribunal making royalty-type payments a condition of a determination is consistent with the NTA policy objective of equating native title with freehold title and having compensation for the effect of mining grants determined according to the principles applicable to freeholders under State and Territory regimes. The Western Australian and Queensland mining regimes (which reflect the general situation around Australia) do not provide for compensation to freeholders based on the amount of ore produced or its value. NTRB negotiators should be aware of the State and Territory compensation regimes when involved in negotiations in different jurisdictions.

In a paper published in 1999, and written well before High Court judgments such as *Western Australia v Ward* were delivered, Tribunal President Graeme Neate concluded:[184]

> "This paper has considered compensation matters in light of the current law. How the law will develop, particularly by decisions of courts, cannot be confidently predicted. There is no binding judicial authority on how to resolve major compensation issues such as what constitutes "just terms" in these cases. One can only proceed to develop approaches based on principles gleaned from decisions of the High Court to date.
>
> The uncertainty and imprecision of this area of the law, and the difficulty of articulating the intellectual underpinning of submissions in support of awards of specified amounts for

[181] *Western Australia v Ward* [2000] HCA 28; (2002) 213 CLR 1 at p 168 [316].
[182] *Jango v Northern Territory of Australia* [2006] FCA 318; (2006) 152 FCR 150.
[183] *Jango v Northern Territory of Australia* [2006] FCA 318; (2006) 152 FCR 150 at 292, [517].
[184] Graeme Neate at 77.

particular incidents of native title, may mean that few compensation applications come to Courts for determination. Parties may be better served by negotiations which lead to a mutually acceptable outcome."

The Tribunal was unable to find any authoritative analysis of s 123 of the *Mining Act* in relation to compensation for freeholders.[185] Presumably this is because compensation is usually agreed by negotiation rather than resort to the Courts. It is also not surprising that native title claimants (in particular) prefer to reach agreements about compensation rather than waiting for a trial which may or may not lead to a determination of native title and then waiting for a determination of compensation which would be made by reference to criteria that have not yet been judicially decided.

7. Criticisms of the Tribunal's approach to future act determinations and some lessons to be learned from case studies

The Corbett/O'Faircheallaigh article and cases cited in it, must be read bearing in mind the law (principally the NTA) and the manner in which it has been applied by the Federal Court and Tribunal. I do not propose to deal in detail with all the criticisms made or cases referred to, but analysis of the following cases demonstrate some of the problems in the Corbett/O'Faircheallaigh arguments and provide lessons which can be learned in dealing with the right to negotiate regime.

(a) *WMC Resources Ltd & Anor v Evans* [1999] NNTTA 372; (1999) 163 FLR 333 (*WMC/Evans*)

This was the first future act determination application dealt with by the Tribunal after the 1998 amendments to the NTA. The Western Australian Government proposed to grant two mining leases to WMC Resources covering an area of 1,349 hectares, two kilometres south-west of Lawlers in the Shire of Leonora. The mining leases were to conduct further exploration for gold and, if a productive ore body found, it would be mined either open cut or underground with the ore being processed in an existing plant. The general area in which the mining leases are located has been and currently is the subject of exploration and mining. The native title party was the Koara people.

Despite extensions of time and requests from the Tribunal it was only the day before the start of the hearing that the final version of the native title party's contentions was received by other parties and the Tribunal. It was only then that the Tribunal and other parties became aware that the native title party wished the Tribunal to receive the transcript of evidence in and adopt findings from the *Koara No.2* determination. The native title party did not call oral evidence and, over the opposition of both the Government and grantee parties, the Tribunal accepted (amongst other documents) the findings from *Koara No.1* and *Koara No.2*, the native title determination application and the Register of Native Title Claims extract for the Koara claim (WC95/1).

[185] *Western Australia v Thomas* (*Waljen*) at 191.

Corbett and O'Faircheallaigh use this case as the basis for making five criticisms of the Tribunal. First, the authors say that the Tribunal tends to discuss evidence in a way that appears to favour the native title party but subsequently either dismisses or ignores that evidence, or places greater weight on the evidence of the Government or grantee parties.[186] The authors quote from the findings made in *Koara No.2*.

> 'Aboriginal sites are not isolated places, but are connected with others through Dreaming stories. People view these places as a cultural whole - the effect on one site causes effects on other sites along the same Dreaming track. A break in this connection affects the integrity of the site. The native title party is worried about how exploration and mining will affect the cultural landscape, particularly given the major cultural features in Leonora which have been destroyed in the past. They are concerned that mining will create major disturbance to the cultural landscape.'

Although not apparent, I note that the quotation finishes in mid sentence and that the balance of the quote which is relevant concludes – '…and features particularly those which exist in the vicinity of the tenement in WF96/1 and WF96/5' (i.e. the tenements the subject of *Koara No.1* and *Koara No.2* and not the *WMC/Evans* application).

The authors then argue that the Tribunal comes to a contradictory conclusion by accepting the contentions of the Government and grantee parties that the findings do not relate specifically to the proposed mining lease and that the Tribunal ignored the evidence of its findings regarding the Koara People's connection to their land as a whole and the interconnectivity of significant sites that exist within the land. For reasons partly dealt with above, the authors misunderstand the law on this point. Had the argument, based on a worst case scenario, been accepted then the authors' critique would have some merit. However, for the reasons outlined above, the Tribunal has since its initial test cases in 1996 acted on the basis that it will examine evidence in particular cases of the actual way in which native title rights and interests are enjoyed or exercised in the particular locality and how they might be interfered with. In *WMC/Evans* case there was no evidence of this kind from the native title party. There was also no evidence of any sites of significance to the native title party in the area, despite a heritage survey having been carried out. The balance of the quotation not cited by Corbett and O'Faircheallaigh makes it clear that the *Koara No.2* findings principally relate to the mining leases under consideration in that matter, which were located from 60 kilometres to 150 kilometres south of the *WMC/Evans* leases.

The second criticism is that the Tribunal is unwilling to impose conditions requested by the native title party[187]. It says that the Tribunal rejected a request in this case for conditions requiring a socio-economic impact statement in the event that productive mining takes place in the future. As discussed above, the Tribunal imposed such a condition in *Koara No.2* but did not regard such a condition as justified on the evidence in *WMC/Evans*. In *WMC/Evans*, despite the grantee party asserting that the Tribunal would be biased if it imposed any conditions because of the paucity of evidence from the native title party, the Tribunal

[186] Corbett/O'Faircheallaigh – pps 168-169.
[187] Corbett/O'Faircheallaigh p 163.

imposed limited conditions in favour of the native title party relating to access, notice of grant and information about productive mining.[188]

The third criticism is that the Tribunal often justifies the importance of conditions on the basis that they are not onerous on the grantee party.[189] Whether this is a legitimate criticism to make will depend on all the circumstances. In the *WMC/Evans* matter the comment was made in the face of the grantee party's strenuous opposition to the imposition of any conditions. There were substantive reasons for imposing the conditions, which are explained in the reasons and are not confined to the fact that they were not onerous.[190]

The fourth criticism is that the case demonstrates the Tribunal's willingness to uncritically accept evidence tendered by a grantee party.[191] It was said that the Tribunal accepted a statement from counsel for WMC of the existence of an anthropological report which indicated that there were no sites in the area even though the Tribunal was 'unaware of who the informants for the survey were and whether any of the Koara native title group were involved'. Again this criticism does not tell the full story. There was no evidence relating to the existence of sites from the native title party, so that even if the anthropological report did not exist there could be no positive finding in favour of the native title party. The Tribunal made clear that no great weight would have been given to counsel's statement if there had been other evidence relating to the existence of sites of significance. The statement (and anthropological report) merely confirmed the absence of sites. Had there been a dispute on the evidence about the existence of sites then the Tribunal would not have relied solely on the statement but sought to have the report tendered in evidence. It is normal for courts and tribunals to accept uncontested evidence unless there is something about the surrounding facts which call it into question. There was also no objection from the native title party's counsel to the acceptance of this statement.

In addition, the Tribunal referred to the legislative requirements for the protection of Aboriginal sites in existence in Western Australia and which were adopted from the case of *Waljen*. In both the expedited procedure and future act determination inquiries, the Tribunal (and the Federal Court) have decided that the existence of a state-based legislative regime for the protection of Aboriginal sites is a relevant fact that can be taken into account in determining whether exploration or mining activity will or is likely to interfere with a site of particular significance. Corbett and O'Faircheallaigh are critical of this approach[192] but where it has been challenged on appeal in relation to the expedited procedure the Federal Court has endorsed the approach (Footnote 68 above). With respect to future act determinations there has been no challenges to the use of state-based regimes to make the assessment required by s 39(1)(a)(v) of the NTA.

The fifth criticism is that the Tribunal tends to accept types of evidence that favours the grantees but ignores them when they would favour native title parties.[193] The authors say

[188] *WMC/Evans* at pp 359-362.
[189] Corbett/O'Faircheallaigh p 163.
[190] *WMC/Evans* at pp 358-359.
[191] Corbett/O'Faircheallaigh p 168.
[192] Corbett/O'Faircheallaigh p 164.
[193] Corbett/O'Faircheallaigh pps 169-170.

that the Tribunal has in some cases[194] referred to the small area of the mining tenement as a proportion of the claim area to say that mining will have minimal impact. In *WMC/Evans* it is said that the Tribunal ignored the fact that the area of the mining leases (1,349 hectares) was relatively large given that 49 per cent of the Koara People's claim was already the subject of mining tenements and the additional areas within the claim degraded from past mining. Again, in the context of *WMC/Evans*, this criticism is misconceived because it ignores the native title party's principal problem in its case which was the lack of evidence of the enjoyment of native title rights and interests, sites of particular significance and other matters referred to in s 39(1)(a) of the NTA.

(b) The Griffin Coal Mining /Nyungar People (Gnaala Karla Booja) cases

The *Griffin Coal* future act determination involved a challenge to whether the grantee party had negotiated in good faith[195] and then a substantive determination.[196] It is particularly instructive for lawyers who represent native title parties in future act determination inquiries. The case study is not put forward as a criticism of the NTRB involved or the legal representatives as the Tribunal is fully aware that clients do not always take the advice of their lawyers.

The future acts involved the grant of four mining leases, each of which was located adjacent to existing coal mining operations that supplied the Collie and Muja Power Stations in south west Western Australia. The land within two of the leases was designated state forest and managed by the Department of Conservation and Land Management and had been subject to active logging in the past. The other two leases also encompassed areas of previously logged state forest and 25% of one and 80% of another was over private freehold land which is occupied by the Collie Power Station and its associated facilities. Mining in the area dates back to 1898. The mining leases were to be used principally for waste stockpiling and infrastructure with only limited mining planned.

As part of the negotiations the native title party provided the following list of issues to be considered in the negotiations which it said had been prepared as a result of research undertaken by the NTRB into coal mining precedents from other jurisdictions:

- establishment of a trust fund, to which the grantee would make annual contributions, to provide for scholarships, cadetships and assist with the development of Noongar businesses;
- provision of employment opportunities within the Griffin Group;
- supply and service provision contracts for Noongar enterprises;
- a cash component based on:

[194] *WA/Champion & ors (Gubrun) & Forrest & ors (Karonie)/Coombe* [1999] NNTTA 245, WF98/304 Hon C J Sumner; *Bissett v Mineral Deposits (Operation) Pty Ltd* (2001)166 FLR 46, NF01/1 J Sosso.

[195] *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100, Hon C J Sumner; (2005) 196 FLR 319.

[196] *The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia*, NNTT WF05/10, [2006] NNTTA 19 (28 February 2006), Hon C J Sumner.

- royalties for resources extracted;
- an annual retainer for the life of the proposed mining leases;
- cash payment on grant of the proposed mining leases;
- cash payment on actual date that mining commenced;
- ex-gratia payment to each member of the negotiating team;

- establishment/construction of a Cultural Centre;
- provision of equity in a future power station and a commitment to negotiate further on water resource requirements for this project;
- environmental protection and eventual rehabilitation;
- establishment of an Aboriginal heritage protection protocol; and
- land access generally.

It is important to note that while the grantee party could voluntarily enter into negotiations about any of these issues, it was only obliged to negotiate in good faith in relation to those matters raised which were related to the effect of the mining lease on registered native title rights and interests and other matters referred to in s 39(1)(a) of the NTA. On the basis of the evidence it is difficult to see how the construction of a cultural centre, for instance, is encompassed by what is required by good faith negotiations in this case. After a number of negotiation meetings, some of which were mediated by the Tribunal, the grantee party had made a cash offer of $80,000 and some non-monetary commitments such as traineeships and with some contribution to the NTRB solicitor's costs. In the end none of this was acceptable to the native title party who rejected all offers and withdrew from mediation.

This was a case where the grantee party was not prepared to countenance royalty type payments, the reasons for which were provided to the native title party. The grantee party's position was based on the use to which the proposed mining leases would be put (not involving significant resource extraction) and that on two of the proposed mining leases there was a significant area of private land over which native title had been extinguished. Over the other mining leases the areas had previously been or were currently state forest and the subject of logging over the years.

The Government party in initiating the negotiations gave the native title party an opportunity to make submissions to it in writing or orally regarding the act.[197] The native title party declined to do so and said it was under no obligation to make such a submission It is well established law that the behaviour of a native title party may be taken into account in deciding whether the other parties have negotiated in good faith.[198] If a native title party

[197] *Native Title Act 1993* s 31(1)(a).
[198] *Walley v WA* (1996) 67 FCR 366; 137 ALR 561 at 576.

acts unreasonably a lesser standard is imposed on the other parties.[199] Further, since the 1998 amendments to the NTA, the obligation to negotiate in good faith is now imposed on all negotiation parties (including the native title party).

Given that the purpose of the right to negotiate is to deal with the effect of a mining proposal, the Tribunal considers it desirable for a native title party to respond to the invitation to make a submission or at least articulate its concerns about the future act during the negotiations which it regards as part of the negotiation process.[200] If a native title party takes a strategic decision not to make such a submission because it feels that the submission will not advance its cause or strengthen its position then it is entitled to do this, but it cannot then complain that the Government and grantee party find themselves in a position of not being able to properly address any issues of concern relating to the effect of the future act on registered native title rights and interests and the other matters referred to in s 39.[201] The Tribunal found that the grantee party had negotiated in good faith as required by the NTA.

The Tribunal then proceeded to the substantive inquiry. The native title party did not consent to the mining leases being granted but declined to submit contentions or evidence. With the consent of the parties (including the native title party) the Tribunal determined the matter on the papers.[202] The matter proceeded on the basis of contentions and evidence provided by the Government and grantee party only. The only substantive issue that arose with respect to native title party interests was in relation to s 39(1)(a)(v) (sites of particular significance). Consistent with the manner in which the law has been applied since 1996 the Tribunal concluded:[203]

> 'The task of the Tribunal in making a determination is a discretionary one which involves weighing the various factors in s 39 based on evidence produced (*Waljen* at 165-166). I have no evidence from the native title party with respect to any matters to be considered pursuant to s 39 of the Act, a situation which makes properly balancing the various interests extremely difficult. Nevertheless, the evidence which does exist points to a situation where in a practical sense there is at best limited current exercise by the native title party of their native title rights and interests over the area of the proposed mining leases or the Collie coal field generally. Historical and current coal mining, while not at law extinguishing native title will already have had a serious adverse impact on the manner in which native title rights and interests can be exercised. On the evidence presented the only substantial issue under s 39(1)(a) is the possible effect of the grants on a site of particular significance. I have taken this possibility into account but am satisfied that the grantee party is aware of its legal obligations and in consultation with the native title party will take steps to ensure that the site is not disturbed or will seek the necessary permissions if this is not in its view possible. The weight of the evidence and particularly the economic significance of the proposal and the public interest in it proceeding support a determination that the acts may be done without conditions.'

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[199] *Western Australia v Taylor* [1996] NNTTA 34, Hon. C.J. Sumner; (1996) 134 FLR 211 at 250.

[200] *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100, Hon C J Sumner; (2005) 196 FLR 319 at [48]-[55].

[201] *Griffin Coal Mining Co Pty Ltd v Nyungar People* [2005] NNTTA 100, Hon. C.J. Sumner; (2005) 196 FLR 319 at [53].

[202] *Native Title Act 1993* s 151.

[203] *The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia*, NNTT WF05/10, [2006] NNTTA 19 (28 February 2006), Hon. C.J. Sumner at [41].

There are a number of issues to be considered by native title party negotiators from the *Griffin Coal* example.

1) How relevant are other coal mining agreements to the present negotiations? Are there traps in entering negotiations by reference to some 'ideal' national standard without looking at the circumstances surrounding specific projects? While a negotiating position based on a national standard for a particular category of mining is a legitimate negotiating position for a native title party to adopt, it is also legitimate for a grantee party to point out that the circumstances of particular coal mining ventures may be different. It is self evident that there is likely to be a significant difference in the effect on native title between a greenfields mining site and one where the proposal is to add additional mining leases to already existing well established productive mines. If negotiations about a national standard proposal break down and there is resort to arbitration then the circumstances of the particular grant become highly relevant because the major focus of any inquiry is based on the factors set out in s 39.

2) There are limits to what are encompassed by good faith negotiations, although this does not prohibit parties voluntarily discussing matters that do not strictly fall within them.

3) In looking at the facts of this particular case, was the grant of the mining leases going to have any effect on native title where some extinguishment had occurred previously; there was no evidence of native title being exercised in relation to the state forest areas; and mining already existing in the vicinity?

4) Was the offer of compensation adequate? Would there have been any legal entitlement to compensation under s 123 of the *Mining Act*? Is there an argument that there would have been no entitlement to compensation for the native title party in this case?

5) By reference to Prof. O'Faircheallaigh's analysis, would the offer made have been inadequate?

6) Should a native title party always make a submission under s 31(1)(a) of the NTA?

Corbett and O'Faircheallaigh use this case as part of their critique of the Tribunal's performance in that the Tribunal did not impose conditions despite the presence of a site 'comprising skeletal material & burial ground'. This is compared to another matter in which it is said the absence of burial sites was sufficient to indicate that there were no sites of particular significance justifying a condition.[204] The criticism misses the point. There was no dispute in the *Griffin Coal* matter that the burial ground was of particular significance to the native title party. The only issue was whether a condition relating to it (and other sites) should be imposed even though no condition had been requested by the native title party.

[204] Corbett and O'Faircheallaigh pp 170-171.

Detailed reasons were provided for the Tribunal's findings that no condition was justified.[205] The Tribunal considered:

- the protective regime provided by the *Aboriginal Heritage Act* which had been recently upgraded, and involved close consultation with Aboriginal peoples;
- the grantee party was aware of the existence of the six sites by virtue of heritage investigations it had commissioned; and
- the conditions to be imposed by the Government party which required notice of any application under s 18 of the *Aboriginal Heritage Act* to interfere with a site and accompanying documents to be given to the native title party.

Corbett and O'Faircheallaigh are critical of the Tribunal for not imposing conditions to enhance the protection available for Aboriginal sites.[206] Whether such a condition should be imposed will depend on the evidence of the nature and extent of any native title rights and interests and of any site or sites, the applicable regime for the protection of sites and the attitude of the grantee party to the protection of sites.

Rather than being an example of Tribunal bias, the Griffin Coal case is an example of how negotiations which do not take proper account of the underlying legal principles involved in the right to negotiate scheme can lead to a result which was in all probability detrimental to a native title party.

(c) *Victorian Gold Mines NL v Victoria and Others* [2002] NNTTA 130; (2002) 170 FLR 1

This case involved the grant of a mining licence in Victoria which was to be part of an overall project for which grants had already been made, some over freehold land. The inquiry only proceeded because of a split within the claim group. The persons who were part of the registered native title claimant and native title party had divided into what was referred to as two factions, the Kurnai faction and Gunai faction. While the Gunai faction was prepared to enter into an agreement to resolve the matter, the Kurnai faction members were not. The basis for their un-willingness to sign an agreement was that they would not sign an agreement which included persons from the other faction, despite the fact that they were all part of the registered native title claimant and native title party. The Kurnai position was that they did not recognise the Gunai tribe as a legitimate group belonging to the Gippsland Region and that any agreement signed with them gave legitimacy to their claim. The native title party representatives were not opposed to mining. The Tribunal commented that the Gunai/Kurnai native title claim was in the most unsatisfactory state; the conflict meant that the right to negotiate provisions of the Act could not function as parliament intended (particularly when an agreement could not be finalised because the Kurnai faction would not sign the same agreement as the Gunai faction for fear of giving the

[205] *The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia*, NNTT WF05/10, [2006] NNTTA 19 (28 February 2006), Hon C J Sumner at [30] to [35].
[206] Corbett and O'Faircheallaigh p 164.

Gunai faction some legitimacy on the claim); and that as a consequence the native title party had missed out on financial benefits available under the grantee party's original proposal.[207]

Despite the overall context of this case, which is not referred to by Corbett and O'Faircheallaigh, they picked one very small statement from lengthy reasons for determination to attempt to support an allegation of Tribunal bias. The authors said that the Tribunal has a practice of considering as relevant wider matters when these favour the grantee's case but ignoring them when they favour the native title party.[208] They criticised the Tribunal's comments (made in relation to s 39(1)(c)) – the economic or other significance of the act) that strictly the Tribunal's concerns in this inquiry were only with the mining lease application which on its own was unlikely to have a great impact in the context of the Victoria economy as a whole but that it had significance as part of the overall project which if it proceeds will bring economic benefits. The authors then said that the Tribunal did not look at the project overall when considering the effect of mining on the native title party but only restricted its consideration to one mine site.

This criticism again fails to understand the law. The inquiry was not into the project as a whole but only into the future act for which notice had been given (i.e. one mining licence which was to comprise part of it). Some other mining licences had already been granted including for a treatment plant over freehold land where native title had been extinguished. To isolate one statement dealing with a relatively minor aspect of the reasons also fails to recognise the process which the Tribunal is engaged in of weighing up various factors on the basis of evidence to decide whether a grant may be made. Importantly in this case there was no evidence that native title rights and interests were enjoyed in the locality of the mining lease area.

8. Conclusion

In making an assessment of the operation of the right to negotiate provisions of the NTA it is important to refer to the original policy framework which was given effect by the legislation. Fundamental to the operation of the provisions is the effect of a future development on the registered native title rights and interests. That effect will differ depending on the nature and extent of the bundle of native title rights and interests and the type of project involved, which can range from relatively non-intensive prospecting or exploration to a large open cut mining project.

The right to negotiate is extremely important and has provided the native title parties with a seat at the table which did not exist previously, where in many cases beneficial agreements have been reached. The procedures were intended to operate in a timely manner and the entitlement at law to compensation is based on that available to freeholders under mining legislation. Prof. O'Faircheallaigh's analysis of mining agreements is helpful in providing parties with comparative information which can inform any negotiations. He is also entitled to his personal views about whether the policy is adequate to protect the rights of Indigenous people and to advocate at the political level for changes to it.

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[207] *Victorian Gold Mines NL v Victoria and Others* [2002] NNTTA 130, Hon C J Sumner; (2002) 170 FLR 1 at 26-27.
[208] Corbett and O'Faircheallaigh p 170.

However, serious questions can be raised about the legal analysis applied by Corbett and O'Faircheallaigh as a basis to criticise the Tribunal. The analysis is selective in the cases it uses, inaccurate in some respects, takes a statistical approach (i.e. the Tribunal has never refused a grant) without taking sufficient account of the evidence produced or law applied. The article seems to have been compiled by quoting evidence which supports a pre-determined position. It may be that if grantee parties in some cases have nothing to fear from the Tribunal this is because of the terms of the NTA, the nature of the project and lack of evidence of native title rights and interests or sites or other s 39(1)(a) factors.

Lawyers acting for Indigenous people need to be aware of both aspects of the right to negotiate, what is available as a matter of policy from the various agreements that have been entered into as well as the legal foundations of the process.

APPENDIX 1 – The Koara Conditions

DETERMINATIONS AND CONDITIONS

APPLICATIONS WF96/1, WF96/5 and WF96/11:
***Minister for Mines (WA) v Evans* [1998] NNTTA 5; (1998) 163 FLR 274 (*Koara No 2*)**

(These conditions apply to applications WF96/1 and WF96/5 only)

Determinations

The determinations of the Tribunal are that mining leases M37/491 and M37/492 may be granted to Sons of Gwalia Limited and mining leases M37/493, M37/494, M37/495 and M37/496 may be granted to Tarmoola Australia Pty Ltd subject to the following conditions
(1-17) to be complied with by the Government party, the native title party and the grantee party.

Conditions

Access

1. Any right of the native title party to access or use the Tenement is not to be restricted except in relation to those parts of the Tenement which are used for exploration or mining operations or for safety or security reasons relating to exploration or mining operations.

Notice of grant

2. The Government party must give to the native title party details of the grant of the mining lease, including the conditions and endorsements, within 21 days of the date on which it was granted.

Aboriginal Sites

3.1 The grantee party shall comply with the *Aboriginal Heritage Act* 1972 (WA) and any other applicable Aboriginal heritage legislation.

3.2 To ensure compliance with condition 3.1 and subject to conditions 3.4 and 3.5, the grantee party must not conduct exploration or mining operations (other than reconnaissance prospecting) over a part or whole of the Tenement unless it has first caused an Aboriginal site survey to be conducted over that part or whole of the Tenement.

3.3 The site survey must be conducted by a Site Survey and Clearance Team which (subject to condition 3.4) must include as many persons as are nominated by the registered native title claimant up to a maximum of three nominees, and be conducted in a professional and efficient manner in accordance with the

"Guidelines for Aboriginal Heritage Assessment in Western Australia" dated January 1994 or any subsequent guidelines or requirements which may be published or prescribed for the purpose of the *Aboriginal Heritage Act* 1972 (WA) to the extent that those guidelines or requirements are relevant to the conduct of site surveys, or as otherwise agreed between the registered native title claimant and the grantee party. The grantee party must pay the reasonable fees and expenses of the nominees of the registered native title claimant in relation to the survey. Further unpaid nominees of the registered native title claimant may be included in the Site Survey and Clearance Team at the discretion of the grantee party.

3.4 The grantee party must give written notice to the native title party of its intention to conduct the site survey and when giving notice must include a suitable topographical map showing the areas proposed to be surveyed, and the Tenement location. If, within 30 days of receipt of the notice, the registered native title claimant fails to nominate any persons for the Site Survey and Clearance Team then the grantee party need not conduct such survey or clearance unless required to do so to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA). If a survey or clearance is required to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA) then the grantee party must take reasonable steps to consult with the registered native title claimant.

3.5 The site survey required under condition 3.2 must be completed within 60 days of the native title party's nomination with the parties co-operating in good faith on the conduct of the survey. If the survey is not carried out in this time due to the failure of the native title party to co-operate in good faith with the grantee party then the grantee party need not conduct such survey or clearance unless required to do so to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA). If a survey or clearance is required to meet the requirements of the *Aboriginal Heritage Act* 1972 (WA) then the grantee party must take reasonable steps to consult with the registered native title claimant.

3.6 If requested in writing either by the registered native title claimant or the grantee party at any time before, or in the course of, or at the conclusion of the site survey, the registered native title claimant (or his or her nominees) and the grantee party (or its agents, representatives or contractors) must meet on the Tenement for the purpose of identifying the boundaries of the sites.

3.7 Where, in respect of a part or the whole of the Tenement, a site survey has been conducted in accordance with these conditions the grantee party is not required to conduct any further site survey and clearance over that part or the whole of the Tenement (as the case may be).

3.8 The grantee party must not disclose to any person any information given to it by the native title party regarding sites, except (and only then on a confidential basis):

(a) with the written consent of the native title party;

(b) to a bona fide prospective assignee of the mining lease pursuant to condition 10.4;

(c) to an actual assignee of the mining lease;

(d) to employees, agents, contractors and consultants for the sole purpose of ensuring that no sites are interfered with and as far as the information relates only to the location of those sites; and

(e) as required by law.

3.9 No exploration or mining operations are to be carried out by the grantee party on sites indicated by the site survey except with the written consent of the registered native title claimant or pursuant to s 18 of the *Aboriginal Heritage Act* 1972 (WA).

3.10 If the grantee party gives notice to the Aboriginal Cultural Material Committee under s 18 of the *Aboriginal Heritage Act* 1972 (WA) it must forthwith serve a copy of that notice on the native title party and the Government party.

3.11 Within 30 days of receipt of a copy of any notice given to the Aboriginal Cultural Material Committee under s 18 of the *Aboriginal Heritage Act* 1972 (WA), the registered native title claimant will inform the grantee party in writing if the native title party wishes to be consulted concerning the proposed use of the land in the notice under s 18 of that Act. If so informed, the grantee party will promptly supply details of the proposed use and make itself available to meet with the registered native title claimant to describe that proposed use within 21 days of the native title party giving it notice. The registered native title claimant will organise for interested members of the native title party to attend the meeting.

3.12 The Government party must forthwith upon receipt by the Minister of a notice and recommendation from the Aboriginal Cultural Material Committee in respect of a site on the Tenement, give a copy of the recommendation and any related report excluding any confidential information provided to the Committee by other than the native title party to the native title party.

3.13 Where the Minister gives or declines to give consent under s 18 of the *Aboriginal Heritage* Act to the proposed use of the land the subject of the notice and recommendation, the Government party must forthwith inform the native title party of the decision.

Productive mining - information provisions

4.1 If the grantee party submits to the State Mining Engineer a proposal to undertake developmental or productive mining or construction activity (a Notice of Intent), then at the same time the grantee party must give to the native title party:

(a) a copy of the proposal, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations, related infrastructure, and

(b) information on the following matters (if not included in the proposal):

(i) the mining methods to be used and the infrastructure to be established;

(ii) the likely timetable for, and duration of, the mining operations;

(iii) the identity of any contractors and sub-contractors (if known at the time) engaged or likely to be engaged and the maximum number of personnel likely to be on the Tenement at any one time;

(iv) the likely effect of the proposed mining operations on the environment and proposals to minimise the environmental impact of such mining operations;

(v) details of any proposed environmental monitoring program;

(vi) the proposed means of access and access routes for personnel and equipment, both to and within the Tenement, including particulars of the amount of vehicular and airborne access and any proposals to construct or upgrade roads, landing strips or other access facilities; and

(vii) the proposals for rehabilitation of the Tenement.

4.2 Where there is a material change proposed to the proposal (the Notice of Intent) provided to the State Mining Engineer the grantee party must, prior to implementing the change, advise the native title party in writing of those proposed changes.

Socio-economic impact assessment

5.1 Where the Environmental Protection Authority or the Minister for the Environment gives written notice that a proposal to undertake developmental or productive mining or construction activity on the Tenement is to be formally assessed under the *Environmental Protection Act* 1986 (WA) the grantee party must (subject to paragraph 5.2) prior to commencing mining operations on the Tenement, commission the conduct of a study (the Koara Socioeconomic Impact Assessment ('the KSIA')) and report ('the report') on the effect of the proposed mining operations on the native title party and their culture for the purpose of informing the native title party about those likely impacts.

5.2 The grantee party must give written notice of its intention to conduct the KSIA to the native title party. The grantee party may, in the written notice, nominate one or more independent expert researchers to conduct the KSIA. The grantee party

is not obliged to undertake or complete the KSIA if within 30 days of receipt of the written notice the registered native title claimant fails to give written notice to the grantee party either:

(a) agreeing to one or more of the independent expert researchers nominated by the grantee party; or

(b) nominating at least four independent expert researchers who are able to undertake the KSIA within the terms specified in clause 5.4.

5.3 The grantee party must contract with an independent expert researcher to undertake the KSIA and write the report ('the Consultant'), being:

(a) in the case where the registered native title claimant has agreed to one or more of the independent expert researchers nominated by the grantee party in accordance with condition 5.2(a) above, one of the independent expert researchers agreed to; otherwise

(b) one of the independent expert researchers nominated by the native title party.

5.4 The contract between the grantee party and the Consultant must contain terms requiring the Consultant to :

(i) complete the KSIA and submit the report to the grantee party within 6 months from the date when the contract is made;

(ii) consult broadly with the native title party and the grantee party and take into account their comments in planning and undertaking the KSIA and writing the report;

(iii) meet with the registered native title claimant when reasonably requested by him to do so.

(iv) provide a copy of the proposed methodology for the KSIA and a draft of the report to the native title party and grantee party for comment;

(v) keep confidential (except as between the parties and unless disclosure is required by law) information provided in confidence by any party to the Consultant for the purposes of the KSIA;

(vi) design the KSIA and write the report covering at least the following:

(a) a description of, and history of use of, the Tenement and adjacent areas, which may be directly affected by the proposed mining operations ('the Tenement and adjacent areas');

(b) a description of the proposed mine and related works including the size of the construction and mining staff and proposed

residential arrangements on the Tenement and adjacent areas and proposed access routes;

(c) the economic, social and cultural significance of and use by the native title party of the Tenement and adjacent areas;

(d) the overall health, economic and educational status of the native title party as a group;

(e) employment opportunities for, and employment patterns of the native title party;

(f) the likely and possible socio-economic and cultural impacts of the proposed mining operations on the native title party and their way of life;

(g) the opinions, wishes and concerns of the native title party in relation to the mining operations on the Tenement and adjacent areas and in relation to the impact of the mining operations;

(h) an analysis of methods of mitigation of the adverse impacts of the mining operations on the native title party; and

(i) an analysis of practical ways to maximise the benefits arising from the mining operations on the native title party including opportunities for the native title party to be involved in the proposed mine economy.

5.5 The Government party, the grantee party and the native title party must co-operate with and provide to the Consultant all information that is within their power and control which is reasonably necessary for the Consultant to undertake the KSIA and where the release of that information by the native title party is not contrary to their law.

5.6 The grantee party must provide to the Government and registered native title claimant copies of the final report of KSIA within 30 days after it is received from the Consultant.

5.7 The Government and grantee parties must provide to the native title party a detailed written response to the KSIA report and the issues raised by it within two months of the receipt of the report by the Government party.

Environmental condition

6. Where the grantee party submits to the State Mining Engineer a proposal to undertake developmental or productive mining or construction activity on the Tenement (a Notice of Intent) the Government party through the Department of

Minerals and Energy must, prior to approval of the proposal by the State Mining Engineer:

(i) write to the native title party giving it an opportunity within 21 days to make a submission to the Government party and the Environmental Protection Authority on whether it wishes the proposal to be referred to the Environmental Protection Authority under s 38 of the *Environmental Protection Act* 1986 (WA); and

(ii) notify the proposal to the Environmental Protection Authority by providing it with a copy of the Notice of Intent accompanied by any submission made by the native title party in accordance with paragraph (i).

Employment and training

7.1 Prior to the commencement of mining operations and associated works on the Tenement the grantee party must establish and thereafter maintain a recruitment and training policy and program which, subject to the requirements of the grantee's business and availability of members of the native title party are designed to provide employment opportunities for members of the native title party. The matters which are in conditions 7.2 and 7.3 must form part of the recruitment and training policy.

7.2 (a) The native title party may from time to time provide the grantee party with a list of members of the native title party seeking employment or training, such list to include the availability, experience, qualifications and contact details of each person on the list.

(b) At least once in each month the grantee party must give written notice to the registered native title claimant of employment and training opportunities which arise in respect of mining operations and associated works on the Tenement.

(c) The grantee party must consider applications for employment or training positions made by members of the native title party fairly and objectively having regard to the attributes of the person and the requirements of the grantee party's business.

7.3 (a) The native title party may from time to time provide the grantee party with a list of Associated Entities which have the capacity to perform contract work in respect of the mining operations and associated works on the Tenement.

(b) When intending to contract out work on the Tenement the grantee party must give consideration to the engagement of an Associated Entity fairly and objectively, having regard to its capacity to perform the work and the requirements of the grantee party's business.

Cultural awareness program

8.1 Following commencement of mining operations on the Tenement, the grantee party must endeavour to ensure that all persons who are not the native title party and who are engaged directly or indirectly by or on behalf of the grantee party and who may enter the lease area in relation to the mining operations are given appropriate information for the following purposes:

(a) to familiarise such persons with the traditions and culture of the native title party;

(b) to promote a knowledge and understanding of and respect for the traditions and culture of the native title party; and

(c) to foster good relationships between the native title party and others.

8.2 The registered native title claimant or his or her nominee and the grantee party shall co-operate in formulating and directing the presentation of the information.

Liaison Committee

9.1 Subject to conditions 9.2 and 9.5 and prior to commencement of mining operations on the Tenement, the grantee party must establish and continue a Liaison Committee ('the committee') comprising:

up to 2 persons nominated by the grantee party; and
up to 2 persons nominated by the registered native title claimant.

9.2 The grantee party must give written notice to the native title party of its intention to form the committee and invite written nominations from the registered native title claimant in respect of its representatives on the committee. If within 30 days of the receipt of the notice the registered native title claimant fails to nominate any such persons to the grantee party, or if at any time the registered native title claimant notifies the grantee party in writing that he or she does not wish the committee to be formed or to continue, the grantee party is not obliged to form or continue the committee as the case requires.

9.3 Each party may replace one or both of its members on the committee by giving at least 7 days written notice to the other party. Where a committee member is temporarily not available to attend meetings of the committee, the member may substitute another person to represent the interests of the relevant party during the period when that member is unavailable.

9.4 The functions of the committee will be the following:

(i) to provide a forum for the exchange of information between the parties concerning:

(a) the mining operations, including proposed changes to those operations;
(b) matters of importance to either the native title party or the grantee party as they relate to those mining operations or the area covered by the Tenement;
(c) the operation of condition 7 including any employment and training opportunities for the native title party on the Tenement and any member of the native title party seeking employment or training opportunities at the mine; and

(ii) to co-ordinate the development and implementation of the cultural awareness program referred to in conditions 8.1 and 8.2.

9.5 The committee must meet at least once each quarter. If all the committee members nominated by the registered native title claimant or their substitutes fail, without giving at least three days written notice to the grantee party, to attend 3 committee meetings in a row the grantee party is not required to continue the committee. The committee meetings must be open to other grantee party representatives and members of the native title party to attend as observers if they wish.

9.6 The grantee party must provide to the committee, on a quarterly basis, a report:
(i) on the number of members of the native title party in employment and training at the mine, including their respective job classification, the number of applications for employment or training received from the native title party, and the number of job and training offers made by the grantee party to members of the native title party; and
(ii) on the number and nature of contracts entered into between the grantee party and any Associated Entity.

9.7 The location of the committee meetings will be on the Tenement unless agreed otherwise by the members.

9.8 The reasonable costs incurred by members in attending up to four committee meetings per year will be met by the grantee party. This does not cover the professional costs of legal representation.

General conditions

Assignment

10.1 These conditions apply to any assignee of the grantee party (other than a mortgagee, chargee or other security holder not in possession of the Tenement).

10.2 The grantee party must not assign the mining lease unless and until the assignee executes and delivers to the native title party a deed expressed to be for the benefit of the native title party by which the assignee undertakes to be bound by

these conditions as if it were the grantee party. In the case of an assignment consisting of the entering into of a mortgage, charge or other security, the deed must provide that the assignee undertakes :

(i) to be bound by these conditions as if it were the grantee party, if it or anyone on its behalf enters into possession of the Tenement, or if it appoints a receiver to enter into possession of the Tenement; and

(ii) not to transfer the mining lease under any power of sale unless the purchaser executes a deed expressed to be for the benefit of the native title party by which the purchaser undertakes to be bound by these conditions as if it were the grantee party.

10.3 Upon the delivery to the native title party of a duly executed deed in compliance with condition 10.2, the native title party must execute a deed expressed to be for the benefit of the assignee by which the native title party undertakes to be bound by these conditions.

10.4 The grantee party must not disclose to a bona fide prospective assignee of the mining lease any information given to it by the native title party regarding sites unless and until the prospective assignee executes a deed expressed to be for the benefit of the native title party by which the prospective assignee undertakes to comply with condition 3.8 as if the reference in Condition 3.8 to the 'grantee party' were a reference to the prospective assignee.

10.5 For the purpose of conditions 10.1, 10.2 and 10.4 , 'grantee party' includes any person to whom the mining lease is assigned

Application of conditions

11.1 These conditions (other than conditions 3.8 and 13) apply only to that part of the Tenement which remains subject to:

(i) the native title claim;

(ii) another claim made by or on behalf of the native title party (either alone or in conjunction with others); or

(iii) an approved determination that the native title party holds native title (either alone or in conjunction with other persons) in respect of that part of the Tenement.

11.2 These conditions (other than conditions 3.8 and 13) apply only while the mining lease (including renewals) is in force.

11.3 These conditions (other than condition 3.8) do not apply to the grantee party if it ceases to be the holder of the mining lease and an assignee of the mining lease executes a deed as required by condition 10.2. This condition does not relieve the

grantee party of any liability incurred under these conditions prior to it ceasing to be the holder of the mining lease.

Notices

12.1 For the purpose of these conditions, the registered native title claimant (from time to time) is authorised to give or receive any notice or other document on behalf of the native title party.

12.2 Notices or other communications under these conditions may be given by delivery, post or facsimile and each party must nominate a postal address and facsimile address for that purpose. Until a party has made such a nomination, its address for service will be taken to be the address of the party's representative at the future act determination application proceedings.

12.3 Any party may by notice in writing change its addresses or facsimile numbers.

12.4 A notice is taken to be received in the case of a posted document, on the second business day after posting and in the case of a facsimile on the first business day after transmission.

General

13. Except as required by law the native title party must not, without the written consent of the grantee party, disclose to others the grantee party's confidential information relating to its activities pursuant to the mining lease.

14. The grantee party shall take all reasonable action to ensure compliance with these conditions by its employees, agents, servants and contractors.

15. The Government party shall make conditions 1, 3.1, 3.10, 4.1 and 10.2 conditions of the mining lease.

16. The Government party must endorse on the mining lease the fact that the grantee party and any assignee is subject to the terms and conditions of a determination by the National Native Title Tribunal dated 19 June 1998.

Definitions

17. For the purpose of these conditions the following terms have the following meanings:

"assign" includes sell, transfer, part with possession, create a legal interest in or otherwise dispose of in whole or in part, or enter into any mortgage, charge, or other security under which the mortgagee, chargee, or other secured creditor has powers to take possession, sell, convey or to appoint a receiver to take possession; "assignment" and "assignee" have corresponding meanings.

"Associated Entity" means any incorporated body or unincorporated association all the members of which are members of the native title party, and means an individual who is a member of the native title party.

"exploration" includes the activities referred to in s 66 of the *Mining Act* 1978 (WA) and the activities referred to in the definition of "explore" in s 253 of the *Native Title Act* 1993 (Cth).

"Government party" means the State of Western Australia.

"grantee party" means Sons of Gwalia Limited in Application WF96/1 and Tarmoola Australia Pty Ltd in Application WF96/5.

"mining lease" means mining leases M37/491 and M37/492 in Application WF96/1 and M37/493, M37/494, M37/495 and M37/496 in Application WF96/5.

"mining operations" means:

(i) mining operations as defined in the *Mining Act* 1978 (WA) other than any activity associated with exploration activities; and

(ii) any work associated with mining operations including construction of access roads, buildings and work preparatory to mining operations.

"native title claim" means the native title determination application (in its form from time to time) made under the *Native Title Act* 1993 (Cth) by Ted Coomanoo Evans on behalf of the native title party and which :

(i) with respect to Application WF96/1 lodged on 7 July 1995 is identified by National Native Title Tribunal number WC95/22; and

(ii) with respect to Application WF96/5 lodged on 10 August 1995 is identified by National Native Title Tribunal number WC95/42.

"native title party" means:

(i) the registered native title claimants in respect of a native title claim and all persons on whose behalf the native title claim is made; and

(ii) in a case where an approved determination is made that the native title party holds native title to the whole or part of the Tenement (either alone or in conjunction with other persons), means the native title holders.

"reconnaissance prospecting" means exploration operations which do not involve the use of mechanised extractive or other equipment which is capable of causing damage to sites (but which may include the use of vehicles for transportation purposes).

"registered native title claimant"

(i) has the meaning given in the *Native Title Act* 1993 (Cth), and if there is more than one person who constitutes the registered native

title claimant, means the first-named registered native title claimant; and

(ii) in the event of an approved determination that the native title party holds native title to the area of the Tenement, means the registered native title body corporate in respect of the native title claim.

Reference to a "site" imports the meaning given by s 39(1)(a)(v) of the *Native Title Act* 1993 (Cth).

"Tenement" means the area of the mining lease.

APPENDIX 2 - List of future act determinations

WF96/3, WF96/12 *Western Australia/Roberta Vera Thomas & Ors (Waljen)/Austwhim Resources NL; Aurora Gold (WA) Ltd,* [1996] NNTTA 30 (17 July 1996) Members Sumner, O'Neil and Neate. (*Western Australia v Thomas* (1996) 133 FLR 124) ('*Waljen*')
WONGATHA, KOARA

WF96/1, WF96/5, WF96/11 *Western Australia/Koara People/Sons of Gwalia Ltd.; Mount Edon Gold Mines (Aust) Ltd; DJ & RM Cottee & PJ Townsend,* [1996] NNTTA 31 (23 July 1996), Members Hon Paul Seaman QC, Deputy President, Ms Diane Smith and Mr Michael McDaniel (*Koara No.1*)

(*Re Koara People* (1996) 132 FLR 73) KOARA

WF96/1, WF96/5, WF96/11: *Minister for Mines, State of Western Australia/Ted Coomanoo Evans on behalf of the Koara People/Sons of Gwalia Lt.* (WF96/1); *Tarmoola Australia Pty Ltd (formerly Mount Edon Gold Mines (Aust) Ltd)* (WF96/5); *DJ & RM Cottee & PJ Townsend* (WF96/11), [1996] NNTTA 31 (23 July 1996), Members Hon C J Sumner, Ms Diane Smith and Mr Michael McDaniel (*Koara No.2*)

(*Minister for Mines (WA) v Evans* (1998) 163 FLR 274) KOARA

WF97/8: *Western Australia/Champion & Ors (Gubrun) & Strickland & Ors (Maduwongga) & Ollan & Ors (Mingarwee)/Resolute Ltd* [1999] NNTTA 219 (4 August 1999) Ms PM Lane. MADUWONGGA, GUBRUN

WF98/5: *Western Australia/Strickland & Ors (Maduwongga) & Forrest & Ors (Karonie)/DR Crook & GK Edson*, [1999] NNTTA 167 (27 May 1999), Member K Wilson MADUWONGGA

WF98/7: *State of Western Australia/Leo Winston Thomas & Ors on behalf of the Waljen People; Ted Coomanoo Evans and Richard Guy Evans on behalf of the Koara People; Quinton Paul Tucker & Ors on behalf of Ngurludharra Waljan Clan; Dimple Sullivan on behalf of the Tjinintjarra Family Group; Sadie Canning & Ors on behalf of the Thithee Birni Bunna Wiya People; Trevor John Brownley & Ors on behalf of the Bibila Lungkutjarra (Waljen) People; and Thomasisha Passmore on behalf of the Milangka-Purungu (Wongatha) People/Anaconda Nickel Ltd,* [1999] NNTTA 99 (19 March 1999), Hon CJ Sumner,

(*Western Australia v Thomas* (1999) 164 FLR 120) (*Anaconda 1*) WONGATHA/KOARA

WF98/9: *Western Australia/ Strickland & Ors (Maduwongga) & Champion & Ors (Gubrun) & Dimer & Ors (Mingarwee)/ Plutonic Pty Ltd & Mineral Commodities NL* [1999] NNTTA 46 (12 February 1999), Hon CJ Sumner MADUWONGGA

WF98/267 & Others: *Western Australia/ Evans (Koara); Thomas (Waljen People); Tucker (Ngurludharra Waljan Clan); Dimple Sullivan (Tjinintjarra Family Group); Canning (Thithee Birni Bunna Wiya People); Brownley Bibila Lungkutjarra (Waljen) People); Thomasisha Passmore (Milangka-Purungu (Wongatha)People); Lynch (Yulbarri Nomad People); Bonney (Mugang People); Canning (United North East Claim); Pearlie Wells (Nardoo); O'Loughlin (Nanga People); Evans (Koara combined Claim); Harrington-Smith(Wongatha combined Claim))/ Anaconda Nickel Ltd; Samson Exploration NL; Delta Gold NL; Murrin Murrin East Pty Ltd,* [1999] NNTTA 203 (15 July 1999), Hon CJ Sumner

(*Western Australia v Evans* (1999) 165 FLR 354) (*Anaconda 2*) WONGATHA/KOARA

WF98/273: *Western Australia/Thomas & Ors (Waljen) & Ors/Herbert Lloyd Townsend Allen*, [1999] NNTTA 103 (29 March 1999), Hon CJ Sumner WONGATHA

WF98/304: *Western Australia/Champion & Ors (Gubrun) & Forrest & Ors (Karonie)/RC Coumbe* [1999] NNTTA 245, (15 September 1999), Hon CJ Sumner MADUWONGGA, GUBRUN

WF99/4: *WMC Resources Ltd/Western Australia/Richard Evans on behalf of the Koara people*, [1999] NNTTA 372 (23 December 1999), Hon CJ Sumner

(*WMC Resources Ltd v Evans* (1999) 163 FLR 333) KOARA/NK/WUTHA

WF00/2: Anaconda Nickel Ltd; Murrin Murrin East Pty Ltd; Murrin Murrin Holdings Pty Ltd; and Glenmurrin Pty Ltd; Delta Gold Ltd/Western Australia/Ron Harrington-Smith, Leo Thomas, Cyril Barnes, Les Tucker, Dimple Sullivan, Aubrey Lynch, Elvis Stokes, Pearlie Wells, Murray Stubbs, Tomasisha Passmore, Thelma O'Loughlin, Sadie Canning (Wongatha People); Richard Guy Evans (Koara People), [2000] NNTTA 366 (8 December 2000), Hon CJ Sumner, Deputy President, Mr J Sosso and Ms J Stuckey-Clarke, Members,

(*Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116) (*Anaconda 3*)
WONGATHA, KOARA

WF03/2: *Townson Holdings Pty Ltd & Anor/ Harrington-Smith & Ors (Wongatha) & Ashwin & Ors (Wutha)/Western Australia*, [2003] NNTTA 82 (9 July 2003), Hon CJ Sumner WONGATHA

WF04/9: *Wongatha People/ Gregory Wayne Down/ Western Australia* [2004] NNTTA 106 (22 November 2004), Hon EM Franklyn WONGATHA

WF98/8: *Strickland & Nudding & Champion, Sambo, Wilson & Donaldson v Glengarry Mining NL*, [1999] NNTTA 3 (15 January 1999), Hon CJ Sumner MADUWONGGA, GUBRUN

WF03/20: *Wongatha People; Wutha People and Koara People/State of Western Australia/Fredrick Andrei and Mindex Australia Pty Ltd*, [2004] NNTTA 81 (9 September 2004), Hon E M Franklyn QC WONGATHA, WUTHA, KOARA

WF97/4: *Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People; Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families; Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga) People*, [1998] NNTTA 2 (20 February 1998), Hon CJ Sumner, MADUWONGGA, GUBRUN

DF97/1: *Northern Territory of Australia/Bill Risk on behalf of the Larrakia People; Tibby Quall on behalf of the Danggalaba Clan/Phillips Oil Company Australia,* [1998] NNTTA 11 (29 September 1998), D Williamson QC,

WF02/4: *Darcy Hunter and Others on behalf of the Nyangumarta People; Frank Sebastian, Joseph Roe & Others on behalf of the Rubibi People; John Dudu Nangkiriny & Others on behalf of the Karajarri People/Western Australia/Gulliver Productions Pty Ltd; Indigo Oil Pty Ltd; Maneroo Oil Company Limited,* [2004] NNTTA 105 (11 November 2004), Hon E M Franklyn QC

WF98/140: *Western Australia/Daniel & Ors (Ngaluma) & Monadee & Ors (Injibandi)/Donald Kimberly North*, [1999] NNTTA 58 (2 March 1999), Professor D Williamson QC

WF99/5: *Placer (Granny Smith) Pty Ltd and Granny Smith Mines Limited/Western Australia/Ron Harrington-Smith & Ors on behalf of the Wongatha people*, [2000] NNTTA 67 (16 February 2000), Hon C J Sumner

WF00/7: *West Australia Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd v Leslie Hayes & Ors (Thalanyji People),* [2001] NNTTA 41 (1 June 2001), Hon CJ Sumner

NF01/1: *Carol Dawn Bissett and Others/Mineral Deposits (Operations) Pty Limited/New South Wales*, [2001] NNTTA 104 (24 September 2001), Member Sosso

(*Bissett v Mineral Deposits (Operation) Pty Ltd* (2001) 166 FLR 46)

VF02/1: *Victorian Gold Mines NL/Victoria/Graham (Bootsie) Thorpe, Lindsay Gordon Mobourne, Regina Lillian Rose, Robert James Farnham on behalf of the Gunai/Kurnai People*, [2002] NNTTA 130, (4 July 2002), Hon CJ Sumner

(*Victorian Gold Mines NL v Victoria* (2002) 170 FLR 1)

VF02/2: *Timothy Glen Summons/Victoria/ Graham (Bootsie) Thorpe, Lindsay Gordon Mobourne, Regina Lillian Rose, Robert James Farnham on behalf of the Gunai/Kurnai People*, [2003] NNTTA 66, (16 April 2003), Hon CJ Sumner

WF04/11: *Western Australia/Judy Hughes & Others on behalf of the Thalanyji People, Ronald Crowe and Others on behalf of Gnulli/Rough Range Oil Pty Ltd*, [2004] NNTTA 108 (1 December 2004), Hon CJ Sumner

QF05/3: *Cameron/Ernest Hoolihan, Hazel Illin, Elsie Thompson (Gugu Badhun)/State of Queensland),* [2006] NNTTA 3 (30 January 2006), Member J Sosso,

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