Preparing evidence for Tribunal Inquiries
Native Title Party

New South Wales Future Act Workshop
Objections to the expedited procedure

Section 237: a future act is ‘an act attracting the expedited procedure’ if it is not likely to:

a) interfere directly with the carrying on of the community or social activities of the persons who are the holders of native title in relation to the land and waters concerned

b) interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders of native title in relation to the land and waters concerned

c) involve major disturbance to any land or waters concerned or create any rights whose exercise is likely to involve major disturbance to any land or waters concerned
Task of the native title party

**Persuade** the Tribunal that the proposed future act is likely to:

a) interfere *directly with the carrying on of the community or social activities* of the persons who are the holders of native title *in relation to the land and waters concerned*

b) interfere with *areas or sites of particular significance*, in accordance with their traditions, to the persons who are the holders of native title *in relation to the land and waters concerned*

c) involve *major disturbance* to any land or waters concerned or *create any rights whose exercise is likely to involve major disturbance* to any land or waters concerned
Community and social activities – s 237(a)

• What are the activities?
• Where do they occur?
• Can the location be described in relation to other landmarks (watercourses, sites, topographical landmarks, roads etc) to confirm that the activity actually occurs on the tenement?
• How often is the activity done?
• Who is involved?
• What needs to happen for the activity to be able to be carried out?
• Why will exploration activity interfere with this these activities?
Areas or sites of particular significance – s 237(b)

• Are the sites registered?
• If not registered – where are they located? Can the location be described in relation to other landmarks to confirm that the sites are located on or in the vicinity of the tenement?
• Gender restricted? Who can go there?
• Secret area? Consider s 155 directions restricting disclosure.
• Why is this site or area of particular significance to the native title party? What about to other groups?
• Measures so far taken to protect these sites.
Major disturbance – s 237(c)

- Does the area have significant environmental, geological, topographical, cultural qualities?
- Has there been any pastoral activity/exploration/mining in the area?
- Have there been any instances where exploration or mining has had an adverse effect on similar areas?
- What is the likely effect on the environment?
- What is the likely effect on the community?
Future act determination applications

Section 38: Tribunal must determine that:

• the act **must not be done**;
• the act **may be done**; or
• the act **may be done subject to conditions** to be complied with by any of the parties
Enjoyment of registered native title rights and interests – s 39(1)(a)(i)

• The Tribunal assumes the existence of the rights and interests as if determined by the Federal Court

• Focus on enjoyment of the rights and interests

• Focus on activities carried out in the specific area, if possible
Way of life, culture and traditions - s 39(1)(a)(ii)

- Act must have a tangible effect on way of life, culture and traditions
  - Not enough that the grant would disrupt NTP view of the strength/potency of its culture: FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/Western Australia [2009] NNTTA 91 at [62]
  - cf Bissett v Mineral Deposits (Operations) Pty Ltd (2001) 166 FLR 46
  - Effect on transfer of traditional knowledge: Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji [2011] NNTTA 172 at [274]
- Must be evidence of contemporary way of life, culture and traditions: White Mining (NSW) Pty Ltd, Austral-Asia Coal Holdings & ICRA Ashton Pty Ltd/Scott Franks & Anor (Plains Clans of the Wonnaruna People/New South Wales [2011] NNTTA 110 at [48]
- Effect on authority to make decisions, consequential effect on social and cultural structures: Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd [2009] NNTTA 49 at [85]-[88]
Development of social, cultural and economic structures - s 39(1)(a)(iii)

• The effect can be detrimental or positive

• Specific evidence

• Conditions can be used to mitigate a detrimental effect
Freedom of access and freedom to carry on rites, ceremonies and other activities of particular significance
- s 39(1)(a)(iv)

• There must be evidence of access, and activities of significance

• Though the grant of a mining or exploration tenement does not confer exclusive possession, it may nevertheless restrict the native title party’s freedom of access

• The effect on access can be mitigated by conditions preserving right of access
Areas or sites of particular significance
- s 39(1)(a)(v)

Generally, same approach as s 237(b) – evidence reminder:

- Are the sites registered?
- If not registered – where are they located? Can the location be described in relation to other landmarks to confirm that the sites are located on or in the vicinity of the tenement?
- Gender restricted? Who can go there?
- Secret area? Consider s 155 directions restricting disclosure.
- Why is this site or area of particular significance to the native title party? What about to other groups?
- Measures so far taken to protect these sites.
The Tribunal will give considerable weight to the interests, proposals, opinions or wishes of the native title party where the future act affects an area or site of particular significance.
Economic or other significance - s 39(1)(c)

To Australia, the State or Territory concerned and the area in which the land or waters concerned are located

To local Aboriginal or Torres Strait Islander people

• Requires a specific evaluation about the impact of the future act

• Not limited to economic significance

• Does not extend to ‘symbolic, cumulative or ripple impacts
Public interest - s 39(1)(e)

The Tribunal may have regard to the public interest in:

– the continuing development of the mining industry in Western Australia and Australia

– ongoing exploration as a necessary part of a viable mining industry

– mining not proceeding in areas of special significance to Aboriginal people without agreement
Any other relevant matter - s 39(1)(f)

The Tribunal may have regard to:

– environmental impact

– state and federal environmental protection regimes

– previous expenditure by the grantee party

– grantee party’s prior conduct