



# Objections to the expedited procedure (fast-tracking)

*Information sheet*

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# Relevant sections of the Act

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

- s. 237 circumstances when fast tracking will apply
- s. 29 notification of the proposed grant of the act
- s. 32 the role of the Tribunal in the expedited procedure
- ss. 25-44 right to negotiate
- s. 148 dismissal of objection applications

## What is an objection to fast-tracking?

There is a fast-tracking process for future acts that may have minimal impact on native title. This process is called the 'expedited procedure'. The types of acts that may be fast-tracked include the granting of some exploration and prospecting licences. In these cases, a statement that the tenement grant is able to be fast-tracked (it 'attracts the expedited procedure') is included in the published notice (notification).

In Western Australia the Department of Minerals and Petroleum receives the tenement application and publishes the notice. In the Northern Territory and Queensland, the Department of Regional Development, Primary Industry, Fisheries and Resources, and Department of Environment and Resource Management respectively receive the tenement applications in those states and publish the notices.

Only native title claimants whose native title application has met the requirements of the registration test have the right to negotiate and can object to the expedited procedure applying to a tenement.

If the expedited procedure applies, the state or territory government can grant the tenement without the grantee party having to negotiate with native title claimants. If native title claimants want to be involved in negotiations, they can put in an objection application. It is not an objection to the actual granting of the tenement, or the particular act in question, only to the grant being fast-tracked.

If native title has been extinguished in the area of the tenement application, then the Tribunal processes do not apply. Grantees or developers wishing to consider this issue should contact the state or territory department.

# How do native title claimants object to fast-tracking?

If any registered native title claimants have a native title claim over the area of the tenement, they may lodge an objection to the expedited procedure with the Tribunal. This means that claimants do not agree that the grant should be fast-tracked and they want to be involved in negotiations with the grantee and government parties.

Native title parties have four months from the date given in the notice (notification date) to lodge an objection application. This is called the objection period. If the objection is successful, the development cannot go ahead without a negotiation process.

If there is no native title application over the area, native title claimants have three months to lodge one with the Federal Court. The claim must then meet the requirements of the registration test before claimants can lodge an objection application.

At any point after the government has published the notice, native title parties or grantees can begin negotiations.

## What does the Tribunal do?

When an objection to fast-tracking (the expedited procedure) has been lodged with the Tribunal, it must conduct an inquiry to determine whether the grant of the tenement can be fast-tracked, or not.

The Tribunal will determine that a tenement application does not attract the expedited procedure (i.e. it cannot be fast-tracked) if the grant of the tenement is likely to:

- interfere directly with the native title party's community or social activities
- interfere with areas or sites of particular significance to native title parties, or
- involve or cause major disturbance to the land or waters.

If the Tribunal accepts the objection:

- the Tribunal will notify all parties in writing that a native title claimant has lodged an objection, and include with the notification letter a set of directions which provide a framework for the conduct of the inquiry. The directions normally allow a period of 16 weeks from the closing date for objections for the parties to attempt informally to negotiate an agreement before the directions must be complied with
- if necessary, a case manager or case officer from the Tribunal will contact the grantee party to discuss the process and outline the options available
- the case manager or case officer will schedule a preliminary conference for a date within 28 days from the date the Tribunal receives the objection application.

The Tribunal encourages parties to contact one another before the preliminary conference so that they get an understanding of each other's position. Native Title Representative Bodies and Service Providers are often able to provide a draft agreement (for example, a site clearance or heritage protection agreement). This can be used as a starting point for negotiations. Tribunal officers are also available, on request, to facilitate discussions between parties.

If all parties give an undertaking to engage in active negotiations, the Tribunal can dispense with the preliminary conference.

Where parties have undertaken to negotiate, they will be required to attend a status conference four weeks before the date of the first direction.

At the status conference, parties will be asked to comment on the likelihood of an agreement being reached prior to the commencement of the inquiry.

Where parties decide they do not wish to enter negotiations, a status conference will not be needed and the matter will be adjourned to a Listing Hearing.

## What to expect in a preliminary conference

Parties can attend the preliminary conference in person or participate by telephone. If participating via telephone, parties should remember to:

- attend on time
- introduce themselves before speaking, and
- not interrupt each other, so that only one person is speaking at any time.

If parties fail to attend by telephone where they have indicated this was their intention, the Tribunal may be compelled to withdraw this option and instead require attendance in person.

At the preliminary conference, the grantee party can discuss its proposals for work on the land and its position in relation to reaching agreement with the native title parties. The native title and government parties also discuss their interests in the area. All parties discuss options for resolving the objection application.

At the preliminary conference the parties may discuss the directions they received in the mail from the Tribunal. The dates specified in the directions are important and the Tribunal encourages parties to carry out each direction earlier than required.

If any party does not attend or participate in the preliminary conference and does not have a justifiable excuse, directions for the Inquiry will remain as set and compliance will be expected. The Tribunal will write to the party summarising the outcomes of the conference (including any directions set) and ask why the party did not participate and whether they intend to participate in the inquiry.

Parties may request that the inquiry process be brought forward. In this case the Tribunal would also amend its directions to remove the time otherwise allowed for negotiations.

## What happens if parties do not reach agreement?

If parties do not reach agreement during negotiations, the Tribunal will conduct a formal inquiry to determine whether fast-tracking should apply.

As set out in the directions, parties must submit their contentions and documentary evidence so that the Tribunal can make a determination as quickly as possible. The claims should not be general statements but should be specific to the proposed future act.

If a party does not fulfil the inquiry directions or reply to correspondence from the Tribunal, the Tribunal will conduct the inquiry and make a determination without their participation. If the native title party fails to comply with directions the objection is vulnerable to dismissal for non-compliance.

Once parties have submitted all documentation, the Tribunal will hold a listing hearing. The purpose of the listing hearing is to make sure there is no possibility of parties reaching a negotiated outcome and to make any necessary arrangements for the inquiry.

Parties, or their representatives, who attend the listing hearing should be able to advise the Tribunal of:

- the facts agreed between the parties and the issues which are still unresolved
- the facts and documents they will use
- the timing and location of the inquiry, and whether the Tribunal can conduct the inquiry on the papers, i.e. based on written contentions and evidence already submitted, and
- any special requirements, for example, interpreters or arrangements for recording confidential information.

## How does the Tribunal conduct an inquiry?

An inquiry hearing to investigate whether the expedited procedure should apply will be as brief and informal as possible. The Tribunal will try to conduct the inquiry and make a determination as quickly as possible.

The Tribunal will usually make a determination on the papers, i.e. based on documentary evidence (including maps and video) and may, if necessary, also visit the area of the proposed future act to obtain oral evidence from parties.

At the end of the inquiry, the Tribunal will make a determination that the act should or should not be fast-tracked and give a copy of the determination, and reasons for the decision, to all parties.

# Is a consent determination (expedited procedure) an option?

The grantee party might consent to a determination that fast-tracking does not apply because:

- there are issues which may be more extensive and broader than those addressed in the fast-tracking process, or they have decided that timeframes associated with the grant of the tenement are not urgent, and negotiations can be postponed until a later time.

If the grantee party is considering consenting to a determination that fast-tracking does not apply, it should first consult with the relevant State government department. All parties must agree before a consent determination can go ahead.

If all parties agree that fast-tracking does not apply, the inquiry member will make a consent determination. This will result in the tenement application going into the right to negotiate stream. Parties should be aware that in this situation negotiations must include all persons who were native title parties at the end of the notification period, regardless of whether they lodged an objection or not.

The Tribunal will make the consent determination and provide all parties with a copy of it.

## 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.

### **Inquiry hearing**

The hearing by the Tribunal of evidence and submissions by parties who are in a right to negotiate inquiry (i.e. a future act determination application inquiry or an expedited procedure 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 meeting/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 which

proposes 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, often conducted by telephone, and usually convened by a Tribunal staff member at the request of a Tribunal member.

### **Registration test**

A set of conditions under the Native Title Act 1993 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.

### **Registered native title claimants**

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

### **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 meeting 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.

# Further information

More details about future act processes can be found in the Tribunal's *Procedures under the right to negotiate scheme* which are available from the Tribunal's website at [www.nntt.gov.au](http://www.nntt.gov.au) .

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