



National  
Native Title  
Tribunal



# Future act: conferences held during inquiries

*Information sheet*

*Section 150 of the Native Title Act*

Future act unit, May 2002

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# Relevant sections of the Act

Relevant sections of the *Native Title Act 1993* (Cwlth):

- s. 32: the role of the Tribunal in the expedited procedure
- s. 35: applying to the Tribunal for a future act determination
- s. 38: future act determinations
- s. 150: the President can direct the holding of a conference to help resolve matters relevant to the inquiry

## What is a right to negotiate inquiry?

If the parties cannot reach agreement about whether a future act such as the grant of a mining tenement should attract the expedited procedure (i.e. be fast-tracked without the normal right to negotiate under the Native Title Act 1993) or about whether certain future acts should be done after negotiations have taken place, the Tribunal may be called upon to conduct an inquiry. The Tribunal may conduct an inquiry into:

- an expedited procedure objection application, and
- a future act determination application.

## What is an expedited procedure objection application inquiry?

This is an inquiry conducted by the Tribunal into whether or not the grant of a mining tenement (usually an exploration or prospecting licence) should be fast-tracked (i.e. subject to the expedited procedure). If the fast-tracking applies then the grant can be made without the normal right to negotiate. A registered native title claimant (a native title party) may object to the fast-tracking of a grant. If they do so, and no agreement can be reached, the Tribunal conducts an inquiry to determine whether the fast-tracking should be permitted. It will not be permitted if the grant is likely to:

- interfere directly with the native title party's country or social activities;
- interfere with acts or an act of particular significance to the native title party; or
- if there is a major disturbance to land.

If the grant cannot be fast-tracked then the negotiation parties must negotiate with a view to reaching an agreement about whether the future act may be done. The Tribunal may be requested to mediate to assist the parties reach agreement.

# What is a future act determination application inquiry (commonly called a future act arbitration)?

If the negotiation parties are unable to reach agreement during negotiations and mediation then any one of them may apply to the Tribunal for a future act determination. That is, for a determination whether the future act (e.g. the grant of a mining lease) can be done and, if so, whether any conditions should be imposed. In order to make such a determination the Tribunal must conduct an inquiry (an arbitration). This means that it will conduct hearings, receive submissions and evidence from the parties and take into account issues set out in the Native Title Act, such as the effect of the grant on the enjoyment by the native title party of their registered native title rights and interests (among other things) and the economic or other significance of the future act and the public interest.

## Can the Tribunal mediate once an inquiry has commenced?

Although the Tribunal may be conducting an inquiry, there is nothing to stop the parties continuing to negotiate with a view to reaching agreement. There is also nothing to stop the Tribunal continuing a mediation which it was involved in before a future act determination application was made. In addition the President of the Tribunal may convene a conference of the parties known as a 'section 150' conference.

## What is a 'section 150 conference'?

At any time during the inquiry process, the Tribunal member or any of the parties may ask for a separate conference to try and resolve matters relating to the inquiry. This conference is known as a 'section 150 conference' because section 150 of the Native Title Act sets out what must be done. The request goes to the Tribunal's President, or his delegate, who can then direct a convenor to hold a conference with parties or their representatives. The inquiry process can still take place while conferences are being conducted.

Conferences held during inquiries are distinct from mediation conferences, but they work on similar principles.

## Who is involved in conferences?

For conferences related to an objection to the expedited procedure, or fast-tracking process, the parties can be:

- the native title parties

- the beneficiary of the future act (grantee party), for example the person or company applying for the tenement
- the government agency making the grant — although they may not always attend.

For conferences related to a future act determination application, the parties can be:

- the native title parties
- the beneficiary of the future act (grantee party), for example the person or company applying for
- the tenement
- the government agency making the grant.

However, if the future act in question is a compulsory acquisition of land, the parties involved could be slightly different and may include:

- the native title parties
- the company or individual who will acquire the land from the government, if known
- the government agency responsible for acquiring the land.

The people who attend conferences should have the authority to make decisions relating to any proposed agreement or resolution of the issue(s).

If you are a party in a future act determination application or an objection to the expedited procedure (fast-tracking), you may not need to attend a conference. This will depend on the issues to be discussed. The convenor of the conference may excuse you from attending. Before the scheduled conference, it is advisable to contact the Tribunal to obtain advice on whether your attendance is necessary.

## The role of the convenor

The Tribunal's President can appoint a Tribunal member or officer to conduct the conference. This person is known as the convenor. If the convenor is a Tribunal member, it is always a different member to the one conducting the inquiry, unless the parties agree otherwise.

The convenor's role is to:

- establish a framework for conferences and how long the process should take
- help parties identify the issues that need to be resolved
- assist parties to reach agreement on those issues
- keep parties focussed on particular issues and limit side disagreements
- guide the process in an impartial way, and
- if requested, assist parties with preparing a document setting out the basic terms of any proposed agreement.

The convenor does not decide issues or give legal advice.

# What happens at conferences?

Conferences are informal and participants are encouraged to speak for themselves. However, parties can appoint lawyers or other representatives to provide advice and/or speak on their behalf.

Parties do not have to present formal evidence at conferences. However, the Tribunal encourages parties to speak openly about their rights and interests and to allow other parties to do the same without interruption. The possibility of reaching agreement is more likely if there is an open exchange of information.

Conferences are held in private and their content is generally confidential and without prejudice.

The matters discussed at conferences cannot be brought up in any subsequent court or Tribunal proceedings, unless parties agree otherwise.

## Starting the conference process

After consultation with all parties, the Tribunal will advise parties in writing of the date, time and place of the first conference, and at the same time send copies of the Tribunal's relevant guidelines if these have not been sent previously.

The conference will generally be held at an office of the Tribunal and parties are encouraged to attend in person where possible. However, the Tribunal can arrange telephone conferences if necessary.

At the conference all parties should be able to give details of:

- the background to the issue(s) for which the conference was called, and
- their willingness to be involved in the conference.

The first conference usually includes a brief general discussion between the convenor and the parties to establish how conferences will be conducted. The discussion may include:

- representation of each party in conferences
- how participants communicate with each other
- the format of conferences, and
- confidentiality and negotiating without prejudice.

During the conference, parties may take a break to talk among themselves, consult advisers or speak on their own behalf.

# Progress of conferences

Parties may be able to resolve the issues, or identify that they cannot be resolved, after one conference.

If the issues are complex, parties may need several conferences. In these situations, the Tribunal sets strict timeframes to resolve matters as quickly as possible and meet the requirements of the Native Title Act. The negotiating process allows time for traditional methods of decision making by Indigenous Australians.

After each conference, the Tribunal will send a letter to the parties recording:

- a list of participants
- the duration of the conference
- the agreed outcomes of the conference, and
- the date, time and place for the next conference, if required.

The Tribunal does not provide parties with copies of any notes it takes during conferences. Parties who want detailed records of discussions should take their own notes.

The convenor and parties should try to ensure that each conference concludes with some progress towards agreement. The convenor and parties should try to ensure that conferences advance the agreement process. Where it does not appear that agreement is likely, the convenor may terminate the conference.

## What happens if parties reach agreement?

### *Agreement about an objection to the fast-tracking process*

If all parties agree the grant of the tenement can be fast-tracked (that is, the expedited procedure applies), the convenor terminates the conference. The native title party generally withdraws the objection and the tenement may be granted.

If the parties agree that fast-tracking does not apply, the Tribunal makes a consent determination that the expedited procedure is not attracted (that is, the future act cannot be fast-tracked) and the matter moves into the right to negotiate process. In Western Australia, the Land Access Branch of the Department of Minerals and Petroleum manages this process. In the Northern Territory and Queensland the right to negotiate process is managed by the Titles Division of the Department of Regional Development, Primary Industry, Fisheries and Resources, and the Department of Environment and Resource Management, respectively.

If it looks like negotiating an agreement during an expedited procedure inquiry will take a long time, parties may consider consenting to a determination that fast-tracking does not apply. The matter will then continue negotiations in the right to negotiate process.

## *Agreement about a future act determination application*

Parties may reach agreement about all or some of the issues. If parties agree on some of the issues and it is clear that further conferences will not resolve the remaining points, the convenor terminates the conference. The parties must indicate to the inquiry member those issues which have been resolved by agreement. The member does not have to consider those issues as part of the inquiry.

If parties agree on all the issues relevant to the inquiry, the convenor may terminate the conference.

The party who lodged the application may withdraw it or the parties can request that the Tribunal make a future act consent determination.

## What happens if parties do not reach agreement?

If parties cannot resolve any of the issues, the convenor terminates the conference and refers the matter back to the inquiry process for arbitration by the Tribunal.

## List of terms

### **Arbitration**

An inquiry conducted by the Tribunal into a future act determination application which takes into account the effect of the future act on the enjoyment by the native title party of their registered native title rights and interests (among other things) and the economic or other significance of the future act and the public interest. The arbitration (inquiry) leads to the Tribunal making a determination whether the future act can be done and if so, whether conditions should be imposed.

### **Directions**

Formal orders from the tribunal in relation to the inquiry, which include orders stating when parties should provide material to the Tribunal.

**Expedited procedure: see fast-tracking.**

### **Expedited procedure objection consent determination**

A decision by the Tribunal that the expedited procedure (fast-tracking) does or does not apply, which is made when parties have reached agreement.

### **Fast-tracking (or expedited) procedure**

This refers to the fast-tracking process for future acts that might have minimal impact on native title, such as some exploration and prospecting licences. If this procedure is used, and no objection is lodged, the future act can be done without the normal negotiations with the registered native title parties required by the Native Title Act.

### **Future act**

The granting of the right to conduct a proposed activity or development on land and/or waters that affects native title rights and interests. Generally, rights to be informed and consulted about the future act are given to native title claimants. In the case of some future acts including the grant of mining or exploration rights and some compulsory acquisitions of native title, the future act cannot validly be done unless the right to negotiate process in the Native Title Act is followed.

### **Future act consent determination**

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 applying. Future act determination: a decision by the Tribunal that a future act may proceed and whether any conditions apply.

### **Future act determination application**

An application made by a negotiation party to the Tribunal for it to determine whether a future act may proceed, and if so what conditions should apply.

### **Inquiry hearing**

The hearing by the Tribunal of evidence and submissions by parties in a right to negotiate inquiry (i.e. a future act determination application inquiry or an expedited procedure (fast-tracking) objection application inquiry). In some cases a determination will be made based on written evidence submitted to the Tribunal without holding an inquiry hearing.

### **Listing hearing**

A preliminary conference/hearing held by the Tribunal so that it can check compliance with directions, ensure that all necessary documents are before it and set a time and location for an inquiry hearing.

### **Mediation (future act)**

A process which allows negotiation parties, with the assistance of a mediator, to discuss their interests in the area, identify the issues, consider alternatives and explore ways to reach agreement. Mediation processes are useful where negotiation is not progressing.

### **Member**

A person who has been appointed by the Governor-General as a member of the Tribunal under the Native Title Act. Members are classified as presidential or non-presidential. Some members are full-time and others are part-time appointees.

### **Native title application**

An application for the legal recognition of the native title rights and interests held by Indigenous Australians over a particular area of land or waters, according to traditional laws and customs.

### **Native title determination**

A decision by an Australian court or other recognised body that native title does or does not exist in a particular area of land or waters.

### **Negotiation party**

An individual, group or organisation that may participate as a party to proceedings in a right to negotiate inquiry, namely the government party (usually a State or Territory government who propose to do the future act); the grantee party (the person who has requested the future act to be done) and the native title party (the registered native title claimants).

### **Notification (future act)**

The publishing of a notice in major newspapers by the State or Territory government stating that it intends to do certain future acts, such as granting a mining lease, in an area. This is called a 'section 29 notice', because section 29 of the Native Title Act sets out how notice must be given.

### **Notification date**

The 'notification date' is identified in the published notice. Starting from the notification date parties have specific periods of time in which to lodge applications. Periods of time vary, depending on the type of application.

### **Objection application**

Registered native title claimants can object to a tenement grant being fast-tracked. They have four months from the notification date to lodge an objection. If the objection is successful, the development cannot go ahead without the normal negotiations required by the Native Title Act.

### **Preliminary conference**

A meeting of the parties, convened by the Tribunal member appointed to the inquiry, at which directions may be made and information sought from the parties about issues relevant to the inquiry. A preliminary conference may be conducted by telephone.

### **Registered native title claimants**

Native title claimants who have met the conditions of the registration test.

### **Registration test**

A set of conditions under the Native Title Act that is applied to native title claimant applications. If an application meets all the conditions, it is included in the Register of Native Title Claims, and the native title claimants then gain the right to negotiate together with certain other rights, while their application is under way.

## **Right to negotiate**

The right of native title claimants (whose application has satisfied the registration test) to be involved in discussions about — but not veto — proposed developments (such as mining) on areas of land or waters where native title exists. Where the right to negotiate applies, negotiations with native title claimants must occur before the grant for the proposed development can go ahead. The right to negotiate process is managed by the State or Territory government, but the Tribunal may be requested to mediate.

## **Status conference**

A conference of the parties, similar to the preliminary conference, which is held four weeks before compliance with the first direction is due. The purpose of the status conference is to ascertain whether negotiations have been, or are likely to be, successful. Without prejudice: a condition applying to discussions during negotiations, which prevents them being used as evidence in any subsequent court action.

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