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Submission of Professor Ciaran O'Faircheallaigh with respect to the Native Title Amendment (Reform) Bill 2011

I support the changes proposed in the **Native Title Amendment (Reform) Bill 2011**, and in particular the proposal to amend Subsection 38(2) so that profit-sharing conditions may be determined by the Arbitral Body. However the proposed amendment to Subsection 38(2) will not on its own address the inequality created by the existing Future Act provisions of the *Native Title Act*, because this inequality is due in substantial measure to the way in which these provisions have been interpreted and applied by the Arbitral Body, the National Native Title Tribunal (NNTT).

Indeed amending Subsection 38(2) may of itself have no effect because the NNTT may decline to determine profit-sharing conditions. While the relevant legal provision would then have changed, there might be no improvement at all in the position of native title claimants and native title holders ('native title parties'). This outcome would be inconsistent with the principles of the United Nations Declaration on the Rights of Indigenous Peoples, cited in the **Native Title Amendment (Reform) Bill 2011.**

To appreciate this point, it is essential to understand how and why the existing Future Act provisions of the *Native Title Act* create a fundamental inequality in negotiating positions between applicants for mining leases and other similar interests ('mining companies') and native title parties, to the serious detriment of the latter. The sources of this inequality are identified, and documented in detail, in the attached article by Tony Corbett and Ciaran O'Faircheallaigh, published by the peer-reviewed *University of Western Australia Law Review*. The article should be treated as part of this Submission.

In summary:

1. The *Native Title Act* gives native title parties a six-month period in which to negotiate with companies wishing to develop new mining projects. If agreement is not reached at the end of the six months, either party may refer the matter to arbitration by the NNTT, which makes a determination as to whether the Future

Act may proceed. In doing so, the NNTT must not determine a condition that entitles native title parties to payments worked out by reference to the amount of profits made, any income derived from or any things produced by the company the project concerned. This creates substantial pressure on the native title parties to reach agreement.

2. In theory mining companies are also under pressure to reach agreement in order to avoid arbitration, because under the *Native Title Act* the NNTT has the power to recommend that a mining lease not be granted or only be granted subject to conditions.

3. In practice mining companies are under no such pressure. Corbett and O'Faircheallaigh's analysis of all 16 arbitration cases conducted by the NNTT up to January 2006 in relation to applications for mining leases shows that in every single case the Tribunal made a determination that the lease be granted. The Tribunal was also unwilling to impose conditions that might prove onerous for the miner. This last point is particularly important, because it highlights the fact that amending Subsection 38(2) to permit profit-sharing conditions offers no guarantee that such conditions will ever be imposed.

4. The NNTT's decisions have maintained this general pattern since 2006. To my knowledge, in only one case has the NNTT recommended that a mining lease not be granted.

5. The overall result is that mining companies know that if they cannot get the deal they want in negotiations, they can go to the NNTT and get their leases issued. Consequently, many native title parties sign agreements that offer them few benefits, because the alternative is arbitration and a determination by the NNTT which offers them no benefits at all.

6. The tendency of the Tribunal to favour miners in *the way in which* it conducts arbitration processes makes the situation even worse. Research into the 16 cases shows, for example, that the Tribunal demands more stringent standards of proof from native title parties than from companies, and tends to accept particular types of evidence when this favours companies but to reject the same sort of evidence when it would favour native title parties.

The **Native Title Amendment (Reform) Bill 2001** would address point 1. above by permitting the NNTT to determine profit-sharing conditions. However it would 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.

To address these problems, the *Native Title Act* should be amended to allocate the arbitration function to a judicial body rather than the government-appointed NNTT. The result would be a situation in which both miners and native title groups faced similar incentives and pressures to reach agreement, and an opportunity for native title to deliver real economic and social benefits to indigenous communities in Australia's mining regions. Such an outcome would be more consistent with the principles of the United Nations Declaration on the Rights of Indigenous Peoples.

The changes proposed in the **Native Title Amendment (Reform) Bill 2011** will not address the fundamental inequality created by the existing Future Acts provisions of the *Native Title Act*. To achieve this goal, additional changes are required to remove the arbitral function from the NNTT.

Yours sincerely,

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