

Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions

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The Native Title Act 1993 (Cth) seeks to recognise and protect native title while facilitating the grant of mining and other interests in land where native title may or does exist. A key mechanism for achieving these goals is the 'Right to Negotiate', designed to result in the conclusion of agreements between grantees (mining companies) and native title parties. The Act creates a strong incentive for native title parties to negotiate agreements. If they fail to do so and the Act's arbitration provisions are applied by the National Native Title Tribunal, the native title parties lose an opportunity to obtain compensation related to the profits or income derived from a mining operation. In principle, the Act also creates incentives for grantees to reach agreement because if they fail to do so and enter arbitration the Tribunal may decline to grant the interests they seek or impose onerous conditions on any grant it makes. However, in practice, the Tribunal has applied the arbitration provisions of the NTA in a manner that renders them largely innocuous from the perspective of grantees. The result is a fundamental inequality in bargaining positions. This undermines the purposes of the NTA and leads to agreements that favour grantees.

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IN its 1992 decision in *Mabo v Queensland (No 2)*¹ ('*Mabo*'), the High Court of Australia rejected the doctrine that Australia was terra nullius or 'land belonging to no one' at the time of European settlement and held that 'the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their traditional laws and customs, to their traditional lands'.² The Native Title Act 1993 represented the Commonwealth government's legislative response to the *Mabo* decision. Among its central objectives³ are 'the recognition and protection of native title', and the establishment of ways in which future dealings affecting native title, 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'.⁴ A critical mechanism for achieving these objectives is a 'special right to negotiate' that the Act confers on native title parties. This is designed to ensure that 'every reasonable effort' has been made to secure the agreement of native title claimants and holders before interests that affect their native title is granted to non-indigenous parties.⁵

The 'right to negotiate' ('RTN') provides native title parties with an opportunity to negotiate about the terms on which any mineral development will take place with the company that is seeking the mining interests (the 'grantee party') and with the state government that proposes to grant them. If negotiations do not lead to an agreement after six months, either party can refer the matter to arbitration by the National Native Title Tribunal ('NNTT'), which can determine that the mining interests may not be granted; may be granted with conditions; or may be granted without conditions. The Tribunal's conduct of the arbitration process has important consequences for grantees and native title parties who do not reach agreement, especially where it relates to the grant of mining leases that are likely to be of major commercial significance for grantees and potentially have extensive impacts on native title rights. It also has wider and important ramifications because the conduct of parties in *all* negotiations and the substance of agreements emerging from them will be affected by the nature of the arbitration process that follows any failure to reach a negotiated outcome. Thus, the way in which the arbitration provisions are applied has important ramifications for the operation of the RTN. The RTN, in turn, is central to achieving the objectives of the NTA. It has been described by Altman as 'the only clear win for indigenous interests in the NTA'⁶ and by Bartlett as the only factor that prevents the amended NTA from being 'blatantly discriminatory'.⁷

1. (1992) 175 CLR 1.

2. NTA Preamble.

3. Other core objectives of the Act which are not a focus of this analysis involve validation of past government actions that may be invalidated because of the existence of native title, and establishment of processes for determining claims to native title: NTA Preamble, s 3.

4. NTA Preamble, s 3.

5. NTA Preamble.

6. J Altman *Native Title Act 1993: Implementation Issues for Resource Developers* Discussion Paper No 88 (Canberra: ANU Centre for Aboriginal Economic Policy Research, 1995) 5.

7. R Bartlett *Native Title in Australia* 2nd edn (Sydney: LexisNexis Butterworths, 2004) 445.

This article examines the NNTT's application of the arbitration provisions of the NTA over the period 1994–2006. It provides critical context by outlining the provisions of the NTA that deal with the RTN and the NNTT's arbitration functions, particularly as these relate to the grant of mining leases. It identifies relevant cases and analyses their outcomes, a task rendered complex by a marked lack of transparency in the information published by the NNTT on arbitration decisions and other future act determinations. It then examines in detail two issues that are fundamental to the NNTT's conduct of its arbitration functions. These involve the imposition of conditions where the NNTT determines that a mining lease may be granted, and the Tribunal's treatment of grantee and native title parties in the arbitration process.

The NNTT has never determined that a mining lease may not be granted, has been unwilling or reluctant to impose substantive conditions not already agreed by negotiation parties on the grant of leases, and has displayed a tendency to favour grantees in the manner it conducts arbitrations. We argue that the NNTT's conduct reflects two major factors. The first is that the Tribunal's 'arbitration' function bears little resemblance to the conventional concept of arbitration, in that it does not involve a process to which the parties have willingly agreed in advance and is not based on rules designed to ensure equitable treatment of each party. The second is that the NNTT is not an independent judicial body but rather constitutes part of the executive. As a result, Tribunal members tend to be responsive to government priorities, which in Australia privilege the interests of resource developers over those of native title parties.

The result of the Tribunal's conduct is that grantees have little to fear from arbitration. We argue that this places all grantees in a position of undue power in their negotiations with native title parties, because the latter are under much stronger pressure to reach agreement than are grantees.⁸ This is resulting in a failure by some grantees to make any serious attempt to secure equitable agreements and is leading to agreements that heavily favour grantees. Such outcomes are inconsistent with the objectives of the NTA. In addition, they cannot provide a firm and lasting foundation for positive relationships between native title interests and mining companies, which in turn are recognised by industry as essential to the sustainable development of Australia's mineral resources.⁹

In conclusion, we argue that native title parties need to 'unmask' the way in which the NNTT is applying the arbitration provisions of the NTA. We identify a range of

8. See generally RJ Lewicki, DM Saunders & JW Minton *Essentials of Negotiation* 2nd edn (Boston: McGraw Hill, 2001) 67, 137.

9. Queensland Resources Council 'Working with Indigenous Communities' (2006) <http://www.qrc.org.au/01_cms/details.asp?ID=240> 6; Minerals Council of Australia *Enduring Value: The Australian Minerals Industry Framework for Sustainable Development* (Canberra: Minerals Council of Australia, 2004).

strategies to mobilise countervailing bargaining power and so overcome the disadvantage they face as a result of the operation of those provisions.

THE RIGHT TO NEGOTIATE AND ARBITRATION PROVISIONS OF THE NTA

Part 2, division 3, subdivision P of the NTA creates what is commonly referred to as the Right to Negotiate. The Act provides that Commonwealth, State or Territory governments must comply with specified procedures before conferring mining rights. The government party is required to give native title parties¹⁰ notice of its intention to confer rights. Following notification the negotiation parties¹¹ –

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.¹²

Either the grantee or the claimants may ask the NNTT to mediate negotiations. If a negotiated outcome is achieved, the negotiation parties must give a copy of the agreement to the Tribunal and to the relevant government minister.¹³ If no agreement is reached within 6 months of the notification date any negotiation party may apply to the NNTT, as the arbitral body,¹⁴ for a determination in relation to the proposed act. The Tribunal –

must make one of the following determinations:

- (a) a determination that the act must not be done;
- (b) a determination that the act may be done;
- (c) a determination that the act may be done subject to conditions to be complied with by any of the parties.¹⁵

If an agreement is reached between the negotiation parties after a party has applied to the Tribunal for a determination, the application is deemed to have been withdrawn. If this occurs or if an agreement is reached during the RTN period and no application for a determination is made, the Tribunal must not make a determination under section 38(1).¹⁶

10. 'Native title parties' are any registered native title body corporate or any registered native title claimant and any native title representative body in relation to any land or waters that will be affected by the proposed act: NTA ss 29(2)(a)-(b), 30.

11. 'Negotiation parties' are the relevant government, any native title party and the grantee party on which the government proposes to confer a mining right: NTA s 30A.

12. NTA s 31(1)(b).

13. NTA s 41A(1).

14. The arbitral body could be a 'recognised State/Territory body' nominated by the relevant State or Territory and determined as an arbitral body by the Commonwealth minister: NTA s 207A. For the purposes of the current discussion it is assumed that the arbitral body is the NNTT.

15. NTA s 38(1).

16. NTA s 37.

As part of the arbitration process, a party can argue that another party has failed in its duty to 'negotiate in good faith'. If the Tribunal finds that there has been an absence of good faith, it must dismiss the application for a determination,¹⁷ requiring the parties to negotiate in good faith before another application for a determination is made.

The NTA provides for an 'expedited procedure' in cases (for example, grant of exploration permits) where the proposed activity 'is not likely to interfere directly' with community or social activities or with areas or sites of particular significance or involve major disturbance to any land or waters.¹⁸ If the expedited procedure does apply, the native title parties do not enjoy a RTN. In reality therefore the 'expedited procedure' is not a procedure, but rather a mechanism for avoiding a procedure that would otherwise apply.¹⁹ In issuing notices of their intention to grant mining interests, government parties may indicate their view that the expedited procedure should apply. The native title parties may object to such proposals, in which case the Tribunal makes a determination as to whether the expedited procedure will or will not apply. If the native title parties do not object, the expedited procedure applies.²⁰

It should be noted that any determination by the NNTT in relation to a proposed future act is not final. The Commonwealth minister can overrule a determination if he or she believes this to be 'in the national interest'.²¹

The NTA creates clear incentives and pressures for native title parties to reach agreement. Under section 33 of the NTA, agreements reached in relation to native title approval of a future act within the relevant negotiation period (initially six months) can include payments to native title parties worked out by reference to the amount of profits made, any income derived or any things produced by the grantee party as a result of the proposed 'act'. However, under section 38(2), if an agreement is not reached within the negotiation period and the matter goes to arbitration by the NNTT, the Tribunal 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 or any things produced by the grantee party. This places native title holders and claimants under considerable pressure to conclude an agreement within

17. Bartlett above n 7, 453-454.

18. NTA s 237.

19. S Choo 'How High Can You Jump? Raising the Bar for Expedited Procedure Matters: Recent Developments in the Interpretation of Section 237 of the Native Title Act' (Paper presented at the Native Title Conference, Geraldton, 2002) 3-4.

20. The provisions described above remained largely unchanged after the 1998 amendments to the Native Title Act 1993 (Cth), with one significant exception. The expedited procedure can now apply where the proposed activity 'is not likely to interfere directly' (as opposed to 'does not interfere directly' prior to the amendments) with community or social activities or with areas or sites of particular significance or involve major disturbance to any land or waters: NTA s 237. This change potentially broadens the application of the expedited procedure.

21. NTA s 42(2).

the negotiation period. For native title parties negotiated outcomes ‘will invariably be preferable to arbitration from a financial perspective owing to the existence of a no rent-sharing proviso at section 38(2)’.²²

In principle, the NTA also 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, speeding up the process of reaching agreements and helping to ensure that the agreements reached would be equitable to both parties.²³ Such an outcome would clearly be consistent with the objectives of the NTA.

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. More generally, any bias by the Tribunal in favour of grantees in the conduct of arbitration would reduce the risks to them of going to arbitration and so reduce the pressure on them to reach negotiated agreements.

How has the NNTT applied the arbitration provisions of the NTA to decisions in relation to the grant of mining leases? We have not been able to identify any published study that focuses on this question. Bartlett examines the NNTT’s administration of the future act regime as a whole in the two years after its establishment, encompassing the RTN, the expedited procedure, questions of ‘good faith’ negotiation, and application of the arbitration provisions.²⁴ Professor Richard Bartlett argues that Aboriginal peoples’ negotiating position is structurally undermined by key aspects of the future acts regime. These include the exclusion of past grants from negotiation; the absence of a requirement for native title parties to consent to future acts; and the wide ambit of the expedited procedure, resulting in the exclusion of many proposed grants from the RTN.²⁵ Bartlett states that within the context of this uneven playing field, the Tribunal’s early future act decisions and determinations favoured certainty and non-indigenous development, and indicated that the Tribunal operated on the basis that:

22. Altman above n 6, 6.

23. Altman, *ibid*; S McKenna ‘Negotiating Mining Agreements under the Native Title Act 1993’ (1995) 2 *Agenda* 301.

24. R Bartlett ‘Dispossession by the National Native Title Tribunal’ (1996) 26 *UWAL Rev* 108.

25. *Ibid*, 116.

- certainty should be provided as quickly as possible;
- the right to negotiate is not significant;
- non-Aboriginal development and settlement must proceed as quickly as possible; and
- native title is a radical change and accordingly 'conservative' interpretations of its principles should be adopted.²⁶

Bartlett notes that the Federal and High Courts reversed a series of rulings by the Tribunal in favour of developer and government parties, and states that the NNTT, 'a body designed to recognise the "unique character" of native title and provide for its "just and proper ascertainment" was adopting conservative interpretations restricting the rights of claimants, whilst the courts appeared much more prepared to recognise and give effect to the rights and interests conferred by such title'.²⁷ His overall conclusion was that the NNTT displays 'a philosophy of decision making which favours certainty and development and discounts native title and the right to negotiate'.²⁸

This conclusion is reinforced by Bartlett's later analysis of a number of specific aspects of the NNTT's application of the arbitration provisions, including the criteria to be used by an arbitral body, the Tribunal's approach to evidence and directions, and determinations made and conditions imposed.²⁹ Bartlett notes that as of 2003, the NNTT had 'yet to make a determination that an act must not be done, even where there has been a gross lack of information and evidence as to the effects of proposed grants of mining leases on native title rights and interests'.³⁰ He states that the conditions imposed to date by the Tribunal on the grant of leases 'do not appear substantial' and 'suggest an approach that native title may, practically speaking, be overridden by the payment of compensation'.³¹

Ritter analyses another aspect of the RTN, the administration of objections to the application of the expedited procedure by the Tribunal's Future Act Unit.³² He notes that in 1997 the Full Bench of the Federal Court found that 'the Tribunal had on many occasions favoured an incorrect interpretation of the NTA that favoured resource interests ahead of native title claimant groups'.³³ After the 1998 amendments to the NTA, the Tribunal issued administrative rules for dealing with objections to the expedited procedure that, as Ritter demonstrates, had no basis in statute and

26. Ibid, 117-118.

27. Ibid, 121.

28. Ibid, 137.

29. Bartlett above n 7, 472-480.

30. Ibid 476.

31. Ibid 479.

32. D Ritter 'A Sick Institution? Diagnosing the Future Act Unit of the National Native Title Tribunal' (2002) 7(2) Australian Indigenous Law Reporter 1.

33. Ibid 2.

made it more difficult for native title parties to mount an objection.³⁴ The Tribunal withdrew the rules after the Western Australian Aboriginal Native Title Working Group obtained a legal opinion that was critical of them, but reintroduced a modified version which still created significant problems for native title parties. In Ritter's words the Tribunal's Future Act Unit 'made a significant effort, unauthorised by statute, to make it more difficult for Aboriginal people to object to the expedited procedure and access the right to negotiate'.³⁵

The following sections provide a detailed analysis of the NNTT's conduct of arbitration in relation to the grant of mining leases over the last decade. This analysis provides a substantial foundation on which to assess the view that the Tribunal favours the interests of resource developers ahead of those of native title parties.

RELEVANT CASES AND OUTCOMES

The first step in the analysis requires identification of cases involving application of the NTA's arbitration provisions to applications for grant of mining leases. These cases involve situations where a negotiated outcome has not occurred and the Tribunal makes a determination on a question of 'good faith' in negotiations; or on whether a mining lease may or may not be granted or may be granted with conditions. We refer to these cases as 'mining lease arbitration determinations'. As discussed in the introduction, they involve issues that are of major importance to the parties and they also affect the context within which all RTN negotiations occur.

The NNTT makes large numbers of future act determinations. We assumed that identifying and obtaining the case files for mining lease arbitration determinations would be a straightforward process. Our initial research quickly proved this assumption to be incorrect, and revealed a marked lack of transparency in the relevant data.

As noted above, the NNTT is prohibited by the NTA from making a determination where agreement has been reached by the negotiation parties.³⁶ However, the Tribunal does in fact make what it refers to as 'future act consent determinations', which it defines as 'a decision by the Tribunal that a future act may proceed and whether any conditions apply, *which is made when parties have reached agreement and consented to those conditions*'.³⁷ The difficulty for our research is that the NNTT did not have a separate category for mining lease arbitration determinations that distinguished these from so-called 'future act consent determinations'.

34. Ibid 4-5; Choo above n 19; WA Aboriginal Native Title Working Group *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: Inquiry into the Effectiveness of the NNTT*, Submission No 19 (2002) 8.

35. Ritter above n 32, 5. See also Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2003* (ATSIC, 2004).

36. NTA s 37.

37. NNTT *Future Act Consent Determinations* (Commonwealth, 2002) (emphasis added).

Another difficulty in identifying and obtaining the data we required was the Tribunal's use of terminology. In addition to the broad application of the statutory term 'determination', the Tribunal does not employ the term 'arbitration' in identifying cases, although the NTA refers to it as 'the arbitral body'. Instead, the term 'inquiry' is used to refer to all future act matters, whether they are determined by 'consent' or by arbitration. These problems of definition and categorisation resulted in mining lease arbitration determinations being subsumed, or lost, within the greater body of future act determinations and so-called 'consent determinations'.

With the assistance of Tribunal staff we employed the following method to overcome these difficulties and identify the relevant cases:

- We isolated the list of 'mining application' file numbers, as supplied by the Tribunal;
- We looked up each of these files under the 'Browse FA by file no.' option on the NNTT website search facility;
- We checked the 'catchwords' column to ascertain if the determination was by consent;
- If not, we checked the introduction for a description of the case;
- If the case concerned a proposed mining development, the Tribunal's decision was then analysed.³⁸

The results of this process are presented in Table 1. We identified 13 cases where the Tribunal made determinations about 'good faith' in negotiations related to the grant of mining leases, and 17 determinations (listed chronologically by file number at the end of the paper) over whether the grant of a mining lease might proceed. In only one case was a decision made that 'good faith' negotiation had not occurred, and this involved a situation where the grantee had made little attempt to engage with the native title party and had made clear that it was participating in the RTN process only so that it could proceed to arbitration by the Tribunal.³⁹ In no case did the NNTT make a determination that the grant of a mining lease could not occur. Both of these findings strongly suggest that grantee parties have little to fear from the arbitration process. They appear most unlikely to have an application for a mining lease rejected. Unless they engage in behaviour that patently demonstrates the absence of an intention to engage in negotiation, they appear unlikely to be required to re-commence the RTN process with a consequent delay in project development.

However, in 10 out of 17 cases the Tribunal did impose conditions on its determination that a mining lease might be granted. If those conditions were stringent and more onerous than grantees might themselves negotiate with native title parties, this

38. NNTT staff (emails, 30 Nov 2004, 2 & 6 Dec 2004).

39. *Western Australia v Dimer* (2000) 163 FLR 426, 452-453.

Table 1: National Native Title Tribunal Arbitration decisions on ‘good faith’ and whether a mining lease may be granted

Arbitration Outcome	Number of Mining Lease Applications
Good faith negotiation satisfied	12
Good faith negotiation not satisfied	1
Future Act can proceed without conditions	7*
Future Act can proceed with conditions	10
Future Act cannot proceed	0

* This includes one case which the NNTT records as involving imposition of conditions, but appears not to do so.⁴⁰

could represent a major incentive for grantees to reach agreement and avoid arbitration. In the next section we analyse the Tribunal’s approach to imposition of conditions.

IMPOSITION OF CONDITIONS ON THE GRANT OF MINING LEASES

Three general points emerge from an analysis of the Tribunal’s approach to imposition of conditions on the grant of mining leases.⁴¹ First, where it has imposed conditions not already agreed between the negotiation parties, these conditions could not reasonably be described as onerous. Second, it has been reluctant to impose conditions requested by native title parties. Third, where there is a dispute between native title and grantee or government parties as to whether conditions should be imposed or what conditions should be imposed, the Tribunal has tended to find in favour of the grantee or government parties.

Absence of onerous conditions

The conditions imposed by the Tribunal on grantees or native title parties are generally far from onerous.⁴² For instance, they may require grantees to pass on to

40. *Bissett v Mineral Deposits (Operations) Pty Ltd* (2001) 166 FLR 46.
41. This analysis is based on a review of all conditions imposed by the Tribunal in mining lease arbitration determinations. The reader may view the relevant cases at the web addresses, correct at 31 January 2006, in appendix 1.
42. Indeed, in only one instance has the Tribunal imposed substantive conditions not already agreed by the parties. This case, *Re Koara People* (1996) 132 FLR 73, was decided by a panel of three members, two of whom were not re-appointed when the Howard government came to office in 1996. On appeal the Federal Court referred the conditions back to the

native title parties copies of notifications sent to government agencies, or to notify native title parties when activity on a lease is about to occur or if the grantee party is taken over by another mining company.⁴³ In other cases they involve matters that are already provided for under general policy or regulation in the jurisdiction concerned, as for example in Western Australia where the Tribunal has applied conditions derived from a standard set of conditions proposed by the Department of Mines and Energy (now the Department of Industry and Resources).⁴⁴

Indeed, when the Tribunal does impose conditions it often justifies their imposition on the basis that they are not onerous on the grantee. In *WMC Resources Ltd v Evans*,⁴⁵ for example, the Tribunal imposed several conditions relating to access to the tenement for members of the native title party and notification of commencement of mining or assignment of leases.⁴⁶ When explaining his reasons for doing so, the Deputy President stated: 'The conditions can hardly be regarded as unreasonable or onerous and some may say they are inadequate if native title is determined to exist'.⁴⁷ Similarly in *Western Australia / Strickland (Maduwongga) & Forrest (Karonie) / DR Crook & GK Edson*,⁴⁸ the Tribunal imposed the condition that the native title party be notified if the mining lease is sold, which it justified on the basis that 'it would not be an onerous condition'.⁴⁹

Unwillingness to impose conditions requested by native title parties

The Tribunal's unwillingness to impose conditions requested by native title parties is evident in a number of areas. For example, the Tribunal has rejected requests from native title parties that, where the nature of any future mining operation is unclear, the grantee be required to conduct a socio-economic assessment if mining commences.⁵⁰ Such requests have been of particular importance in Western Australia,

Tribunal, but it should be noted that the basis of its decision related to issues of law regarding whether or not the Tribunal could impose further conditions at a later stage when more was known about the proposed mining operations rather than on the basis that the conditions imposed in the first instance were unduly onerous: *Evans v Western Australia* (1997) 77 FCR 193.

43. *Western Australia v Maduwongga & Karonie Peoples* (unreported) NNTA 167, K Wilson, 27 May 1999; *Western Australia v Thomas* (1999) 164 FLR 120; *WMC Resources Ltd v Evans* (1999) 163 FLR 333; *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116; *Wongatha People v Western Australia* (unreported) NNTA 106, EM Franklyn, 22 Nov 2004.

44. See eg *Western Australia v Ngalyuma & Injibandi Peoples* (unreported) NNTA 58, D Williamson, 2 Mar 1999, 12.

45. Above n 43.

46. Ibid 359-361.

47. Ibid 359.

48. *Western Australia v Maduwongga & Karonie Peoples* above n 43.

49. Ibid 6.

50. *WMC Resources v Evans* above n 43, 353-354.

where prior to legislative changes that came into effect in February 2006 mining leases were granted to allow mineral exploration to continue and so could become subject to the future acts regime at a time when little was known about any future development. Their denial takes on added significance given that the Federal Court has determined that the Tribunal cannot 'revisit' a determination at a later stage and impose additional conditions when more is known about a proposed project.⁵¹

The Tribunal has also refused to impose conditions designed to enhance the protection available for Aboriginal cultural heritage sites under state legislation. In many cases involving proposed grants in New South Wales, Victoria and Western Australia, the Tribunal has rejected requests by native title parties to impose such conditions, and instead determined that State legislation is adequate and that no further protection measures are required.⁵² The level of protection offered by State cultural heritage legislation is in fact highly variable, indicating that additional protective measures would be required in some cases. For example, in relation to Western Australia, there is extensive evidence that cultural heritage legislation is primarily designed not to protect Aboriginal heritage but to allow its destruction where it might interfere with development.⁵³ In other circumstances, the Tribunal has itself recognised shortcomings in the Western Australian legislation.⁵⁴ It has also stated, as a matter of principle, that the existence of general legislation does not relieve the Tribunal of the obligation 'to consider each proposed Future Act of a similar nature on the basis of its own particular circumstances'.⁵⁵ Yet in arbitration cases the NNTT has consistently declined to impose conditions requested by native title parties that are designed to provide additional protection.

Another area involves the Tribunal's refusal to impose conditions that might help native title parties ensure that grantees comply with existing agreements or with conditions previously imposed by the Tribunal itself. This point is illustrated by O'Faircheallaigh and Kelly's review of arbitration hearings related to the activities

51. *Evans v Western Australia* above n 42.

52. *Western Australia v Maduwongga, Gubrun & Mingarwee Peoples* (unreported) NNTTA 46, Sumner CJ, 12 Feb 1999; *Western Australia v Ngalmu & Injibandi Peoples* (unreported) NNTTA 58, Prof D Williamson, 2 Mar 1999; *Western Australia v Gubrun & Karonie Peoples* (unreported) NNTTA 245, Sumner CJ, 15 Sep 1999; *WMC Resources v Evans* above n 43; *Bissett v Mineral Deposits* above n 40; *Victorian Gold Mines NL v Victoria* (2002) 170 FLR 1; *Wongatha & Wutha Peoples v Western Australia* (unreported) NNTTA 82, Hon CJ Sumner, 9 July 2003.

53. R Dixon & M Dillon *Aborigines and Diamond Mining: The Politics of Resource Development in the East Kimberley* (1990); Bartlett above n 7, 500; D Ritter 'Trashing Heritage: Dilemmas of Rights and Power in the Operation of Western Australia's Aboriginal Heritage Legislation' (2003) 23 *Studies in Western Australian History* 195.

54. See generally C O'Faircheallaigh 'Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples' (2004) 2(25) *Land, Rights, Laws: Issues of Native Title* 1, 9, 12, n 11.

55. *Western Australia v Ngalmu & Injibandi Peoples* above n 52, 12.

of the Western Australian nickel miner, Anaconda Ltd.⁵⁶ Anaconda had earlier negotiated and signed a number of agreements with native title parties. The Aboriginal signatories believed that Anaconda had failed to comply with these agreements, and also that the company had failed to comply with conditions attached by the Tribunal to certain of Anaconda's leases. When Anaconda applied for additional leases, the native title parties objected and tried to use the Tribunal hearings to obtain redress for Anaconda's failure to implement terms of the existing agreements and to ensure that Anaconda complied with conditions the Tribunal had imposed. They requested that additional conditions should be attached to new grants of tenements requiring Anaconda to comply with the terms of earlier agreements.

The Tribunal ruled that Anaconda be granted its tenements, despite finding that the company had indeed not complied with certain aspects of agreements it had signed with native title parties and despite its 'misgivings about some aspects of the negotiations and agreements which were entered into'.⁵⁷ The Tribunal also found that Anaconda had failed to comply with some conditions the Tribunal had attached to earlier determinations that tenements could be granted and it recorded Anaconda's acknowledgement of this failure.⁵⁸ The Tribunal stated:

The Tribunal finds it unsatisfactory (and somewhat inexplicable) that Anaconda has ignored its obligations under a previous determination made by the Tribunal. The conditions were imposed after lengthy hearings involving senior officers of Anaconda where the concerns of native title parties were fully ventilated. Anaconda should have been fully aware of the conditions and been careful to ensure it complied with them.... However, the Tribunal has concluded, somewhat reluctantly, that no further conditions should be imposed.⁵⁹

The Tribunal did not explain the logic behind its 'reluctant' decision.

The extent of the Tribunal's disinclination to impose conditions is indicated by its reluctance to apply them when requested by native title parties even where the conditions involved have already been accepted by the grantee parties. In *Western Australia / Strickland (Maduwonga) & Champion (Gubrun) & Dimer (Mingarwee) / Plutonic Pty Ltd & Mineral Commodities NL*,⁶⁰ the parties requested that some matters agreed between them prior to arbitration be included as conditions, while other matters in dispute be subject to arbitration. The Tribunal member seemed reluctant to comply with this request and concluded: 'I have given weight to the grantee party's agreement to the grant of the tenements subject to the conditions ... and have decided on this basis to impose conditions *despite some reservations*

56. C O'Faircheallaigh & R Kelly *Corporate Social Responsibility, Native Title and Agreement Making: A Report to the Human Rights and Equal Opportunity Commission* (2001) 167.

57. *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116, 201.

58. *Ibid* 202.

59. *Ibid* 202-203.

60. Above n 52.

about the extent of the evidence to support them'.⁶¹ Similar 'reservations about the extent of other evidence' were expressed when consenting to impose conditions that formed an existing agreement in *Western Australia / Thomas (Waljen) / Herbert Lloyd Townsend Allen*.⁶²

Support for grantees in disputes regarding conditions

The Tribunal tends to support grantee or government parties where the imposition of a condition is the subject of dispute between them and native title parties. For instance, in *Western Australia / Champion (Gubrun) & Strickland (Maduwongga) & Ollan (Mingarwee) / Resolute Ltd*,⁶³ the parties disagreed over whether the following condition, sought by the native title claimants, should be imposed by the Western Australian government as a condition of granting the mining lease:

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 each of the registered native title claimants or pursuant to section 18 of the Aboriginal Heritage Act 1972 (WA).⁶⁴

The government party argued against imposition of the condition, claiming that it would represent an 'onerous responsibility'.⁶⁵ The Tribunal found in favour of the grantee and government parties, and suggested that a condition requiring consent from the traditional owners was 'substantially contained'⁶⁶ in a condition requiring consent from the state minister for exploration or mining on sites as provided for under the Aboriginal Heritage Act 1972 (WA). It was suggested that the determination instead include 'a condition that the grantee party must give written notice to both the native title party and the government party' of its intention to conduct activities on the tenement.⁶⁷ Clearly, a condition providing that the native title parties be notified when activities were to occur represents a quite different outcome than the requirement for their consent before activities could occur.

CONDUCT OF ARBITRATION

The NTA's requirement in section 109(1) that the NNTT carry out its activities in a manner that is 'fair' and 'just' is of particular significance in relation to the Act's arbitration provisions, given their importance in the operation of the RTN and so in

61. Ibid 21 (emphasis added).

62. (Unreported) NNTTA 103, Sumner CJ, 29 Mar 199.

63. (Unreported) NNTTA 219, PM Lane, 4 Aug 1999.

64. Ibid 3.

65. Ibid 4.

66. Ibid 7.

67. Ibid 7-8.

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. What does the conduct of arbitration cases to date reveal about the Tribunal's record in this regard? We consider this question by examining four aspects of the way in which the Tribunal has conducted relevant cases: the standards of evidence it demands from different parties; the degree to which there is consistency between its assessment of evidence and its findings; the Tribunal's consistency in giving weight to particular sorts of evidence; and its consistency in applying the principles it articulates.

Standards of evidence

Our examination of the cases reveals that the Tribunal's approach to the standards of evidence demanded from the grantee and native title parties consistently favours the grantee. Highly specific evidence is demanded from the native title parties regarding, for example, how and where native title rights are enjoyed in relation to the proposed mining lease. The same level of detail is not required of the grantee in relation to, for instance, when, how and over what area mining will occur, what benefits it is likely to generate and what impacts it is likely to have on native title.

In *Bissett v Mineral Deposits (Operations) Pty Ltd*,⁶⁸ which concerned the proposed extension of mineral sandmining near Newcastle, the NNTT demanded a high particularity of evidence from the native title party but not from the grantee or government parties. The Tribunal required specific evidence regarding the potential impact of mining on particular native title rights,⁶⁹ and found that 'there is 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'.⁷⁰

In contrast to the specific evidence demanded of the native title party, contentions of a general nature by the grantee were accepted. For example, the existence of a 'longstanding Aboriginal employment policy resulting in several Aboriginal people being employed at any one time'⁷¹ was accepted at face value. The Tribunal did not request specific evidence regarding, for example, what the policy entailed, the number of people employed as a result or the nature of work being performed. This occurred although the native title party, who would supposedly benefit from such a policy, argued that there was no evidence to support the contention that the policy existed.⁷²

68. Above n 40.

69. Ibid 63-66, 94-95.

70. Ibid 64.

71. Ibid 79.

72. Ibid 81.

In *Townson Holdings Pty Ltd / Harrington-Smith (Wongatha) & Ashwin (Wutha) / Western Australia*,⁷³ an arbitration over whether negotiations had been conducted in good faith and whether mining leases over an area of 1,500 hectares should be granted, the requirement of specific evidence was again applied inequitably. Both the native parties contended that they conducted ceremonies on and had custodial responsibilities for the tenement area.⁷⁴ The Wongatha People also submitted that ‘elaborate evidence ... has been given during the past 18 months in the determination proceedings involving the Wongatha claim’.⁷⁵ However, the Tribunal dismissed the native title parties’ case because of ‘the lack of particularity in the evidence from the native title parties in this matter’.⁷⁶

Once again, the same standard was not required of the grantee. The Tribunal noted: ‘There is no specific evidence of the economic significance of the grant of the proposed mining leases...because of the uncertainty about whether a viable ore body will be discovered’.⁷⁷ However, in this case, the Tribunal did not see the lack of specific evidence relating to potential economic benefits as a basis on which to question, much less dismiss, the grantee’s request that a lease be issued.

Another example of the Tribunal’s willingness to uncritically accept evidence tendered by a grantee occurred in *WMC Resources Ltd v Evans*. The Tribunal accepted an anthropological report tendered by Western Mining Corporation’s solicitor as evidence of an absence of significant sites, despite being ‘unaware of who the informants for the survey were and whether any of the Koara native title group were involved’.⁷⁸

Evidence and decisions

The Tribunal tends to discuss evidence during hearings 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 and/or grantee party, when making its decisions. In other words, there is a lack of fit between the Tribunal’s explicitly stated understanding of the evidence before it and its subsequent conclusions.

In *Bissett v Mineral Deposits (Operations) Pty Ltd*, the Tribunal acknowledged deficiencies in the grantee’s Environmental Impact Statement (EIS), particularly that the native title party was not consulted for the Aboriginal Heritage Management Plan, stating that ‘some of the concerns raised, in this Tribunal’s opinion, are valid’.⁷⁹

73. (Unreported) NNTA 92, Sumner CJ, 9 Jul 2003.

74. Ibid 34.

75. Ibid.

76. Ibid.

77. Ibid 36; see also *WMC Resources v Evans* above n 43, 356.

78. *WMC Resources v Evans* ibid.

79. *Bissett v Mineral Deposits* above n 40, 90.

Importantly, the Aboriginal community's endorsement of the Plan was a condition of the grant of development consent by the local council.⁸⁰ In concluding, however, and in determining that the mining lease should be granted the Tribunal member stated, 'I do not accept that the EIS prepared is other than a professional document that adequately and carefully analyses the impact of the proposed development'.⁸¹

A striking example of disparity between the Tribunal's initial consideration of evidence and its decision occurred in *WMC Resources Ltd v Evans*. In what appeared to be an important ruling in favour of the native title party, the Tribunal agreed that the findings from a previous case, *Minister for Mines (WA) v Evans ('Koara 2')*,⁸² be accepted for the purposes of the case at hand.⁸³ *Koara 2* included evidence of the Koara People's connection to their country, and the connectivity of significant sites to each other. The Tribunal recorded the following statement as a finding of fact:

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.⁸⁴

Having accepted these findings, the Tribunal then came to the contradictory and, for the native title party, apparently fatal conclusion that: 'On the question of the weight and relevance of the *Koara (No 2)* findings I generally accept the contentions of the government and grantee parties. The findings do not relate specifically to the proposed mining leases'.⁸⁵ In doing so the Tribunal ignored the essence of the findings it had previously accepted, regarding the Koara People's connection to their land as a whole and the interconnectivity of significant sites that exist within that land.

Relevance of evidence

Also evident from an analysis of the cases is the Tribunal's tendency to accept particular types of evidence or argument as valid when they favour grantees, but to ignore or dismiss them when they would favour native title parties. A case in point is the argument that the area of land to be affected by mining activities is a small

80. Ibid 54-55.

81. Ibid 94-95.

82. (1998) 163 FLR 274.

83. *WMC Resources v Evans* above n 43, 352.

84. Ibid 349-350.

85. Ibid 352.

proportion of the claim area, and therefore mining will have minimal impact and should proceed. In *Western Australia / Champion (Gubrun) & Forrest (Karonie) / RC Coumbe*,⁸⁶ for example, the Tribunal concluded that mining activities will ‘have only a minimal effect on native title rights and interests ... reinforced by the fact that the area of the mining leases is only 104 hectares ... in a claim covering thousands of square kilometres’.⁸⁷ Likewise, in *Bissett v Mineral Deposits (Operations) Pty Ltd*, the Tribunal accepted contentions by the government party that the restrictions would only affect four to six hectares at any given period of time’.⁸⁸

The same logic is not applied in favour of the native title party when the lease area is relatively large. In *WMC Resources Ltd v Evans*, the proposed leases cover an area of 1,349 hectares.⁸⁹ The size of the proposed lease takes on greater significance given that 49 per cent of the Koara People’s claim was already the subject of mining tenements and that additional areas within the claim were degraded from past mining.⁹⁰

A related issue involves the practice of considering as relevant wider matters related to mining when these favour the grantee’s case but ignoring them when they favour the native title parties. For example, in *Victorian Gold Mines NL v Victoria*,⁹¹ the Tribunal considered an entire mining project that covers a number of mine sites when considering economic benefits to the State of Victoria:

Strictly the Tribunal is concerned in this inquiry only with mining licence application 5320 which on its own it is unlikely to have a great impact in the context of the Victorian economy as a whole. However it has significance as part of the overall project which, if it proceeds, will bring economic benefits.⁹²

In contrast, when examining the impacts of mining on native title claimants, the Tribunal restricted consideration to one mine site.⁹³

Finally, the Tribunal has used the absence of Aboriginal burial sites as an indication that sites or areas are not of ‘particular significance’⁹⁴ and so the imposition of conditions on the grant of leases is not justified.⁹⁵ However, in *The Griffin Coal*

86. Above n 52.

87. Ibid 10.

88. *Bissett v Mineral Deposits* above n 40, 70; see also *Western Australia v Maduwongga, Gubrun & Mingarwee Peoples* (unreported) NNTA 46, Sumner CJ, 12 Feb 1999, 10; *Western Australia v Ngalmala, Monadee & Injibandi Peoples* above n 44, 11.

89. *WMC Resources v Evans* above n 43, 334.

90. Ibid 346, 354.

91. (2002) 170 FLR 1.

92. Ibid 26; see also *WMC Resources v Evans* above n 43, 356.

93. *Victorian Gold Mines NL v Victoria* (2002) 170 FLR 1, 16-18; see also *Nyungar People v Western Australia* (unreported) NNTA 19, Sumner CJ, 28 Feb 2006, 16.

94. Native Title Act 1993 (Cth) s 39(1)(a)(v).

95. *Bissett v Mineral Deposits* above n 40, 68-69, 73-74.

*Mining Co Pty Ltd / Nyungar People (Gnaala Karla Booja) / Western Australia*⁹⁶ the Tribunal did not impose conditions despite the presence of a site ‘comprising skeletal material and burial ground’.⁹⁷

Application of principles

The Tribunal cites various principles when considering evidence and giving reasons for arbitration decisions. These could be of considerable importance in ensuring fair and just outcomes for native title parties, but having cited these principles and precedents the Tribunal then usually ignores them in determining cases.

A principle that is regularly cited is:

The Tribunal’s duty in making a determination requires a weighing of the various effects and interests ... before it and there is no statutory indication that any one effect or interest is to be afforded any greater weight than any other.⁹⁸

The earlier discussion of the differing requirements for evidence from native title parties and grantees and of the different significance attached to evidence from the two suggests the Tribunal does in fact afford greater weight to the interests of grantee parties.

Another principle the Tribunal regularly cites is: ‘For the purpose of the right to negotiate provisions of the Act, determined and claimed and registered native title rights and interests are treated as being on the same footing’.⁹⁹ In other words, native title claims that have been registered but not yet determined are treated the same as claims that have been determined. However, in *WMC Resources Ltd v Evans*, the Tribunal stated: ‘The conditions [imposed upon the grantee] can hardly be regarded as unreasonable or onerous and some may say they are inadequate if native title is determined to exist’.¹⁰⁰ If the conditions would be viewed as inadequate for an area where native title has been determined to exist, application of the precedent would have led the Tribunal to impose ‘adequate’ conditions in this case.

A third principle regularly cited, and one that draws support from the High Court’s *Mabo* decision,¹⁰¹ is that Aboriginal culture is not ‘frozen in time’ and that Aboriginal laws and customs, like those of all peoples, will change. For example, in *Bissett v*

96. *Nyungar People v Western Australia* above n 93.

97. *Ibid* 13.

98. *NNTT Guide to Future Act Decisions Made Under the Commonwealth Right to Negotiate Scheme* (NNT, 2005) 95, citing *Re Koara People* above n 42, 81; *Western Australia v Thomas* (1996) 133 FLR 124, 165-166.

99. *Wongatha & Wutha Peoples v Western Australia* (unreported) NNTTA 82, Sumner CJ, 9 Jul 2003, 33; see also *WMC Resources v Evans* above n 43, 340.

100. *WMC Resources v Evans* above n 43, 359.

101. R French ‘A Moment of Change: Personal Reflections on the National Native Title Tribunal 1994-1998’ (2003) 27 MULR 488, 495, fn 35.

Mineral Deposits (Operations) Pty Ltd, the Tribunal member was critical of what he described as a ‘frozen in time’ approach to what constitutes ‘tradition’.¹⁰² However, he then rejected the deposition of the native title parties regarding the contemporary significance of sites within the mining lease application,¹⁰³ accepting the Environmental Impact Assessment’s description of them as ‘transitory and fragile’¹⁰⁴ and ‘having only low to moderate scientific value’.¹⁰⁵ He noted the absence of burial sites, disturbance of which he assumed would have ‘particularly deleterious cultural implications for the native title party’.¹⁰⁶ In doing so, the member adopted the ‘frozen in time’ approach he had earlier criticised.

THE NNTT’S APPLICATION OF THE ARBITRATION PROVISIONS

An analysis of cases over more than a decade indicates that companies seeking grants of mining leases have little to fear from the application of the arbitration provisions of the NTA. There is little chance the NNTT will find they have acted in bad faith thus requiring them to recommence the Right to Negotiate process, unless their behaviour has been patently uncooperative. They seem assured of obtaining a mining lease, and any conditions attached to it are unlikely to be onerous and most unlikely to be more onerous than those that could be negotiated with native title parties. If experience to date is any guide, grantees are likely to benefit from favourable treatment by the Tribunal in the way in which it conducts arbitration hearings and reaches arbitration decisions.

Native title parties face the opposite situation. The analysis of cases indicates that, for them, entering arbitration demands commitment of scarce resources, offers little hope of any positive outcomes and little prospect that they will be treated equitably in arbitration processes. It must also be remembered that even if the NNTT were to make a determination that favoured the native title parties, there is still the possibility that its decision would be set aside or varied by the relevant government minister under section 42. Against this background it is not surprising that the native title parties did not participate in the two most recent mining lease arbitration cases.¹⁰⁷

This situation has profound implications for all negotiations conducted pursuant to the RTN provisions of the NTA. Native title parties are under considerable pressure to reach agreement, both because of the ‘no royalty’ provision of section 38(2) and because if they fail to do so the grantee can proceed to an arbitration which will almost certainly yield a result for the native title parties inferior to that the grantee

102. *Bissett v Mineral Deposits* above n 40, 74.

103. *Ibid* 73-74.

104. *Ibid* 72.

105. *Ibid* 72.

106. *Ibid* 69.

107. *Nyungar People v Western Australia* above n 93; *Gugu Badhun People v Queensland*, (unreported) NNTA 3, J Sosso, 30 Jan 2006.

has placed on the negotiating table, despite the fact that the latter may represent a very poor outcome for them. In contrast, grantees are under little pressure to settle because they know they can achieve a satisfactory outcome from arbitration. Thus, a profound inequality in bargaining positions is created and, unless native title parties can find some other source of countervailing bargaining power, agreements reached through the RTN process are likely to strongly favour grantees.

Two specific examples will illustrate the impact of the current situation. Both are real and arise from the authors' experience, but details are omitted to preserve confidentiality. During mid-2005, negotiations were under way in an eastern Australian state in relation to a major new resource project that, at full production, is expected to generate revenues of about \$320 million per annum. The grantee offered the native title parties financial compensation of \$45 000 per annum. In a brief seeking advice on this offer, a Native Title Representative Body ('NTRB') legal officer mentioned that the negotiators for the mining company were 'continually threatening to go to arbitration' if an agreement was not reached in the time frame they had set. The native title group felt the company offer was grossly inadequate, but that it had little choice but to settle.

The second involves a negotiation in Western Australia. Company representatives informed a group of traditional owners that unless they accepted an offer of financial compensation by close of business on the day of the meeting, the company would go to the NNTT and the Tribunal would give it a mining lease. The traditional owners, who had previously been advised of the Tribunal's decision-making record, signed the agreement. Under subsequent pressure from the relevant NTRB, the company re-opened discussions, and entered into agreements on substantially improved terms. However, this incident highlights just how vulnerable the position of native title parties can be.

Not all mining companies adopt approaches of this sort, but on the other hand neither are these isolated incidents. They suggest that some companies are certainly taking full advantage of the disproportionate bargaining power afforded them by the NNTT's application of the arbitration provisions.

Why have native title parties not had more frequent recourse to the courts to challenge the NNTT's application of the arbitration provisions? A critical factor here involves the serious resource constraints facing NTRBs that would, in most cases, have to meet the cost of such legal actions. In 1998, consultants commissioned by the Federal government concluded that NTRBs would need to be allocated approximately double their existing level of funding in order to perform their core, statutory obligations, that is, those specifically provided for under the NTA.¹⁰⁸ The need for additional funding has been endorsed by Commonwealth agencies,

108. B Rashid & Corrs Chambers Westgarth *Review of Native Title Representative Bodies: Consultancy for ATSIC Native Title Branch* (1998) 77.

Parliamentary committees, State governments and the mining industry.¹⁰⁹ However, the Commonwealth government has chosen not to increase NTRB funding, which in fact has declined slightly in real terms (by 2.4 per cent in 1997 dollars, from \$44 277 000 in 1997–1998 to \$43 199 000 in 2002–2003).¹¹⁰ In contrast, the Federal government has substantially increased real funding for the NNTT (by 43 per cent between 1998–1999 and 2003–2004),¹¹¹ and for non-Aboriginal interests that oppose native title claims (by 465 per cent from \$2 million to \$11.3 million between 1997–1998 and 2001–2002). At the same time, the workload faced by NTRBs has risen dramatically, while the Federal government has tightened conditions on their use of the funds they receive, including prohibiting NTRBs from applying them to support native title groups where a determination of native title has occurred.¹¹² Reflecting this situation:

It is no answer to concerns [in relation to NNTT decisions] merely to state that if an applicant, or a representative body, is concerned over the manner in which the NNTT carries out its functions or interprets the NTA they may seek judicial review. Given the limited resources available to representative bodies, that option is simply not available in most cases.¹¹³

An additional reason for the reluctance of native title parties to appeal NNTT decisions may be a belief, particularly in the wake of the High Court's *Ward* and *Yorta Yorta* decisions,¹¹⁴ that the courts would be no more likely than the NNTT to treat their interests equitably.¹¹⁵

How can we explain the conduct of the NNTT in applying the NTA's arbitration provisions? The first point to note is that the term 'arbitration' is in fact a misnomer. 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.

109. See eg Aboriginal and Torres Strait Islander Social Justice Commissioner above n 35, 2; Cape York Land Council *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Inquiry into the Effectiveness of the NNTT* Submission No 32 (2003); Rio Tinto Ltd, Submission No 17 (2002) 6; Cabinet Office of New South Wales, Submission No 3 (2001).

110. Aboriginal and Torres Strait Islander Commission, *ATSIC Annual Reports 1997–1998 to 2002–2003*.

111. Nominal funding increased from \$19 million in 1998–1999 to \$32 million in 2003–2004: NNTT *Annual Reports 1998–1999 to 2002–2003*.

112. See generally O'Faircheallaigh above n 54.

113. WA Aboriginal Native Title Working Group above n 34, 9.

114. See *Ward v Western Australia* (2002) 213 CLR 1; *Yorta Yorta v Victoria* (2002) 214 CLR 422.

115. Bartlett above n 7, chs 6 & 7, 65–82; L Wright 'Themes Emerging from the High Court's Recent Native Title Decisions' (NNTT: Occasional Paper Series 1, 2003).

Arbitration decisions are final and binding and cannot be set aside by an external party.¹¹⁶ As is clear from the earlier discussion, 'arbitration' by the NNTT is a very different process. One indication of this fact is that in only one of the 17 cases we examined was arbitration initiated by a native title party.

The second and related point is that the NNTT is not an independent judicial body but rather constitutes part of the executive, a point highlighted by the ministerial power to override Tribunal determinations.¹¹⁷ Unlike the judiciary its 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. One of those priorities is to facilitate the development of Australia's mineral resources.¹¹⁸ 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',¹¹⁹ 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.¹²⁰ Against this background the NNTT's application of the arbitration provisions of the NTA is certainly explicable.

However, the Tribunal's behaviour can also be seen as potentially inconsistent with the state's own priorities. It has been well established for almost two decades that, in Australia's mining regions, the ability of Aboriginal people to negotiate favourable agreements with developers plays a central role in ensuring that the positive economic impacts of mining are maximised at the local and regional level. This is because Aboriginal people are, more than any other group in Australia that shares in wealth generated by mining, inclined to spend and invest their money locally.¹²¹ Thus, by undermining the negotiating power of native title interests, the Tribunal is in fact militating against the positive economic outcomes it professes to facilitate.

116. See generally SC Bennett *Arbitration: Essential Concepts* (New York: ALM Publishing, 2002); G Gibson *The Arbitrator's Companion* (Sydney: Federation Press, 2001) x, 2, 13-16; A Tweeddale & K Tweeddale *Arbitration of Commercial Disputes: International and English Law and Practice* (New York: Oxford University Press, 2005).

117. NTA s 42.

118. Bartlett above n 24, 111-112; R Howitt *Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples* (London: Routledge, 2001); O'Faircheallaigh above n 54; KJ Walker *The Political Economy of Environmental Policy: An Australian Introduction* (Kensington: UNSW Press, 1994) 253.

119. See eg NNTT, *Annual Report 2002-2003* (2003) 33.

120. See eg *Wongatha & Wutha Peoples v Western Australia* (unreported) NNTTA 82, Sumner CJ, 9 Jul 2003, 37.

121. Northern Land Council *Land Rights and Mining: The Economic and Social Realities* (1985); C O'Faircheallaigh 'A Framework for Northern Economic Development' (Paper presented at Northern Australia Development Council's 10th Annual Conference *Developing the North: Ideas to Reality*, Kununurra, 23-25 Oct 1986).

POLICY IMPLICATIONS

What are the implications of this situation for Aboriginal people? One clear implication is the need to reveal to the wider Australian community the fact that the NNTT is applying the arbitration provisions of the NTA in a manner that is inconsistent with the Act's objectives, that systematically disadvantages native title parties, and that can deny them the benefits of the RTN. Another and major implication is the need to identify some alternative sources of bargaining strength to counteract the disadvantage they face as a result of the NTA's arbitration provisions and the way they are being implemented. O'Faircheallaigh has identified a range of relevant strategies.¹²² These include the use of legal and regulatory avenues not involving the RTN – for example, administrative law and environmental impact assessment requirements; gaining leverage from the corporate social responsibility policies of mining companies; and a range of political strategies operating at local, regional, state and national levels. As part of their wider political strategies, Indigenous Australians can also pursue changes to the NTA and the operations of the NNTT to ensure that the RTN operates more equitably than it does at present. This last option is one to be pursued over the long term, given that the current Federal government's foreshadowed amendments to the NTA may in fact further reduce, rather than enhance, the procedural rights of native title parties.

The Tribunal's application of the NTA's arbitration processes also has important ramifications for industry. While in the short term it may facilitate the grant of mining interests under conditions highly favourable to mineral developers, in the longer term the negotiation of agreements that are fundamentally inequitable is likely to result in hostility towards mineral development from native title groups, to preclude development of positive relationships between native title parties and mining companies and to 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.

122. O'Faircheallaigh above n 54.

Appendix 1: NNTT Mining Lease Arbitration Determinations

WF96/1	<i>Minister for Mines (WA) v Evans</i> (1998) 163 FLR 274 < http://www.nntt.gov.au/determination/1247.html >
WF97/8	<i>Western Australia/ Champion & Ors (Gubrun) & Strickland & Ors (Maduwongga) & Ollan & Ors (Mingarwee)/ Resolute Ltd</i> [1999] NNTTA 219 (Unreported, Ms PM Lane, 4 August 1999) < http://www.nntt.gov.au/determination/1257.html >
WF98/5	<i>Western Australia/ Strickland & Ors (Maduwongga) & Forrest & Ors (Karonie)/ DR Crook & GK Edson</i> [1999] NNTTA 167 (Unreported, Mr K Wilson, 27 May 1999) < http://www.nntt.gov.au/determination/1259.html >
WF98/7	<i>Western Australia v Thomas</i> (1999) 164 FLR 120 < http://www.nntt.gov.au/determination/1262.html >
WF98/9	<i>Western Australia/ Strickland & Ors (Maduwongga) & Champion & Ors (Gubrun) & Dimer & Ors (Mingarwee)/ Plutonic Pty Ltd & Mineral Commodities NL</i> [1999] NNTTA 46 (Unreported, Hon CJ Sumner, 12 February 1999) < http://www.nntt.gov.au/determination/1266.html >
WF98/140	<i>Western Australia/ Daniel & Ors (Ngaluma) & Monadee & Ors (Injibandi)/ Donald Kimberly North</i> [1999] NNTTA 58 (Unreported, Professor D Williamson, 2 March 1999) < http://www.nntt.gov.au/determination/1271.html >
WF98/267	<i>Western Australia v Evans</i> (1999) 165 FLR 354 < http://www.nntt.gov.au/determination/1276.html >
WF98/273	<i>Western Australia/ Thomas & Ors (Waljen) & Ors/ Herbert Lloyd Townsend Allen</i> [1999] NNTTA 103 (Unreported, Hon CJ Sumner, 29 March 1999) < http://www.nntt.gov.au/determination/1277.html >
WF98/304	<i>Western Australia/ Champion & Ors (Gubrun) & Forrest & Ors (Karonie)/ RC Coumbe</i> [1999] NNTTA 245 (Unreported, Hon CJ Sumner, 15 September 1999) < http://www.nntt.gov.au/determination/1281.html >
WF99/4	<i>WMC Resources Ltd v Evans</i> (1999) 163 FLR 333 < http://www.nntt.gov.au/determination/1283.html >
WF00/2	<i>Anaconda Nickel Ltd v Western Australia</i> (2000) 165 FLR 116 < http://www.nntt.gov.au/determination/1228.html >
NF01/1	<i>Bissett v Mineral Deposits (Operation) Pty Ltd</i> (2001) 166 FLR 46 < http://www.nntt.gov.au/determination/1160.html >
VF02/1	<i>Victorian Gold Mines NL v Victoria</i> (2002) 170 FLR 1 < http://www.nntt.gov.au/determination/1027319420_19553.html >
WF03/2	<i>Townson Holdings Pty Ltd & Anor/ Harrington-Smith & Ors (Wongatha) & Ashwin & Ors (Wutha)/ Western Australia</i> [2003] NNTTA 82 (Unreported, Hon CJ Sumner, 9 July 2003) < http://www.nntt.gov.au/determination/1057797973_2216.html >
WF04/9	<i>Wongatha People/ Gregory Wayne Down/ Western Australia</i> [2004] NNTTA 106 (Unreported, Hon EM Franklyn, 22 November 2004) < http://www.nntt.gov.au/determination/110111382_2860.html >
QF05/03	<i>Cameron/ Hoolihan & Ors (Gugu Badhun)/ Queensland</i> [2005] NNTTA 84 (Unreported, Mr J Sosso, 16 November 2005) < http://www.nntt.gov.au/determination/1132276550_2384.html >
WF05/10	<i>The Griffin Coal Mining Co Pty Ltd/ Nyungar People(Gnaala Karla Booja)/ Western Australia</i> [2006] NNTTA 19 (Unreported, Hon CJ Sumner, 28 February 2006) < http://www.nntt.gov.au/determination/1141695708_3332.html >