

## The National Native Title Tribunal's Application of the Native Title Act in Future Act Inquiries

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*In an article published in an earlier volume, Mr Tony Corbett and Professor Ciaran O'Faircheallaigh claimed that the 'politics' of native title need to be 'unmasked' to show that the National Native Title Tribunal displays an institutional bias against native title parties when making future act determinations concerning the grant of mining leases. The nature of their allegations, coupled with the subsequent uncritical acceptance of them by some other commentators, requires a response to ensure any further discussion of the Tribunal's role in these matters is better informed. Fundamentally, the criticisms Mr Corbett and Professor O'Faircheallaigh make of the Tribunal are either based on a misunderstanding of the Native Title Act 1993 (Cth) or more properly characterised as criticisms of the policy choices made by the Australian Parliament in passing the relevant legislation. The authors also fail to appreciate that what most often leads the Tribunal to determine that a mining lease may be granted with or without conditions being attached is the absence of any adequate material from the native title party addressing the criteria the Tribunal must take into account.*

**T**HE analysis of various resource development agreements involving Indigenous Australians undertaken primarily by Professor Ciaran O'Faircheallaigh has resulted in a substantial body of work.<sup>1</sup> In providing the results of that analysis,

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The views expressed here are those of the authors, and not necessarily those of the National Native Title Tribunal. We thank G Neate, S Sparkes and D O'Dea for their comments on earlier drafts. The comments of the referee were also useful in assisting us to finalise this article for publication. Any errors or omissions that remain are attributable to us.

1. See eg C O'Faircheallaigh, 'Implementation of Mining Agreements in Australia and Canada', Aboriginal Politics and Public Management Research Paper No 13, (Brisbane: Griffith University, 2003); C O'Faircheallaigh, *A New Approach to Policy Evaluation: Mining and Indigenous People* (Aldershot: Ashgate, 2002); C O'Faircheallaigh, *Environmental Agreements in Canada: Aboriginal Participation, EIA Follow-Up and Environmental Management of Major Projects* (Canadian Institute of Resources Law, 2006); C O'Faircheallaigh, 'Aborigines,

it is appropriate that Professor O’Faircheallaigh and his colleagues express their opinions on the worth of those agreements to Indigenous people and suggest changes to policy, legislation and funding regimes to bring about ‘more equitable outcomes’, the apparent point of Professor O’Faircheallaigh’s endeavours.<sup>2</sup>

However, the analysis Professor O’Faircheallaigh and Tony Corbett employed to ‘unmask’ the ‘politics’ allegedly embedded in the National Native Title Tribunal’s application of the right to negotiate provisions of the Native Title Act 1993 (Cth) (NTA) is flawed.<sup>3</sup>

The proposition put forward in their article is that ‘the Tribunal favours the interests of resource developers ahead of those of native title parties’.<sup>4</sup> They conclude that mining companies are afforded ‘disproportionate bargaining power’ by the Tribunal, which leaves native title parties with ‘little hope of any positive outcomes and little prospect that they will be treated equitably in arbitration processes’.<sup>5</sup> Professor O’Faircheallaigh has repeated these allegations elsewhere,

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Mining Companies and the State in Contemporary Australia: A New Political Economy or “Business as Usual”?’ (2006) 41 Aus J Political Sci 1; C O’Faircheallaigh, ‘Denying Citizens their Rights? Indigenous People, Mining Payments and Service Provision’ (2004) 63 AJPA 42; C O’Faircheallaigh, ‘Environmental Agreements, EIA Follow-Up and Aboriginal Participation in Environmental Management: The Canadian Experience’ (2007) 27 Environmental Impact Assessment Review 319; C O’Faircheallaigh, ‘Evaluating Agreements Between Indigenous People and Resource Developers’ in Marcia Langton, M Tehan, L Palmer & K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (Melbourne: MUP, 2004) 303; C O’Faircheallaigh, ‘Mining Agreements and Aboriginal Economic Development in Australia and Canada’ (2006) 5 J Aboriginal Econ Development 74; C O’Faircheallaigh, ‘Negotiating Protection of the Sacred? Aboriginal-Mining Company Agreements in Australia’ (2008) 39 Development and Change 25; C O’Faircheallaigh & T Corbett, ‘Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements’ (2005) 14 Environmental Politics 629.

2. C O’Faircheallaigh, ‘Native Title and Agreement Making in the Mining Industry: Focussing on Outcomes for Indigenous Peoples’ in Australian Institute of Aboriginal and Torres Strait Islander Studies, *Land, Rights, Laws: Issues of Native Title*, Issues Paper No 25 (Native Title Research Unit, 2003) vol 2, 8.
3. T Corbett & C O’Faircheallaigh, ‘Unmasking the Politics of Native Title: The National Native Title Tribunal’s Application of the NTA’s Arbitration Provisions’ (2006) 33 UWAL Rev 153. Mr Corbett rehearsed many of the same arguments in ‘The National Native Title Tribunal’s Facade of Indigenous Advocacy’ (2006) 25(2) Social Alternatives 37.
4. Corbett & O’Faircheallaigh, *ibid* 160.
5. *Ibid* 172–3. This thesis appears to be based on the earlier work of other commentators who are also critical of the Tribunal, largely D Ritter ‘A Sick Institution? Diagnosing the Future Act Unit of the National Native Title Tribunal’ (2002) 7(2) AILR 1, and R Bartlett, ‘Dispossession by the National Native Title Tribunal’ (1996) 26 UWAL Rev 108. While it is beyond the scope of this article to address all the issues raised by Ritter and Bartlett, a few points are of note. Ritter’s article, among other things, criticised the Tribunal’s introduction of guidelines for making expedited procedure objection applications. As Corbett and O’Faircheallaigh note in their article (p 160), Ritter alleged that, in doing so, the Tribunal ‘made a significant effort, unauthorised by statute, to make it more difficult’ for native title parties to make objections, supporting this with an opinion given by W Martin QC (now Chief Justice of the Supreme Court of Western Australia). What Ritter did not mention was that the guidelines were largely the work

upping the ante by stating that: 'In the conduct of arbitration processes ... [the Tribunal] has shown a consistent bias towards developers [sic] interests'<sup>6</sup> and that the way the Tribunal 'conducts its business is heavily biased against Aboriginal people and biased in favour of mining companies'.<sup>7</sup>

The allegation of institutional bias made by Mr Corbett and Professor O'Faircheallaigh is considered below in the light of the Tribunal's role under the relevant provisions of the NTA, the nature of the proposed future act and the materials presented to the Tribunal in any particular case. This assessment shows that their allegation is unsupported by the materials from which it is drawn. It also demonstrates, among other things, that the two 'major factors' forming the platform for their criticisms of the Tribunal's performance are untenable.

The authors foreground their analysis in the following way:

In principle, the NTA ... 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....

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.<sup>8</sup>

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of Deputy President Franklyn, a Queen's Counsel and a former judge of the Supreme Court of Western Australia. Obviously, in the Deputy President's opinion, the Tribunal was authorised to promulgate the guidelines. Further, Ritter's comment (p 8, n 2) that 'tellingly', no superior court had ever found the Tribunal was 'too generous towards Indigenous interests' was wrong: see *Strickland v Western Australia* (1998) 85 FCR 303, 320-1 (RD Nicholson J), discussed later in this article. Professor Bartlett has expressed his view of the NTA elsewhere: 'Stripped of the right to negotiate, the Native Title Act is blatantly discriminatory. The right to negotiate merely provides a crude approximation of the right that equality before the law would otherwise require': R Bartlett, *Native Title in Australia* (Sydney: LexisNexis, 2nd ed, 2004) [21.5]. Given his view of the NTA, which is shared by other prominent commentators [5.40], it is not surprising Professor Bartlett judges Tribunal determinations in relation to the right to negotiate harshly.

6. C O'Faircheallaigh, "Unreasonable and Extraordinary Restraints": Native Title, Markets and Australia's Resources Boom' (2007) 11(3) ALR 28, 32. See also C O'Faircheallaigh, 'Native Title and Mining Negotiations: A Seat at the Table, But No Guarantee of Success' (2007) 6(26) ILB 18.
7. V Laurie, 'Native Title Arbitrator "Biased" Against Aborigines', *The Australian*, 21 May 2007, 6.
8. Corbett & O'Faircheallaigh, above n 3, 158 (first emphasis in original; remainder added).

The assumptions made by the authors in these paragraphs reveal that their analysis is to some extent results-oriented (ie, how often the Tribunal comes to a particular decision). This is not a sound methodology to employ when assessing the performance of an administrative decision-maker. For example, whether or not a particular outcome is achieved in a particular case will depend, importantly, on the facts of the particular case and the statutory context. Where they do analyse the Tribunal's reasoning, they often misunderstand the law on point. On other occasions, they selectively quote from the Tribunal's reasons in a particular case to support their argument.<sup>9</sup>

Overall, Mr Corbett and Professor O'Faircheallaigh do not seem to appreciate that the Tribunal is a public body 'entrusted with a decision on the existence or non-existence of fact' and so must be 'cognisant of the proper interpretation' of the NTA 'to be applied to the relevant facts'.<sup>10</sup>

In relation to the 'politics' of administrative decision-making, it is now uncontroversial to say that the exercise of administrative powers, such as those exercised by the Tribunal when conducting an inquiry, 'accord the decision-maker an ability to choose between alternative courses of action *according to that person's opinion*'. All such powers are, therefore, 'subjective in [at least] two respects, being dependent on the administrator's view of the facts and on their choice between the options available to them *on such facts*'.<sup>11</sup> However, the emphasised points are important in relation to any allegation of a bias in the Tribunal's exercise of that 'choice' or discretion. As is noted below, what usually leads the Tribunal to conclude that a mining lease should be granted with no, or with limited, conditions being imposed is a lack of any, or any sufficient, facts from the native title party which would enliven the subjective factors we have noted.<sup>12</sup>

In this context, it is also important that political scientists 'pay as much or more attention to the constraining rules'<sup>13</sup> applying to administrative bodies such as the Tribunal as to any 'discretion' such a body has, a warning that is particularly apposite when asking whether or not the Tribunal's conduct is determined by 'conditions outside of the ... law',<sup>14</sup> ie, an institutional, politically-based bias that

9. For some examples of the latter, see C Sumner, 'Getting the Most Out of the Future Act Process' (Paper presented at the 8th Native Title Conference: Tides of Native Title, Cairns, 7 Jun 2007) 45, 52.

10. *Brownley v Western Australia (No 1)* (1999) 95 FCR 152, 167 (Lee J).

11. M Aronson, B Dyer & M Groves, *Judicial Review of Administrative Action* (Sydney: Law Bok Co, 4th edn, 2009) [3.24]–[3.25] (emphasis added).

12. It is acknowledged that fact-finding is not seen as a value-free exercise in the academic literature, where it is contended that 'the application of legal rules [to the facts] ... combines both discretionary and rules-based elements': V Waye, 'Judicial Fact finding: Trial by Judge Alone in Serious Criminal Cases' (2003) 27 MULR 423, 433.

13. M Shapiro, 'Law and Politics: The Problem of Boundaries' in KE Whittington, RD Kelemen & GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford: OUP, 2008) 773.

14. R Chavez, 'The Rule of Law and Courts in Democratizing Regimes' in Whittington, Kelemen & Caldeira, *ibid*, ch 5, 75.

favours the interests of the government of the day and developers over native title parties.<sup>15</sup>

## THE STATUTORY CONTEXT

Any analysis of the Tribunal's role under the future act regime<sup>16</sup> should begin with a consideration of the policy framework adopted by Parliament, as reflected in the statutory regime, read in the light of some of the fundamental principles of statutory interpretation.

### Policy behind the right to negotiate scheme

In formulating a policy response to *Mabo v Queensland (No 2)*,<sup>17</sup> the Australian government accepted its interdepartmental committee's recommendation that 'the North American approach of negotiating regional settlements of native title' should not be adopted.<sup>18</sup> After a heated debate in the Australian Parliament (and elsewhere) 'the result ... [was] legislation' that 'suffered a torturous passage through the Commonwealth Parliament'<sup>19</sup> and received Royal Assent on 24 December 1993. That legislation was, of course, the NTA. In considering what Mr Corbett and Professor O'Faircheallaigh have to say about the Tribunal, it is important to first reflect on what the then Prime Minister, Paul Keating, had to say about the right to negotiate when delivering the second reading speech.

The Prime Minister's position was that, while there would be ungrudging and unambiguous recognition and protection of native title, a 'just and practical regime' governing future development that delivered 'justice and certainty' not only for Indigenous people but also for 'industry and the whole community' was required. Governments would generally be able to make grants over native title land only if those grants could be made over freehold title. The 'right to negotiate', which would apply over areas where native title had been recognised under Australian law or where there was a registered native title claim, would involve a process of negotiation and, if necessary, determination by an arbitral body or the relevant minister. It would be based on Indigenous people having 'a right to be asked about actions affecting their land but not a right to veto'. The time-frames set for notification, negotiation and arbitration would be 'tight but fair' and there would be provision for 'expedited processes where a grant would not involve major disturbance to land or interference with the life' of Indigenous communities. The integrity of the Australian land management system would be

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15. Corbett & O'Faircheallaigh, above n 3, 155, 161, 172–3.

16. NTA pt 2, div 3, subdiv P.

17. (1992) 175 CLR 1.

18. Bartlett, *Native Title in Australia*, above n 5, [3.3]. See also R French, 'A Moment of Change: Personal Reflections on the National Native Title Tribunal 1995–98' (2003) 27 MULR 488, 496–8.

19. Bartlett, *ibid* [3.16]–[3.17].

maintained, 'but in a way which respects the profound Aboriginal connection to the land and provides appropriate protections'. However, the legislation would not 'lock land away' or set up 'complicated barriers to mining exploration operations'. Just terms compensation would be payable for extinguishment of native title and any special attachment to land would be taken into account in determining just terms. Compensation for impairment of native title, for instance, for surface disturbance caused by mining, would be 'on the basis of existing State and Territory regimes'.<sup>20</sup>

The major elements of this policy are embedded in the substantive provisions of the NTA. They represent the intention of the Parliament of Australia. Thus, the NTA strikes 'a delicate balance of rights between parties' involved in the native title process.<sup>21</sup>

### **Preamble to the NTA and the future act regime generally**

In framing their arguments, Mr Corbett and Professor O'Faircheallaigh make much of the preamble to the NTA and link what is said there directly to the objects clause of the NTA. For example, they say that the NTA:

[R]epresented the Commonwealth government's legislative response to the *Mabo* decision. Among its central objectives ... are 'the recognition and protection of native title', and the establishment of ways in which future dealings affecting native title [both found in NTA, section 3 – the objects clause], 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'.<sup>22</sup>

Both the preamble and the objects of the NTA do, of course, reflect elements of Parliament's response to the decision in *Mabo v Queensland (No 2)*.<sup>23</sup> The general principles applicable to the future act regime are expressed in the preamble as follows:

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to

20. Commonwealth, *Parliamentary Debates*, House of Representatives, 16 Nov 1993, 2877 (Paul Keating, Prime Minister).

21. A Frith & A Foat, 'The 2007 Amendments to the Native Title Act 1993 (Cth): Technical Amendments or Disturbing the Balance of Rights?' (Research Monograph, AIATSIS Native Title Research Unit, Nov 2008) 2. We should not be taken to endorse all of the views expressed in that article.

22. Corbett & O'Faircheallaigh, above n 3, 154 (footnotes omitted). The second quote is from the preamble. The case referred to is *Mabo (No 2)*, above n 17.

23. *Ibid.*

negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

The Tribunal relied on the statement in the preamble that 'every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate' to find that the government party was required to make all reasonable efforts to negotiate and reach agreement, including making realistic substantive offers and concessions, in order to discharge its duty to negotiate in good faith with the native title parties.<sup>24</sup>

However, in *Strickland v Western Australia*,<sup>25</sup> Nicholson J found the Tribunal was wrong to do so. According to his Honour, the preamble did not provide grounds for reading down the express words of the NTA:

The reasoning of the Tribunal that negotiations in good faith require 'reasonable substantive offers' requires ... a further and unnecessary level of complexity and application to the interpretation of the words of section 31(1)(b). It is not necessary to have resort to any standard outside the words in the section itself.<sup>26</sup>

Further, the court took the view that it was not for the Tribunal (or, indeed, the court) to assess the reasonableness of offers made during the negotiations.<sup>27</sup> These findings by the court put an end to the notion that the preamble could be decisive in determining what it meant by negotiating in good faith under the NTA.

Whether or not the NTA as originally enacted was otherwise true to the principles expressed in the preamble is beyond the scope of this article. However, when the future act regime was substantially amended in 1998,<sup>28</sup> one of the purposes for doing so was to ensure that some future acts would *not* attract the right to negotiate.<sup>29</sup> The fact that the government of the day's intention had moved a

24. See *Western Australia v Taylor* (1996) 134 FLR 211 (Member Sumner); *Minister for Lands, Western Australia/Strickland/Champion/Dimer* [1997] NNTTA 31 (Member Sumner). At the time, the obligation to negotiate in good faith was only imposed on the government party. When the NTA was amended by the Native Title Amendment Act 1998 (Cth), the obligation was imposed on all of the negotiation parties: see NTA s 31(1)(b).

25. Above n 5.

26. *Ibid* 321.

27. *Ibid*.

28. Native Title Amendment Act 1998 (Cth).

29. In *O'Faircheallaigh, 'Unreasonable and Extraordinary Restraints'*, above n 6, the author asserts that the amendments made in 1998 removed the renewal of mining leases granted before the NTA commenced from the class of future acts attracting the right to negotiate. While he is right to say that this 'is ... significant for the ability of native title groups to capture benefits from the resources boom', it is not correct to say this was as a result of the 1998 amendments. NTA ss 25(1), 26(2)(c), 26(3), as passed in 1994, excluded renewals and certain extensions of those interests, although it is arguable that the changes made in 1998 widened this exclusion to cover other possibilities; eg, by including the re-grant or re-making, as well as the renewal or extension, of such a lease: see subdiv I. The significant amendment made in 1998 was the removal of the possibility of the right to negotiate applying to renewals, re-grants or extensions, on the same terms and over the same area, of mining leases granted *after* the NTA commenced where the right to negotiate applied to the grant of the original lease: see NTA s 26D.

considerable distance from the sentiments expressed in the preamble was clear. For example, in relation to section 7 of the NTA as amended,<sup>30</sup> it was said that:

[I]f the NTA states that an act [eg, a future act] can be done, or enables such an act, then even though this may affect native title rights *differently to the way it affects other rights or even if it only affects native title rights*, the RDA cannot restrict or invalidate such acts.<sup>31</sup>

No changes were made to the preamble when the NTA was amended in 1998. Therefore, the result is that:

The preamble declares the moral foundation upon which the NT Act rests. It makes explicit the legislative intention to recognise, support and protect native title. That moral foundation and that intention stand despite the inclusion in the NT Act of substantive provisions, which are adverse to native title ... and provide for ... the authorisation of future acts affecting native title.<sup>32</sup>

Whilst cognisant of that moral foundation, the Tribunal is an administrative body and must apply the relevant provisions of the NTA in a manner that reflects the Australian Parliament's intention as expressed in the substantive provisions of the NTA.<sup>33</sup> In any particular matter, this may (or may not) lead to an outcome that is acceptable to a particular participant. However, only Parliament can redress any substantial power imbalance either present in the provisions of the NTA at its inception or introduced subsequently by way of amendments.

### The objects of the NTA

Mr Corbett and Professor O'Faircheallaigh allege that the Tribunal's application of the arbitration provisions of the NTA 'is inconsistent with the Act's objectives'.

The four 'main' objects of the NTA are:

- to provide for the recognition and protection of native title;
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;

30. This section deals with the relationship between the Racial Discrimination Act 1975 (Cth) (RDA) and the NTA. For a discussion of s 7(2), see *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362, [29]–[37] (Deputy President Sumner).

31. Supplementary Explanatory Memorandum (to government amendments moved in July 1998) to the Native Title Amendment Bill 1997 [No 2], 4 (emphasis added).

32. *Northern Territory v Alyawarr; Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 461 (Wilcox, French & Weinberg JJ). The future acts so authorised include some that extinguish all native title rights and interests: see *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 237–9, 244–8, 254, 275, where Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ found that the NTA allowed for a compulsory acquisition that had the effect of extinguishing native title, even where the only interests existing in the area concerned (other than those of the Crown) were native title rights and interests, provided all of the conditions found in the NTA were met.

33. Taking account of the preamble of the NTA and extraneous aides, such as Prime Minister Keating's second reading speech (see above n 20 and associated text) where appropriate.

- to establish a mechanism for determining claims to native title; and
- to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.<sup>34</sup>

The first and second of these objects are the most relevant to the future act regime.<sup>35</sup> As to the first, the right to negotiate regime is an element of the protection of native title and, given its beneficial nature, is not to be narrowly construed.<sup>36</sup> The second object reflects the fact that native title parties do not have a veto in relation to future acts, in that it focuses on facilitating dealings affecting native title, provided the 'standard' set by the NTA is met.<sup>37</sup>

In looking to the objects clause as a guide to the interpretation of the NTA, as Mr Corbett and Professor O'Faircheallaigh attempt to do:

It has to be borne in mind when considering an objects clause that it alone will not represent the object of the legislation. [Parliament's] intention is to be gleaned from the whole of the Act and regard must also be had to other sections.<sup>38</sup>

When the Tribunal conducts a future act inquiry, this means having regard to the provisions of Part 2, Division 3, Subdivision P and Part 6, Division 5 of the NTA, which express (in part) Parliament's intentions in relation to achieving two of the NTA's four finely balanced objects. Mr Corbett's and Professor O'Faircheallaigh's analysis pays little attention to what is actually required under those provisions.

### **The NTA is remedial legislation**

The NTA is remedial legislation and so its provisions must be construed beneficially.<sup>39</sup> However, the interpretation adopted is 'restrained within the confines of the actual language employed and what is fairly open on the words used'. Simply 'treating all of the legislation as requiring a liberal interpretation is too simplistic an approach'.<sup>40</sup> The Tribunal must act in accordance with the

34. NTA s 3.

35. NTA pt 2, div 3.

36. *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141, 145 (Spender, Sundberg & McKerracher JJ).

37. There is a limitation on the facilitation of those dealings in cases where a future act attracts the right to negotiate, which is the Tribunal's power to make a determination that the future act must not be done: see NTA s 38(1)(a). This is subject to the Commonwealth Minister's power under s 42 to overrule that determination in the national interest or in the interests of the relevant state or territory and the Federal Court's jurisdiction under s 169 to set aside the determination in an appeal on a question of law.

38. DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (Sydney: LexisNexis Butterworths, 6th ed, 2006) [4.42], referring to *Municipal Officers' Assoc of Australia v Lancaster* (1981) 37 ALR 559, 579.

39. See, eg, *FMG Pilbara v Cox*, above n 36; *Kanak v National Native Title Tribunal* (1995) 61 FCR 103, 124 (Lockhart, Lee & Sackville JJ); *Gumana v Northern Territory* (2007) 158 FCR 349, 373–4 (French, Finn & Sundberg JJ); *Western Australia v Ward* (2002) 213 CLR 1, 243 (Kirby J).

40. Pearce & Geddes, above n 38, [9.2], [9.5]. This is true even in the case of 'beneficial legislation

substantive provisions of the NTA. The remedial nature of the legislation is, of course, taken into account, but subject to provisos noted here.

## THE TRIBUNAL'S ROLE IN THE FUTURE ACT REGIME

The Tribunal is directly concerned with that part of the NTA's future act regime<sup>41</sup> which deals with right to negotiate applications.<sup>42</sup> The right to negotiate only applies to specified, and important, categories of future acts, ie, the grant of certain mining tenements and petroleum titles and some compulsory acquisitions of native title.<sup>43</sup>

The Tribunal's powers in relation to the future act regime are invoked when the relevant government gives notice under section 29 of its intention to do a future act to which Subdivision P of the NTA applies. Any registered native title body corporate and any registered native title claimant is a native title party.<sup>44</sup> In the notice given under section 29, the government party may state that it considers the expedited procedure is attracted to the proposed future act.<sup>45</sup> A native title

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par excellence': *Secretary, Department of Social Security v Knight* (1996) 72 FCR 115, 122 (Tamberlin J).

41. NTA pt 2, div 3, subdiv P. Future acts covered by Subdivs B to N are administered by the relevant government; ie, state, territory or Commonwealth. The procedural rights afforded to native title parties under these provisions often include the 'opportunity to comment'. The Federal Court found this was neither a right to participate in the decision on whether or not to do the future act in question nor a 'right' that entitled native title parties to seek information from the decision-maker about matters of concern to them. According to the court, the NTA leaves it entirely to the decision-maker to decide whether the comments provided should cause it to change or modify its decision to do the future act: see *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 71, 73-4 (Heerey, Drummond & Emmett JJ). The native title parties' position in relation to these future acts was further weakened by the court's view that a failure to afford such procedural rights does not affect the validity of a future act (other than one that attracts the right to negotiate: see NTA s 28) because there is no express linkage in those provisions between the duty imposed on the person proposing to do the future act to afford those rights and the validity of the future act: see *Daniel v Western Australia* (2004) 212 ALR 51, 65 (RD Nicholson J); *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (1999) 95 FCR 14, 22 (Cooper J); *Lardil Peoples v Queensland* (2001) 108 FCR 453, 471-4 (French J), 477 (Merkel J), 486-7 (Dowsett J).
42. NTA s 75. It has a limited role in relation to assisting when asked with the negotiation of Indigenous Land Use Agreements, which can deal with future acts (among other things): see NTA pt 2, div 3, subdivs B-E.
43. Generally speaking: (i) tenements and titles that do not attract the expedited procedure and are not otherwise excluded from the right to negotiate provisions; and (ii) compulsory acquisitions made for the benefit of third parties and, in Western Australia, South Australia and the Northern Territory, only where the area affected is wholly outside towns and cities as defined in NTA s 251C. The right to negotiate does not apply to acts to the extent that they affect areas below the mean high water mark: see NTA s 26.
44. NTA ss 29(2), 253. Any applicant on behalf of a native title claim group who lodges a claim before the end of the three month period commencing on the notification day specified in the section 29 notice that is registered within four months of that day is also a native title party. A body corporate that becomes a registered native title body corporate after the notice period ends in relation to a claim that was registered is also a party: NTA s 30.
45. NTA ss 29(7), 32. If that procedure is attracted, then the future act can be done without the

party can lodge an objection with the Tribunal to the application of the expedited procedure within four months of the notification day specified in the section 29 notice.<sup>46</sup> The Tribunal must then hold an inquiry and determine whether the act attracts the expedited procedure<sup>47</sup> 'as speedily as possible'.<sup>48</sup>

Unless the expedited procedure applies to the future act, the negotiation parties (ie, the government, grantee and native title parties) must negotiate in good faith with a view to reaching agreement with the native title parties to the doing of the act.<sup>49</sup> The Tribunal may be requested to mediate.<sup>50</sup>

If at least six months elapse from the notification day and the parties have negotiated in good faith during that time but no agreement has been reached, any negotiation party may apply to the Tribunal for a future act determination.<sup>51</sup> The Tribunal must 'take all reasonable steps to make a determination in relation to the act as soon as practicable'.<sup>52</sup> If a determination is not made within six months of receipt of the application, the Tribunal must report to the relevant minister<sup>53</sup> and provide an estimate of when a determination is likely.<sup>54</sup> The minister is then empowered to make the determination in the Tribunal's stead in some circumstances.<sup>55</sup> There is also provision for the minister to overrule a Tribunal determination.<sup>56</sup>

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right to negotiate applying. A statement that the expedited procedure applies to exploration and prospecting tenements is often made because the relevant government considers that these future acts fall within the scope of s 237, which defines an 'act attracting the expedited procedure'.

46. NTA s 32(3).

47. NTA s 31(4). An inquiry is only necessary if the objection is not withdrawn and the application is not dismissed for other reasons: see NTA ss 148–149. The Tribunal regularly dismisses a large number of objection applications without holding an inquiry because of non-compliance with Tribunal directions. In many other cases, the parties reach agreement and so no inquiry is necessary.

48. *Western Australia v Ward* (1996) 70 FCR 265, 278 (Lee J), an approach confirmed by the decision of RD Nicholson J in *Little v Western Australia* [2001] FCA 1706, [84]–[85]. See also *Dann v Western Australia* (1997) 74 FCR 391, 394 (Wilcox J), 399 (Tamberlin J). Despite this directive from the court, the Tribunal has been said to have an 'ideological fixation with speed': Ritter, above n 5, 7. In fact, the Tribunal's standard practice in expedited procedure matters is to allow the parties a four month period after the s 29 closing date for the lodgement of an objection for parties to come to an agreement which could lead to disposal of the objection by consent and the Tribunal often extends that period.

49. NTA s 31(1). Since the amendments made by the Native Title Amendment Act 1998 (Cth), the obligation to negotiate in good faith found in s 31(1)(b) is imposed on all negotiation parties. However, s 36(2) provides that a native title party's failure to do so does not deny the Tribunal the power to make a future act determination. Presumably, this was to avoid giving the native title party a de facto veto that could be exercised by simply refusing to negotiate in good faith.

50. NTA s 31(3).

51. NTA s 35(1). If a future act determination application is made, the Tribunal may be called upon to decide whether the government or grantee party negotiated in good faith during the requisite period (ie, at least six months). If the Tribunal finds that either of them did not do so, the Tribunal has no power to make a future act determination: NTA s 36(2); *Walley v Western Australia* (1996) 67 FCR 366 (Carr J); *FMG Pilbara v Cox* above n 36, 143.

52. NTA s 36(1).

53. The Commonwealth Attorney-General.

54. NTA s 36(3).

55. NTA ss 36(4), 36A.

56. NTA s 42(2) (but not a determination under s 32(4), which deals with the expedited procedure).

The NTA determines who is a party to a Tribunal inquiry and directs the Tribunal (among other things) to ‘ensure that every party is given a reasonable opportunity to present his or her case’.<sup>57</sup> The Tribunal ‘may hold hearings’ for the purposes of an inquiry or make a determination ‘on the papers’ if the matter can be adequately determined in that way.<sup>58</sup> Hearings are held in public unless the Tribunal otherwise directs. After holding an inquiry, the Tribunal must ‘make a determination’<sup>59</sup> in writing about the matters covered by the inquiry and must state in the determination ‘any findings of fact upon which it is based’.<sup>60</sup>

### The Tribunal’s way of operating – subsection 109(1)

Subsection 109(1) states that the Tribunal ‘must pursue *the objective of carrying out its functions*’ not only in a way that is ‘fair’ and ‘just’ but also in a way that is ‘economical, informal and prompt’.<sup>61</sup> Following the amendments made to the NTA in 1998,<sup>62</sup> when pursuing that objective, the Tribunal may take into account the ‘customary and cultural concerns’ of Indigenous people but only to the extent that doing so does not ‘prejudice unduly any party to any proceedings that may be involved’.<sup>63</sup> Mr Corbett and Professor O’Faircheallaigh say that subsection 109(1) of the NTA is:

[O]f particular significance in relation to the Act’s arbitration provisions, given their importance in the operation of the RTN and so in 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.<sup>64</sup>

They make this point in the context of their general allegation that the Tribunal is not acting in a fair and just manner towards the native title party when acting as the

57. NTA s 142. During an inquiry, the President of the Tribunal can direct a member or officer of the Tribunal to preside over a conference to ‘help in resolving any matter that is relevant to the inquiry’: NTA ss 150(1)–(3). What is said and done at that conference cannot be mentioned in any hearing before the Tribunal unless the parties otherwise agree. A member who presides over a s 150 conference cannot be a member of the Tribunal as constituted for the purposes of the future act inquiry unless the parties otherwise agree: NTA s 150(4).

58. NTA ss 151–154. However, a hearing must be held if the Tribunal is of the view that ‘the issues for determination cannot be adequately determined in the absence of the parties’.

59. Unless an agreement of the kind mentioned in s 31(1)(b) has been reached or the relevant Minister has already made a determination under s 36A: see s 37.

60. NTA ss 162–164. For what is required under s 162, see *Parker v Western Australia* (2008) 167 FCR 340 (Moore, Branson & Tamberlin JJ).

61. Emphasis added. The Tribunal’s functions are set out in NTA s 108. The Tribunal relied upon s 109(1) to reject a document purporting to withdraw a native title party’s application in circumstances where the grantee party had, in preparing the document, deliberately avoided the native title party’s legal representative: *Huddleston/Northern Territory/Stroud* [2003] NNTTA 35, [109]–[117] (Member Williamson).

62. See the Native Title Amendment Act 1998 (Cth).

63. NTA s 109(2).

64. Corbett & Faircheallaigh, above n 3, 166–7.

arbitral body<sup>65</sup> in an inquiry. However, Mr Corbett and Professor O'Faircheallaigh do not seem to appreciate that it is a statute 'designed' standard of fairness.<sup>66</sup> The question is how to strike the right balance between what are often competing interests in the circumstances of the particular case before the Tribunal. This requirement, to pursue a specified objective in a prescribed way, whilst acting in a manner that is fair and just to *all* of the parties involved in the proceedings, creates tension.<sup>67</sup> Reasonable people might have different views as to how to strike the correct balance, as demonstrated by the comments made in *Parker v Western Australia*.<sup>68</sup>

### Proceedings must involve a 'future act'

The Tribunal originally assumed that an act to which the right to negotiate applied was a future act unless there had been a clear and unambiguous act of extinguishment.<sup>69</sup> A future act is one that 'affects' native title,<sup>70</sup> ie, an act that extinguishes native title rights and interests or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.<sup>71</sup> A 'future act' 'affects' native title if it can be shown to do so, not because it arguably 'may' or 'might'.<sup>72</sup> However, the Federal Court later found that, if the Tribunal's jurisdiction<sup>73</sup> is challenged<sup>74</sup> (eg,

65. See NTA s 27, which defines 'arbitral body'. In South Australia, the Environmental and Resources Development Court is the arbitral body for right to negotiate applications (except in relation to gas and petroleum tenements, where it is the Tribunal): see the Environment, Resources and Development Court Act 1993 (SA), the Mining Act 1971 (SA) and the Native Title (South Australia) Act 1994 (SA).

66. D Rodriguez, 'Administrative Law' in Whittington, Kelemen & Caldeira, above n 13, 348

67. See Sumner, above n 9, 24–6

68. Above n 60. Moore J (347–8) was critical of the Tribunal's reluctance to refer to a native title claimant's evidence because it was culturally sensitive, saying it 'should have stated the finding as it was obliged to by s 162(2), notwithstanding any perceived sensitivities', whereas Tamberlin J (360) thought the Tribunal acted reasonably in not spelling out the evidence because of its 'highly confidential nature'. See also *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49, [28] (Deputy President Sumner).

69. *Western Australia v Thomas* (1996) 133 FLR 124, 163–5 (Members Sumner, O'Neil & Neate); *Alexander/Western Australia/Mineralogy Pty Ltd* [1997] NNTTA 11 (Deputy President Sumner); *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116, 127–36 (Deputy President Sumner, Members Sosso & Stuckey-Clarke).

70. NTA ss 227–233. There are other important elements of the definition but they are not relevant to the discussion at hand.

71. NTA s 227.

72. *Lardil Peoples v Queensland* above n 41, 473 (French J), 476 (Merkel J); *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467, 478–87 (Carr J).

73. 'Jurisdiction' is used here, and by the Federal Court in some cases, to describe the Tribunal's authority to conduct a right to negotiate inquiry. However, 'it would be equally accurate and perhaps clearer to characterise the question as one about the power of the Tribunal which is not a court but a statutory body carrying out an administrative function': *Hicks v Western Australia* [2002] FCA 1490, [15] (French J). The question of whether negotiations in good faith have occurred for the purposes of NTA s 36(2) goes to the Tribunal's power to conduct a future act inquiry, not to its jurisdiction: see *FMG Pilbara v Cox*, above n 36, 143.

74. In almost all cases, the Tribunal's jurisdiction is not challenged and so it proceeds with the

if an allegation is made that the act in question is not a future act), the Tribunal is duty-bound to make due inquiry and satisfy itself that the proposed act is a future act. This is so even where complex issues might arise, such as whether native title has been extinguished over the area concerned.<sup>75</sup>

These jurisdictional considerations serve as a salutary reminder that the foundation of the Tribunal's power to conduct a future act inquiry is the existence of a future act and (among other things) the extent to which that future act 'affects' the enjoyment of registered native title rights and interests.<sup>76</sup>

### **Criteria the Tribunal must apply - expedited procedure determination**

In determining whether or not the expedited procedure is attracted to a future act, the Tribunal must refer to section 237. A future act attracts 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 (disregarding any trust created under Division 6 of Part 2) of native title in relation to the land or waters concerned; and
- (b) interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders (disregarding any trust created under Division 6 of Part 2) of the native title in relation to the land or waters concerned; and
- (c) involve major disturbance to any land or waters concerned or create rights 'whose exercise is likely to involve major disturbance to any land or waters concerned'.<sup>77</sup>

According to Mr Corbett and Professor O'Faircheallaigh: 'In reality ... the "expedited procedure" is not a procedure, but rather a mechanism for avoiding a procedure that would otherwise apply,' ie, the right to negotiate.<sup>78</sup> Other commentators have expressed a similar view, referring to the expedited procedure

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inquiry unless there is evidentiary material before it which, on its face, suggests that the Tribunal lacks, or may lack, jurisdiction.

75. *Mineralogy v National Native Title Tribunal* (1997) 150 ALR 467, 472-4, 478, 482 (Carr J). In *Risk v Williamson* (1998) 87 FCR 202, 217, 220-1, O'Loughlin J upheld the decision in *Mineralogy* that the Tribunal must make findings of fact necessary to establish that it has jurisdiction.

76. NTA s 39(1)(a)(i).

77. As noted earlier, if a future act does attract the expedited procedure, then the native title party has no right to negotiate in relation to that act.

78. Corbett & O'Faircheallaigh, above n 3, 157.

as a 'loophole'<sup>79</sup> and a procedure that '*presumes* native title will be overridden'.<sup>80</sup> This view persists despite the fact that the government of the day clearly indicated that the NTA would include an expedited process that would deny the native title party the right to negotiate.<sup>81</sup> It also persists in the face of a Federal Court decision made 13 years ago that the expedited procedure is not to be construed as an exception to the normal negotiation procedure found in section 31(1). In Carr J's view:

Parliament has ... provided for two sets of circumstances. One is where there is no interference of any of the three types referred to in section 237, in which case the expedited procedure applies. The other is where there may be such interference, in which case the right to negotiate procedure must be embarked upon followed by, if necessary, a determination. There are insufficient indications in the Act to suggest that one procedure is normal and the other exceptional. They are simply different procedures to be applied depending upon the factual circumstances.<sup>82</sup>

While the policy embedded in the NTA as interpreted by the court (and the Tribunal) may be objectionable from a native title party's point of view, particularly in the light of the preamble, it is a matter for Parliament as to whether this policy should be changed.

As originally enacted, section 237 provided that a future act 'is an act attracting the expedited procedure' if the act 'does not' have any of the effects listed in paragraphs (a) to (c). It was the subject of judicial scrutiny which led to different views emerging at first instance as to its interpretation. In *Ward v Western Australia*,<sup>83</sup> Carr J saw it as involving a 'predictive assessment' (a view which accorded with that of the Tribunal at the time). In *Western Australia v Ward*,<sup>84</sup> Lee J disagreed. The correct interpretation of the statute was resolved by the Full Court in *Dann v Western Australia*,<sup>85</sup> where Lee J's approach was preferred,<sup>86</sup> ie, the issue was to be determined not by what was *likely* to happen but what *potentially could happen* if (in the case of a exploration licence) the grantee party exercised all the powers available to it under the licence. The court found the question was to be determined on a 'worst case' scenario.<sup>87</sup>

79. T Burton & C Davies, 'Major Disturbance or Miner Disturbance? *Little v Oriole Resources Pty Ltd* (2005) 146 FCR 576' (2006) 6(19) ILB 10, 10.

80. Bartlett, above n 5, 'Dispossession by the National Native Title Tribunal', 124 (emphasis in original).

81. See above n 20 and associated text.

82. *Ward v Western Australia* (1996) 69 FCR 208, 231. (The decision on this point is unaffected by *Dann*, above n 48, where Carr J's view in *Ward* as to what was required under s 237 as it stood at time was rejected.)

83. *Ward*, *ibid.*

84. Above n 48.

85. *Ibid.*

86. *Ibid* 393 (Wilcox J), 399–400 (Tamberlin J), 411 (RD Nicholson J).

87. *Ibid* 394 (Wilcox J). It is the fact that the Tribunal adopted Carr J's view prior to the *Dann* decision that Ritter says showed the Tribunal 'had on many occasions favoured an incorrect interpretation of the NTA that favoured resource interests ahead of native title claim groups': Ritter, above n 5, 2. It should be noted that two Federal Court judges divided at first instance

In practical terms, in Western Australia, the *Dann* decision meant that, for instance, if there was a site of particular significance within the tenement area, the Tribunal found that the expedited procedure was not attracted. However, section 237 was amended in 1998<sup>88</sup> with the avowed intention that a predictive assessment was required.<sup>89</sup> It is worth noting that in 10 of the 29 objection applications the Tribunal has heard and determined between 1 July 2007 and 22 June 2009, it found the expedited procedure did not apply, ie, in more than 30 per cent of those cases, the Tribunal determined on the evidence that the native title party should have the right to negotiate.<sup>90</sup>

### Criteria the Tribunal must apply – future act determination

In relation to a future act determination application,<sup>91</sup> the Tribunal must make one of the following determinations:

- the act (eg, the grant of a mining lease) must not be done;
- the act may be done;
- the act may be done subject to conditions to be complied with by any of the parties.<sup>92</sup>

Section 39(1) sets out the matters which the Tribunal *must* take into account in deciding which kind of determination to make. Therefore, any analysis of the Tribunal's decision as to the appropriate determination to make in a particular case must take into account that the 'direct purpose' of section 39 is to:

[I]nstruct the Tribunal on the matters relevant to a determination in relation to a future act to be made ... under section 35 [*sic*, read section 38] if the parties do not reach agreement thereon by negotiation under section 31.<sup>93</sup>

In deciding which type of determination to make, the Tribunal *must* take into account the *effect* of the proposed future act on:

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as to the correct interpretation. Obviously, Ritter was of the view the Tribunal should have followed Lee J, a view he was entitled to take. But the Tribunal was not applying an 'incorrect' interpretation of the law until the Full Court said it was in the *Dann* decision.

88. See the Native Title Amendment Act 1998 (Cth). There is currently no proposal to amend s 237 to return it to its original form.

89. See Explanatory Memorandum to the Native Title Amendment Bill 1997 (Cth) [20.39]; *Little v Oriole Resources*, above n 79, 586–8 (French, Stone & Siopis JJ).

90. Figures provided by the Tribunal's Operations Unit. This should not be taken to be a crude statistical reduction; ie, a 'for and against' analysis. Rather, it reflects the fact that in the small number of cases where the Tribunal was asked to adjudicate on the issue, the native title party's case was often well prepared and credible evidentiary material addressing the s 237 criteria was presented.

91. It is the Tribunal's approach to the determination to these applications that is the main focus of Mr Corbett and Professor O'Faircheallaigh's criticisms and, therefore, the main focus of this article.

92. NTA s 38(1).

93. *Brownley (No 1)*, above n 10, 166 (Lee J).

- (i) the *enjoyment* by the native title parties of their *registered native title rights and interests*;<sup>94</sup>
- (ii) the way of life, culture and traditions of any of those parties;
- (iii) the development of the social, cultural and economic structures of any of those parties;
- (iv) the freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions; and
- (v) any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.<sup>95</sup>

The Tribunal must also take into account the interests, proposals, opinions or wishes of the native title parties in relation to the *management, use or control* of land or waters 'in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act'.<sup>96</sup> Paragraphs 39(1)(a) and (b) are clearly beneficial provisions and are construed accordingly.

The other criteria found in section 39 are of a different nature. When deciding which type of future act determination to make, the economic or other significance of the act to Australia, the state or territory concerned must be taken into account. So must the economic or other significance of the act to the area in which the land or waters concerned are located and to the Aboriginal peoples and Torres Strait Islanders who live in that area.<sup>97</sup>

The public interest in the doing of the act must also be taken into account.<sup>98</sup> The Tribunal has acknowledged that, 'in the abstract', it may be in the public interest to refuse the grant of a mining tenement:

To take an extreme example, it is unlikely that it would be in the public interest for an open cut coal mine to be approved for Kings Park in Perth.... Specifically in the native title context, there may be public interest considerations against mining over areas of special significance to Aboriginal people.<sup>99</sup>

When determining the effect of the proposed future act in accordance with these criteria (referred to below as the 'section 39 criteria'), the Tribunal *must* take into account:

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- 94. NTA s 39(1)(a) (emphasis added). This means looking to the effect of the act on the enjoyment of the rights and interests registered on either the National Native Title Register or the Register of Native Title Claims: see NTA Pts 7 & 8A.
  - 95. NTA s 39(1)(a).
  - 96. NTA s 39(1)(b) (emphasis added).
  - 97. NTA ss 39(1)(c).
  - 98. NTA s 39(1)(e). The Tribunal has a discretion to take into account any other matter it considers relevant: s 39(1)(f).
  - 99. *Holocene*, above n 68, [182]. Kings Park is on the edge of the CBD.

- any existing non-native title rights and interests and existing use of the land or waters concerned by persons other than the native title parties; and
- any agreements between the negotiation parties.<sup>100</sup>

## CONDITIONS IMPOSED AND TREATMENT OF THE PARTIES

Two issues said to be ‘fundamental’ to the Tribunal’s ‘conduct of its arbitral functions’ are identified by Mr Corbett and Professor O’Faircheallaigh: the imposition of conditions where it is determined that a mining lease may be granted, and the Tribunal’s ‘treatment of grantee and native title parties in the arbitration process’.<sup>101</sup> The authors allege that any conditions the Tribunal does impose ‘could not reasonably be described as onerous’, that the Tribunal is ‘reluctant to impose conditions requested by native title parties’ and, where there is a dispute between the grantee and the native title parties as to whether conditions should be imposed or what those conditions should be, the Tribunal ‘has tended to find in favour of the grantee or government party’.<sup>102</sup> These allegations have been addressed at length elsewhere.<sup>103</sup> Therefore, only the main issues are addressed here.

### Imposition of conditions requires some evidence in support

The Tribunal’s task in deciding what type of determination to make is ‘a discretionary one’ that ‘involves weighing the various factors’ in section 39 ‘based on evidence produced’.<sup>104</sup> There is no common thread running through the section 39 criteria and so the Tribunal may be required to take into account diverse, and often conflicting, interests. Further, the NTA does not direct that greater weight be given to some criteria over others. Therefore, the weight given to each depends upon the evidentiary material that is before the Tribunal.<sup>105</sup>

A failure by the Tribunal to take into account any of the requisite matters would be an error of law. More importantly, giving weight to a matter for which there was no evidentiary material would be an error of law.<sup>106</sup> The material before the Tribunal is usually provided by the parties to an inquiry.<sup>107</sup> The Tribunal is not bound by the rules of evidence,<sup>108</sup> which reflects the fact that the NTA contemplates a ‘desirable, flexible procedure’. However, this ‘does not go so far as to justify’ the making of

100. NTA ss 39(2), 39(4).

101. Corbett & O’Faircheallaigh, above n 3, 155.

102. Ibid 162.

103. See Sumner, above n 9, 35, 44–52.

104. *Thomas*, above n 69, 165–6.

105. *Holocene*, above n 68, [37]–[38].

106. See *Strickland v Western Australia*, above n 5, 323; Aronsen, Dyer, Groves, above n 11, [4.105].

107. *Thomas*, above n 69, 154–63.

108. NTA s 109(3).

a Tribunal determination 'without a basis in evidence having rational probative force'.<sup>109</sup> The Tribunal takes the view that weight will be given to the likely effect of the proposed act by reference to the available evidentiary material, without either assuming that there will be such an effect or establishing an evidentiary threshold test. However, there needs to be sufficient material to demonstrate, for example, how the native title party's *enjoyment* of the relevant registered native title rights and interests and the other matters set out in paragraphs 39(1)(a)–(b) *will be affected* if the future act is done.<sup>110</sup>

The critical point is that it is not the effect that the doing of the future act in question might possibly have but its effect in so far as this can be inferred *from the factual materials before the Tribunal* in the inquiry. In this context, it is important to note that:

In administrative matters such as these, any party (not just the native title party) has what might be termed an evidentiary choice. They might choose not to lead any evidence on a particular issue. But that does not necessarily mean that they must fail on that issue; ie, that they have an evidential onus of proof. The Tribunal might (subject to observing the requirements of procedural fairness) make its own inquiries and satisfy itself that the particular issue should be decided in favour of the party electing not to put evidence before it. Alternatively, part of an opposing party's evidence whether in cross-examination or otherwise, may satisfy the Tribunal on the point. That party has, in colloquial terms, taken its chances and won. However, ... where facts are peculiarly within the knowledge of a party to an issue, its failure to produce evidence as to those facts may lead to an unfavourable inference being drawn when the administrative tribunal applies its common sense approach to evidence.<sup>111</sup>

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109. *Hughes v Western Australia* (2003) 182 FLR 362, 370 (Member Sosso), citing *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 256 (Brennan J).

110. NTA s 39(1)(a); see *Thomas*, above n 69, 166–7; *Re Koara People* (1996) 132 FLR 73, 81–82 (Deputy President Seaman, Members Smith and McDaniel). In cases where native title rights and interests have been recognised by the Federal Court and registered on the National Native Title Register pursuant to NTA s 193, this approach is modified appropriately: see *Holocene*, above n 68, [163]. However, the principle is that claimed native title rights and interests that are on the Register of Native Title Claims are treated on the same basis as determined native title rights and interests: *WMC Resources v Evans* (1998) 163 FLR 333, 340 (Member Sumner); *Western Desert Lands Aboriginal Corporation v Western Australia* (2008) 218 FLR 362, 375 (Deputy President Sumner). The 1998 amendments to the NTA substituted the words 'enjoyment by the native title parties of their registered native title rights and interests' in lieu of 'any native title rights and interests' in s 39(1)(a)(i). This reinforced the view expressed by the Tribunal in *Thomas*. In *Australian Manganese Pty Ltd/Western Australia/Stock* [2008] NNTT 38, [36]–[39] (Deputy President Sumner), the Tribunal rejected the native title party's contention that it misunderstood the effect of the amendment. No appeal was made against that decision.

111. *Ward*, above n 82, 217 (Carr J). (The decision on this point is unaffected by *Dann*, above n 48, where Carr J's view in *Ward* as to what was required under s 237 as it stood at time was rejected.) The same may be said in cases where there is 'a good deal of evidence pointing in one direction' before the Tribunal and 'any intelligent observer could see that unless contrary material comes to light that is the way the decision is likely to go': *McDonald v Director-General of Social Security* (1984) 1 FCR 354, 358 (Woodward, Northrop & Jenkinson JJ).

It should be obvious that much of the material relevant to paragraphs 39(1)(a) and (b) will be peculiarly within the knowledge of the native title party. For example, no other party would usually be in a position to produce material going to how the future act in question would, if done, affect the native title parties' enjoyment of their registered rights, their way of life, culture and traditions or the development of their social, cultural and economic structures.<sup>112</sup> Similarly, the native title parties are in the best position to provide materials relevant to their interests, proposals, opinions or wishes in relation to the management, use and control of any area where their registered native title rights and interests would be affected by the doing of the future act.<sup>113</sup>

The problem the Tribunal most often faces when conducting a future act inquiry is either that there is no material on point or the material provided is insufficient to allow inferences favourable to the native title party to be drawn.

An analysis of 30 future act determinations<sup>114</sup> made other than by consent illustrates the point. The native title party produced factual material going to the section 39 criteria in only eight of the 30 cases. In another eight of those cases (28%), at least one of the native title parties either refused to participate in the inquiry or produced no factual material at all. In 22 of those cases (76%), at least one of the native title parties produced no factual material addressing the section 39 criteria. In 19 cases (66%), no factual material addressing the section 39 criteria was produced by any of the native title parties.<sup>115</sup>

While material going to the section 39 criteria is usually provided by the parties, it may be obtained as a result of the Tribunal making its own inquiries. Therefore, it might be said that the Tribunal should take a more inquisitorial approach.<sup>116</sup> In appropriate cases, the Tribunal has done so. For example, in *Western Australia v Daniel*,<sup>117</sup> the Tribunal advertised for submissions from the public on the economic or other significance of the proposed future act (which was the compulsory

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112. NTA s 39(1)(a)(i)-(iii).

113. NTA s 39(1)(b).

114. Mr Corbett and Professor O'Faircheallaigh based their analysis on only 17 cases which, from a statistical perspective, is problematic. The Tribunal carried out a wider analysis; ie, 30 determinations involving 29 cases in total, including the 17 considered by Mr Corbett and Professor O'Faircheallaigh. These are listed in Appendix 1.

115. A legal practitioner outside of the future act process may find these figures incredible, ie, that a matter would go to a hearing before a tribunal with little or no factual material on the relevant criteria being presented on behalf of a party with so much at stake. But it has been relatively commonplace and, to some extent, is encouraged by commentators such as Mr Corbett and Professor O'Faircheallaigh, who find it unsurprising that a native title party would choose not to participate in the process: above n 3, 172. This is despite the fact that a lack of evidence from the native title party is the most likely reason for the Tribunal to determine that the future act (eg, the grant of a mining lease) can be done, often without any conditions being imposed. See Sumner, above n 9, 30-6.

116. See above n 110 and associated text.

117. (2002) 172 FLR 168 (Deputy President Sumner).

acquisition of native title over part of the Burrup Peninsula in Western Australia) and the public interest in the doing of the act for the purposes of paragraphs 39(1)(c) and 39(1)(e). This was done over the objections of the State of Western Australia. The state's contention that any submissions received should be taken into account for limited purposes was also rejected, with the Tribunal receiving the submissions on the basis that they could be used for whatever purpose the Tribunal considered appropriate.<sup>118</sup>

However, as noted earlier, the evidentiary material relevant to many of the section 39 criteria is peculiarly within the knowledge of the native title party. If that party exercises its 'evidentiary choice', to use Carr J's expression, by lodging little or no relevant material, it is difficult to see how a more inquisitorial approach by the Tribunal would assist.

### **Unwilling to impose conditions requested by native title parties**

Mr Corbett and Professor O'Faircheallaigh allege that the Tribunal is unwilling to impose conditions requested by native title parties.<sup>119</sup> They give *WMC Resources Ltd v Evans*<sup>120</sup> as an example. However, in that matter, the Tribunal imposed limited conditions in favour of the native title party. This was done despite an assertion from the grantee party that to do so would show the Tribunal was biased in favour of the native title party because of the paucity of the evidence to support the imposition of any conditions.<sup>121</sup>

Mr Corbett and Professor O'Faircheallaigh are also critical of the Tribunal for refusing to impose conditions to enhance the protection available for cultural heritage sites.<sup>122</sup> Whether such conditions should be imposed will depend on the evidence, the applicable statutory regime for cultural heritage protection and the attitude of the grantee party. The Tribunal can (and does) take into account the operation of other legislation such as the Aboriginal Heritage Act 1972 (WA) (AHA) when making a future act determination and, depending on the facts of the case, may leave issues arising under subparagraph 39(1)(a)(v) to the relevant site protection regime.<sup>123</sup>

However, the Tribunal will not do so if that would amount to avoiding its responsibilities under subparagraph 39(1)(a)(v) to properly consider the effect of

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118. Ibid 172–3, 176–9.

119. Corbett & O'Faircheallaigh, above n 3, 163–6.

120. (1999) 163 FLR 333 (Member Sumner).

121. Ibid 359–62.

122. Corbett & O'Faircheallaigh, above n 3, 164.

123. The relevance of the AHA has been raised in several s 169 appeals and the court has repeatedly endorsed the Tribunal's view: see eg *Parker*, above n 60, 353 (Branson J); *Parker v Western Australia* [2007] FCA 1027, [18] (Siopsis J); *Little*, above n 48, [70], [77], [88]. These cases dealt with s 237 (ie, the factors relevant to an expedited procedure objection inquiry) but it appears that the same principles would apply in relation to future act determination inquiries.

the grant of a mining lease on any area or site of particular significance to the native title parties.<sup>124</sup> Indeed, in a case where it was clear that the grantee party would require approval from the relevant minister under section 18 of the AHA to destroy or interfere with such a site in order to commence mining, the Tribunal found that the state regime could not be relied upon.<sup>125</sup> This factor, when weighed with evidence going to subparagraph 39(1)(b) and the other section 39 criteria, led the Tribunal to determine for the first time that the mining lease must not be granted.<sup>126</sup>

Mr Corbett and Professor O’Faircheallaigh allege that the Tribunal is disinclined to impose conditions on the grant of a mining lease ‘even where the conditions ... have ... been accepted’ by the grantee party, and that, when it does impose such conditions, it needlessly expresses reservations about the extent of the evidence to support them.<sup>127</sup> However, they have misunderstood the law. Subsection 39(4) relieves the Tribunal of its duty to consider the section 39 criteria where there is agreement on issues relevant to its determination but only to the extent of any such agreement and only if *all* parties agree. In the case the authors use to support their allegations, one of the native title parties did not agree. Hence, the section 39 criteria had to be considered and there was little or no evidence from the native title parties going to those criteria. Further, some of the conditions agreed to by the other parties were beyond the scope of the Tribunal’s powers.<sup>128</sup>

The authors also assert that ‘in only one instance has the Tribunal imposed substantive conditions not already agreed by the parties’, a reference to *Koara (No 1)*.<sup>129</sup> However, while noting *Koara (No 2)*<sup>130</sup> was a determination which followed a successful appeal to the Federal Court in relation to *Koara (No 1)*, the authors do not mention that the matter was eventually resolved by a determination that the grant of the lease might be done subject to conditions, including a condition sought by the native title party that a socio-economic impact assessment be conducted. The Tribunal imposed this condition despite strong objections from the government and grantee parties, who argued that it was not justified on the evidence, was not within the scope of the NTA and was invalid.<sup>131</sup>

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124. *Holocene*, above n 68, [145].

125. *Ibid.*

126. *Ibid* [216], [218]. It must be noted that this decision was made in 2009, long after Mr Corbett and Professor O’ Faircheallaigh wrote their article. However, it is referred to at some length here, and later in this article, because it illustrates the Tribunal’s approach in a case where there was a body of materials before it that addressed the s 39 criteria.

127. Corbett & O’Faircheallaigh, above n 3, 165–6

128. *Western Australia/Strickland/Plutonic (Baxter) Pty Ltd* [1999] NNTTA 46 (Member Sumner) 13–15, 21.

129. (1996) 132 FLR 73 (Deputy President Seaman, Members Smith & McDaniel).

130. *Minister for Mines (WA) v Evans* (1998) 163 FLR 274 (Members Sumner, Smith & McDaniel).

131. *Ibid* 302.

### Conditions imposed justified because not onerous

The authors allege that the Tribunal 'often' justifies the imposition of conditions on the grant of a mining lease on the basis that they are not onerous on the grantee party,<sup>132</sup> citing only two cases in support. In the first of those cases, *WMC Resources Ltd v Evans*,<sup>133</sup> the comment was made in the face of the grantee party's strenuous opposition to the imposition of any conditions. The reasons the Tribunal did so were not confined to the fact that they were not onerous.<sup>134</sup> In the other case, *Western Australia/Strickland/Crook*,<sup>135</sup> one of the native title parties chose not to provide any evidentiary material. The other verbally consented to the lease being granted subject to the imposition of only one condition (ie, that the grantee party give the native title party notice if the lease was later sold). The Tribunal merely noted that attaching the condition sought by the native title party would not be onerous because the grantee party would be required to notify other interest holders in that event. The Tribunal then found that, because of the lack of evidence from the native title parties, it was unable to impose any conditions other than the notification condition requested by one of those parties.<sup>136</sup> In the circumstances, neither of these cases supports the authors' allegation.

### Standards of evidence

The allegation that the Tribunal demands a higher standard of evidence from native title parties than from grantee parties does not hold up when considered in the circumstances of the Tribunal decisions relied upon.

In relation to *Bissett v Mineral Deposits (Operations) Pty Ltd*,<sup>137</sup> Mr Corbett and Professor O'Faircheallaigh say that the Tribunal 'required specific evidence regarding the potential impact of mining on particular native title rights' and found that there was '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'.<sup>138</sup> However, the quote has been foreshortened. What the Tribunal actually said was that there was no solid material that demonstrated that:

[T]he enjoyment of a number of the registered rights and interests will be deleteriously impacted upon by the proposed act *due to the fact that it is not clear what the nature of their enjoyment by the native title party actually is*.<sup>139</sup>

Member Sosso went on to note that:

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132. Corbett & O'Faircheallaigh, above n 3, 163.

133. Above n 120.

134. Ibid 358–9.

135. [1999] NNTTA 167 (Member Wilson).

136. Ibid 6–7.

137. (2001) 166 FLR 46 (Member Sosso).

138. Corbett & O'Faircheallaigh, above n 3, 167.

139. *Bissett v Mineral Deposits*, above n 137, 65 (emphasis added).

[T]he focus of section 39(1)(a)(i) is directed towards determining the effect of the future act on the *enjoyment* of registered rights and interests. The preponderance of material before the Tribunal fails to illustrate how the *enjoyment* by the native title party of the bulk of its registered rights and interests *in the area of the proposed tenement* will be effected in an immediate and real manner by the proposed future act.<sup>140</sup>

The authors also say the Tribunal did not request specific evidence of what the grantee party contended was its ‘longstanding Aboriginal employment policy’.<sup>141</sup> However, what they do not grasp is that the Tribunal sought no evidence of the policy because the Tribunal did not rely on it. The references to ‘employment’<sup>142</sup> in the member’s reasons are references to employment within the community generally. The Tribunal was not referring to the alleged Aboriginal employment policy.<sup>143</sup> Nothing in these findings demonstrates any different standard was applied by the Tribunal to the evidence required from the parties.<sup>144</sup>

There is also an allegation that different standards were applied in *Townson Holdings Pty Ltd/Harrington-Smith/Western Australia*.<sup>145</sup> Again, it cannot be sustained. In that matter, the Tribunal determined that the mining leases in question might be granted. No specific evidence as to the economic significance of the grant of those leases was given because of uncertainty as to whether a viable ore body existed. The criticism was that ‘the Tribunal did not see the lack of specific evidence ... as a basis on which to question ... the grantee’s request that a lease be issued’.<sup>146</sup> In *Townson*, the grantee party had no current proposal for productive mining. It intended to use the leased area for further exploration.<sup>147</sup> In those circumstances, what the Tribunal actually said was:

The grantee party has not provided any evidence of the extent of the economic significance of the proposed mining leases noting that it is difficult to predict because of the uncertainty about whether a viable ore body will be discovered. Nevertheless, I can at least accept that continuing exploration will have some positive economic effect in the locality and there is potential for this to be increased if mining occurs.<sup>148</sup>

140. Ibid (emphasis in original).

141. Corbett & O’Faircheallaigh, above n 3, 167.

142. Made when considering the ‘economic or other significance’ of the act: NTA s 39(1)(c).

143. See *Bissett v Mineral Deposits*, above n 137, 79–81. The native title party alleged there was no such policy.

144. The allegations in Corbett and O’Faircheallaigh, above n 3, 169 in relation to the ‘striking example of disparity between the Tribunal’s initial consideration of evidence and its decision’ and the Tribunal’s apparently uncritical acceptance of an anthropological report tendered by the grantee party in *WMC Resources v Evans*, above n 120, are dealt with in Sumner, above n 9, 45, 46.

145. [2003] NNTTA 82 (Deputy President Sumner): see Corbett & O’Faircheallaigh, above n 3, 168.

146. Corbett & O’Faircheallaigh, *ibid* 168.

147. This was, at the time, permissible under the Mining Act 1975 (WA).

148. Above n 145, [93].

It is clear from the full quote that little weight was given to this factor by the Tribunal in coming to its decision and, in any case, it is not indicative of the application of a different standard of evidence.<sup>149</sup> In any event, the major problem in this case was the paucity of evidence from the native title party.

### THE TRIBUNAL'S 'CONDUCT' REFLECTS TWO 'MAJOR FACTORS'

Mr Corbett and Professor O'Faircheallaigh allege that the Tribunal's 'conduct', which they say demonstrates a bias in favour of grantee parties, 'reflects two major factors', namely:

- the Tribunal's arbitral function 'bears little resemblance to the conventional concept of arbitration'; and
- the Tribunal is 'not an independent judicial body but ... constitutes part of the executive' which makes Tribunal members 'responsive to government priorities'.<sup>150</sup>

However, these criticisms of the Tribunal are either based on a misunderstanding of the task the Tribunal is performing under the NTA or more properly characterised as criticisms of the policy choices made by the Australian Parliament.

### Tribunal arbitration v 'conventional' arbitration

One of the 'major' factors Mr Corbett and Professor O'Faircheallaigh say affects the Tribunal's conduct of future act inquiries is that Tribunal arbitration 'bears little resemblance to the conventional concept of arbitration'.<sup>151</sup> They go on to say that the term 'arbitration' is 'in fact a misnomer' because:

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.

149. It is interesting that Mr Corbett and Professor O'Faircheallaigh do not point out that there are consequences for grantee parties who choose not to produce material on a point relevant to a Tribunal inquiry. In an expedited procedure objection inquiry, if a grantee party does not submit material explaining its intentions as to heritage protection, the Tribunal conducts the predictive assessment required by s 237 on the basis that grantee party will exercise rights available under the proposed tenement to the full, ie a worst case scenario. This has, in some cases, been the very reason why the Tribunal has decided that the expedited procedure should not apply to the tenement concerned and that the native title party should have the right to negotiate. See, eg, *Freddie/Western Australia/ Povey* [2001] NNTTA 162, [49] (Member Stuckey-Clarke); *Ward v Northern Territory of Australia* (2002) 169 FLR 303, 318, 328 (Member Sosso); *Ward/Ausquest Limited/Northern Territory* [2002] NNTTA 41, [62] (Member Sosso); *Parry/Buchanan Exploration Pty Ltd/Northern Territory* [2002] NNTTA 221, [66] (Member Sosso).

150. Corbett & O'Faircheallaigh, above n 3, 155.

151. *Ibid.*

Arbitration decisions are final and binding and cannot be set aside by an external party.... As is clear from the earlier discussion, ‘arbitration’ by the NNTT is a very different process.<sup>152</sup>

It may be that the authors do not understand that what the Tribunal conducts is a particular type of ‘conventional’ arbitration, best described as ‘statutory arbitration’. This is:

A method of deciding issues by arbitral tribunals otherwise than by agreement between the parties, resort to which may be optional or compulsory, and in the constitution of which the disputants have no choice.<sup>153</sup>

If it becomes necessary to make a future act determination, the NTA prescribes the matters to which the Tribunal must have reference – ie, the section 39 criteria. Clearly, Parliament was not prepared to leave it to the parties to first agree to go to arbitration and then determine what might be relevant to resolving any issues preventing agreement between them or who might best arbitrate in relation to those issues. Further, by comparison with the ‘conventional’ arbitration to which the authors refer (where decisions are ‘final and binding’), the NTA provides that:

- the relevant minister can override the Tribunal’s determination in certain circumstances or step in and make a future act determination without awaiting a Tribunal determination in certain circumstances; and
- any party can ‘appeal’, as of right, to the Federal Court on a question of law from any decision or determination of the Tribunal.<sup>154</sup>

The authors’ understanding of the Tribunal’s role colours their consideration of the Tribunal’s ‘conduct’ of future act determination inquiries and is identified as a ‘major factor’ supporting the implication made in the title to their article that there are politics embedded in the Tribunal’s conduct.<sup>155</sup> While it is not entirely clear as to why they think this is the case, if they have misunderstood the nature of the inquiry the Tribunal is conducting under the NTA, then the foundation upon which both their analysis and their criticisms of that process rests is undermined. If they do not misunderstand and, instead, simply reject the model adopted by the legislature, then their criticisms should be directed at the choice Parliament made

152. Ibid 174–5.

153. LexisNexis online, *Encyclopaedic Australian Legal Dictionary*.

154. See NTA ss 36A, 42, 169. The jurisdiction conferred by s 169 is original jurisdiction because ‘it is an appeal against a decision or determination of an administrative body’: *Hicks*, above n 73 [12].

155. They are also critical of the fact that the Tribunal does not use the term ‘arbitration’ in identifying determinations: Corbett & O’Faircheallaigh, above n 3, 161. The Tribunal uses the term ‘inquiry’ instead. There is nothing sinister in this. It is simply that the relevant Tribunal functions are identified in NTA s 108(1) as being ‘in relation to applications, inquiries and determinations’, not arbitration. Also, ss 139(b) and 169 direct the Tribunal to *hold an inquiry* into a right to negotiate application and make a determination on that application. No mention is made of arbitration.

and their energy spent on proposing amendments to the NTA to introduce what they call a 'conventional' arbitration process.

### **Tribunal members are on fixed term appointments**

The other 'major factor' Mr Corbett and Professor O'Faircheallaigh say affects the Tribunal's conduct of future act inquiries is that the Tribunal is 'not an independent judicial body but ... constitutes part of the executive'. This, they say, results in Tribunal members being 'responsive to government priorities, which in Australia privilege the interests of resource developers over those of native title parties'.<sup>156</sup> Later in the article, they expand on this point:

Unlike the judiciary its [the Tribunal's] 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. ... 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', ... 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. Against this background the NNTT's application of the arbitration provisions of the NTA is certainly explicable.<sup>157</sup>

This criticism of Tribunal members is unsupported by any evidence, other than a comment in a footnote that two of the three members who imposed 'substantive conditions [on the grant of a mining lease] not already agreed by the parties' were not re-appointed 'when the Howard government came to office in 1996'.<sup>158</sup> Putting that to one side, the authors do not seem to appreciate that 'government policy priorities' do not prompt Tribunal members to consider the economic value of the mining industry to Australia or any public interest involved in the doing of the future act (ie, the grant of the lease). The NTA does. It mandates<sup>159</sup> that the Tribunal take into account these matters (along with the other section 39 criteria)

156. Corbett & O'Faircheallaigh, above n 3, 155.

157. Ibid 175 (footnotes omitted). When the Corbett and O'Faircheallaigh article was published in 2006, 'recognition and protection of native title' was not the Tribunal's outcome statement. It was (and had been since June 2005) the 'resolution of native title issues over land and waters'. Mr Corbett again neglects to mention this in 'The National Native Title Tribunal's Facade', above n 3, also published in 2006, despite the fact that most of the criticisms levelled against the Tribunal in that article were bolstered by the former outcome statement. All Commonwealth agencies are required to report on the basis of an outcomes and outputs framework. For a helpful discussion of this framework, see *Combet v Commonwealth of Australia* (2005) 224 CLR 494.

158. Corbett & O'Faircheallaigh, *ibid*, 162–63, n 42. They refer to *Koara (No 1)*, above n 129. However, it should be a reference to *Koara (No 2)*, above n 130. The Hon CJ Sumner was the member reappointed. There are other reasons why a member is not reappointed besides the displeasure (if any) of the government of the day; eg, the member may not seek reappointment. It should also be noted that, for most Tribunal members, the administration of the future act process comprises only a small proportion of their work.

159. See NTA ss 39(1)(c), 39(1)(d).

when deciding what kind of future act determination to make in any particular case. Failure to do so would be an error of law.

Fundamentally, this ‘major factor’ is actually an attack on Parliament’s decision that an administrative tribunal, rather than a body with judicial powers, should determine these matters,<sup>160</sup> a preference confirmed by relevant minister’s capacity to intervene in the process or overrule a Tribunal determination.<sup>161</sup> A debate as to whether or not the Parliament should revisit that policy decision is legitimate. An unsubstantiated intimation that Tribunal members do the government of the day’s bidding in order to keep their appointments is not.

### **THE TRIBUNAL’S APPROACH STRENGTHENS GRANTEE PARTY’S BARGAINING POSITION**

Mr Corbett and Professor O’Faircheallaigh argue that the way in which the Tribunal performs its role as the arbitral body gives mining companies no incentive to reach agreement with native title parties. They support this by pointing to the fact that (at the time they were writing) the Tribunal had never made a determination that a mining lease must not be granted. This, they say, means there is no pressure on the company to reach agreement because the outcome of the arbitration process is not uncertain, ie, the mining company will get its lease.<sup>162</sup> This point requires some further analysis.

#### **The Tribunal never says no to the grant of a mining lease**

In the Tribunal’s experience, it has been the rare case where the native title party argues that the Tribunal should determine the future act must not be done.<sup>163</sup> On one occasion when this contention was made, it was not supported by reference to the section 39 criteria. Rather, it was argued that:

- the native title party had ‘evinced a strong preference’ that the mining project not proceed until a ‘mutually beneficial agreement’ (which had almost been reached during the negotiations) with the grantee party was struck;

160. This can be contrasted with the choice made by the Parliament of South Australia, where the Environmental and Resources Development Court is the arbitral body for right to negotiate applications (except in relation to gas and petroleum tenements, where it is the Tribunal): see the Environment, Resources and Development Court Act 1993 (SA), the Mining Act 1971 (SA) and the Native Title (South Australia) Act 1994 (SA).

161. NTA ss 36A, 42. This would not be permissible in relation to a federal court established under Chapter III of the Australian Constitution.

162. Corbett & O’Faircheallaigh, above n 3, 155, 172.

163. Usually, the native title party argues that the future act should not be done unless certain conditions are imposed. While we have not done a search of the determinations on this point, we are aware of only three occasions when the native title party simply sought a determination that the act must not be done: *Bissett v Mineral Deposits*, above n 137; *Holocene*, above n 68; *Australian Manganese*, above n 110.

- a determination that the act must not be done should be made because this would be 'in the interests of promoting' the native title party's 'rights and aspirations toward self-determination'.<sup>164</sup>

It would be an improper exercise of power for the Tribunal to make such a determination solely on the basis that an agreement satisfactory to the native title party had not been reached and that this adversely affected their aspirations to self-determination. It would, in effect, give the native title party the power to veto the grant of the lease, which is clearly not the law.<sup>165</sup>

However, subsequent to that decision, the Tribunal determined for the first time that a mining lease must not be granted in *Western Desert Lands Aboriginal Corporation (Jamukurnu–Yapalikunu)/Western Australia/Holocene Pty Ltd.*<sup>166</sup> In that case, after assessing the materials before it, the Tribunal determined that most of the factors raised by section 39 were evenly balanced. The main issue was the effect of the grant of the mining lease in question on a site of particular significance<sup>167</sup> (Lake Disappointment) in the context of 'the interests, proposals, opinions or wishes of the native title party in relation to the management, use or control of the land'.<sup>168</sup>

It needs to be emphasised that this case was well prepared and presented. There was a substantial amount of evidence from the Martu people, including oral evidence given by 12 people at a hearing held on country and a connection report prepared in support of their native title claim. The grantee party submitted a considerable body of evidence going to the details of its project for developing the resource in question (25 million tonnes of potash identified during the exploration phase). All of the parties engaged experienced legal counsel and made extensive submissions that addressed the section 39 criteria.

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164. *Australian Manganese*, above n 110, [56]. This might be said to be a contention going to NTA s 39(1)(b). However, that would only be the case if the 'interest, proposals, opinions or wishes' of the native title party were shown to be 'in relation to the management, use or control of land and waters in relation to which there are registered native title rights and interests ... that *will be affected* by the act' (emphasis added). Something more than a bare statement as to the promoting self-determination is required for the purposes of s 39(1)(b). It should also be noted that, while lengthy contentions as to the application of the law were filed on the native title party's behalf, the native title party's evidence going to the s 39 criteria consisted of two witness statements, each approximately a page in length: see [27]–[28].

165. *Ibid* [57].

166. Above n 68. *Western Desert Lands Aboriginal Corporation (Jamukurnu–Yapalikunu)*, the native title party, is a registered native title body corporate that holds the Martu People's native title on trust: see *James v Western Australia* [2002] FCA 1208 (French J); *James v Western Australia (No 2)* [2003] FCA 731 (French J). The registered native title rights and interests relevant to this matter include the right to possess, occupy, use and enjoy the area concerned to the exclusion of all others (ie, 'exclusive' native title).

167. NTA s 39(1)(a)(v).

168. NTA s 39(1)(b).

On the evidence, the Tribunal was satisfied that there was ‘no doubt’ that Lake Disappointment was of spiritual significance to the native title party and that:

Although it is not so sacred or dangerous that it needs to be avoided in all circumstances, the evidence overwhelmingly establishes it [the lake] as an important place which is integrated into Martu culture and connection to country generally.<sup>169</sup>

It was also clear that, if the lease was granted, mining operations could not be conducted in accordance with the lease without interfering with that site and that any such interference would be ‘considerable’.<sup>170</sup>

In relation to paragraph 39(1)(b), the ‘clear inference’ from the evidence was that the native title party would not have agreed to exploration or continued to negotiate with the grantee party if the only result was going to be an entitlement to compensation under the NTA and not the other benefits (which would have seen them ‘and particularly their children involved in the mainstream economy’) that were clearly in contemplation during negotiations. According to the Tribunal:

The expectation of the Martu ... would have been that, in return for mining on a place that is very special to them, benefits of this kind could be negotiated. What they now say is that the substantial interference with one of their important traditional sites is not acceptable in the light of the limited benefits available to them i.e. effectively for the upgrading of a road and the possibility of some employment and business opportunities.<sup>171</sup>

In the circumstances, based on the evidence produced, the Tribunal found that ‘the interests, proposals, opinions and wishes of the native title party in relation to the use of Lake Disappointment should be given greater weight than the potential economic benefit or public interest’ in the mining project (of which the lease in question formed part) proceeding.<sup>172</sup> This decision has put grantee parties on notice that they are not always ‘assured of obtaining a mining lease’ or ‘likely to benefit from favourable treatment by the Tribunal’<sup>173</sup> in future act determination proceedings.<sup>174</sup>

169. *Holocene*, above n 68, [141], [149].

170. *Ibid* [144], [151].

171. *Ibid* [214].

172. *Ibid* [216].

173. Corbett & O’Faircheallaigh, above n 3, 172. *Holocene*’s parent company, Reward Minerals Ltd, asked the Commonwealth Attorney-General (the relevant minister) to exercise the discretion available under NTA s 42 to overrule the Tribunal’s determination. This was the first time such application had been made to the minister: see Reward Minerals Ltd, ‘Request to Commonwealth Minister Over NNTT Decision: ASX Release’ (10 June 2009) <[www.infomine.com/index/pr/Pa755431.pdf](http://www.infomine.com/index/pr/Pa755431.pdf)> accessed 25 June 2009. In a letter dated 27 July 2009, the Attorney-General informed the parties and the Tribunal that he had decided not to overrule the Tribunal’s determination because he was of the view it was neither in the national interest nor in the interests of Western Australia to do so. He also said that, even if it had been, he would not have exercised his discretion to overrule the Tribunal’s determination.

174. We recognise that a cynic might say that the Tribunal ‘changed its tune’ in this case because of

### The Tribunal's approach weakens native title party's bargaining position

The authors allege that the Tribunal's approach to its future act inquiry function places a native title party in a lesser bargaining position during negotiations.<sup>175</sup> It is acknowledged that the provision of the NTA to which they refer is one of several that place the native title parties in a less than ideal bargaining position when it comes to making agreements about future acts that attract the right to negotiate. The first, and most obvious, is that they have no right of veto.<sup>176</sup> The second is that, while the NTA contemplates royalty-type payments to native title parties in negotiated agreements,<sup>177</sup> the NTA denies the Tribunal the power to impose such a condition as part of its determination.<sup>178</sup> Thirdly, the Tribunal cannot make a determination of compensation for loss or impairment of native title as a result of the doing of the future act in question.<sup>179</sup> All of these provisions reflect Parliament's policy choices. Whether or not there should be amendments to address them is a matter for Parliament. However, none of these provisions support an allegation that it is the Tribunal's approach to the discharge of its duties that gives rise to any inequality in bargaining power.

### NEGOTIATION IN GOOD FAITH

Mr Corbett and Professor O'Faircheallaigh state that the Tribunal has only made one finding that a party did not negotiate in good faith and only in a situation where the grantee party in question not only made little attempt to engage with the native title party but made it clear it was participating in the negotiation process only so as to proceed to a Tribunal inquiry.<sup>180</sup> This ignores *Western Australia v Taylor*,<sup>181</sup>

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the criticisms made by Mr Corbett, Professor O'Faircheallaigh and others of its performance previously. But this not only does a great disservice to the Martu People, the other parties and their legal representatives, it ignores the fact that, in this case, the evidence went to the s 39 criteria.

175. Corbett & O'Faircheallaigh, above n 3, 172 referring to NTA s 38(2).

176. See above n 20 and associated text.

177. NTA s 33(1).

178. NTA s 38(2).

179. NTA ss 41(3), 52; see *Evans v Western Australia* (1997) 77 FCR 193 (RD Nicholson J). As from 1 September 2007, when Items 58 & 59 of Schedule 1, Part 1 of the Native Title (Technical Amendments) Act 2007 (Cth) commenced, what the Tribunal can do is impose a condition that an amount determined by the Tribunal must be secured by bank guarantee. Prior to this, the Tribunal could only impose a condition for monies to be paid into trust. For a full discussion of this issue, see Sumner, above n 9, 36-44.

180. Corbett & O'Faircheallaigh, above n 3, 161, referring to *Western Australia v Dimer* (2000) 163 FLR 426. For a similar finding in another matter that post-dates their article, see *Cosmos/Alexander/Western Australia/Mineralogy Pty Ltd* [2009] NNTTA 35 (Unreported, Deputy President Sosso, 17 April 2009). For a finding that the native title party did not negotiate in good faith, see *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia* [2009] NNTTA 62 (Member O'Dea); *FMG Pilbara Pty Ltd/Wintawari Guruma Aboriginal Corporation/Western Australia* [2009] NNTTA 63 (Member O'Dea).

181. (1996) 134 FLR 211 (Member Sumner).

where the Tribunal found the State of Western Australia had not negotiated in good faith. The decision resulted in the dismissal of the future act application in question and the withdrawal of a large number of others.

Their prediction that there was ‘little chance’ that the Tribunal would find that a grantee party had not negotiated in good faith ‘unless their behaviour has been patently uncooperative’<sup>182</sup> was proven wrong when the Tribunal found that FMG Pilbara Pty Ltd had not discharged its duty to negotiate in good faith in circumstances where it *could not* be said that the company’s behaviour was ‘patently uncooperative’.<sup>183</sup>

Finally, as noted earlier, the court’s rejection of the Tribunal’s beneficial interpretation of what it meant to negotiate in good faith (ie, that it entailed making of substantive offers to the native title party) is also ignored.<sup>184</sup>

### ARBITRATION USED AS A THREAT TO FORCE A SETTLEMENT ON NATIVE TITLE PARTY

Mr Corbett and Professor O’Faircheallaigh assert that native title parties are pressured to reach agreement because any other party can make a future act determination application to the Tribunal after six months from the notification day specified in the section 29 notice.<sup>185</sup> However, grantee parties are not lining up to go to arbitration as soon as the six month negotiation period is finished. Tribunal statistics as at 12 June 2009 show that there have been 286 applications determined by the Tribunal. Of those, 54 were lodged within six to 12 months of the section 29 notification day, 42 within 12 to 18 months and 190 (or 66%) more than 18 months after the section 29 notification day.<sup>186</sup> It will be interesting to see whether this pattern changes following the Full Court’s finding (among others) that the Tribunal can make a future act determination once the prescribed six-month period expires regardless of the stage negotiations have reached, provided negotiations were conducted in good faith during that period with a view to reaching agreement with the native title parties.<sup>187</sup>

182. Corbett & O’Faircheallaigh, above n 3, 172.

183. *Cox v Western Australia* (2008) 219 FLR 72 (Deputy President Sosso). However, the Full Court set aside the Tribunal’s decision: see *FMG Pilbara v Cox* above n 36, 149 (Spender, Sundberg & McKerracher JJ). On 25 May 2009, one of the native title parties applied for leave to appeal to the High Court against the whole of that judgment.

184. *Strickland v Western Australia*, above n 5, 321, discussed above.

185. Provided they have negotiated in good faith: NTA s 36(2).

186. Figures provided by the Tribunal’s Operations Unit. In 244 of those 286 applications, the Tribunal made a determination by consent, usually because an agreement had been reached but could not be formalised for various reasons; ie, the parties chose to use the Tribunal’s power to make a determination to finalise their agreement.

187. See *FMG Pilbara v Cox*, above n 36, 146–7.

The authors also give two examples, drawn from their own experience, where they say grantee parties used the threat of a Tribunal determination as a means to place inappropriate pressure on the native title party to accept the terms of an agreement. In one example, the grantee party is alleged to have said that, unless the offer was accepted by close of business on the day of a particular meeting, 'the company would go to the NNTT and the Tribunal would give it a mining lease'.<sup>188</sup> It is difficult to comment on these matters without more information as to the circumstances. Generally speaking, simply expressing an intention to exercise the right to make an application for a future act determination once the statutory six month period has passed cannot be relied upon to demonstrate a lack of good faith in negotiating.<sup>189</sup> However, if it could be shown that, in doing so, the grantee party had improper motives or had adopted a negotiating position so unreasonable as to indicate a lack of sincerity in its desire to reach agreement with the native title party, then this would support a finding that the grantee party had not negotiated in good faith. Clearly, behaviour that was shown to amount to a threat or an attempt to intimidate the native title party would not indicate that the party in question was negotiating in good faith. As in any other matter, it would all depend on the facts.<sup>190</sup>

## APPEALS TO THE FEDERAL COURT AGAINST TRIBUNAL DETERMINATIONS

Mr Corbett and Professor O'Faircheallaigh argue<sup>191</sup> that native title parties have not challenged Tribunal future act determinations because:

- native title representative bodies have such limited resources that appealing to the Federal Court under section 169 is simply not an option in most cases;
- native title parties may believe that the courts 'would be no more likely to treat their interests equitably' because of the High Court decisions in *Western Australia v Ward*<sup>192</sup> and *Yorta Yorta*.<sup>193</sup>

The inadequacy of the funding available to representative bodies is a real issue.<sup>194</sup> However, native title parties have found the resources necessary to appeal against

188. Corbett & Faircheallaigh, above n 3, 173.

189. *FMG Pilbara v Cox*, above n 36, 145; *Strickland*, above n 5, 319; *Daniel*, above n 117, 199.

190. *Placer (Granny Smith) Pty Ltd v Western Australia* (1999) 163 FLR 87, [30] (Member Sumner); *Dimer*, above n 180, 430–1. The practical effect of NTA s 36(2) is that the native title party would have to demonstrate a lack of good faith in the negotiations: *Daniel*, above n 117, [47].

191. Above n 3, 173–4. See also O'Faircheallaigh, 'Unreasonable and Extraordinary Restraints', above n 6, 31–2.

192. *Ward*, above n 39.

193. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

194. It is, to some extent, being addressed. An increase of \$45.8 million to be provided over four years to Native Title Representative Bodies (NTRBs) and bodies funded under s 203FE to perform NTRB functions was announced on 12 May 2009: see Commonwealth Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, *Additional \$50 Million for Native Title System*, Joint Media Release (12 May 2009).

(or seek judicial review of) a Tribunal determination on a right to negotiate application in more than 14 cases. Only one involved an appeal against a future act determination and it was determined more than a decade ago.<sup>195</sup> In circumstances where the Tribunal is perceived as biased against their clients, it seems odd to say that representative bodies could not fund a test case to the Federal Court to allow the law to be developed through the normal processes.<sup>196</sup> That said, the failure to exercise the right to appeal might also be explained by the fact that subsection 169(1) confines the appeal to a question of law, something that the Parliament could address if it chose to do so.

If the right to appeal is not being exercised because of a perception that the courts are not likely to treat the native title party 'equitably', then it is difficult to see what recourse there would be other than for them to advocate for substantial changes to the NTA.<sup>197</sup> In the meantime, the argument seems to concede that, at least in the conventional sense, the Tribunal applies the law correctly.

## CONCLUSION

We acknowledge what has been said by others, namely that:

If it is only the Native Title Act that is authorized to provide the terms of engagement, then the playing field is already capitulated to the whitefella law and the lived experience – the emotional, procedural and substantive issues arising within indigenous lives – is once again marginalized.<sup>198</sup>

It can also be said that the right to negotiate process enshrined in the NTA is far from perfect, particularly when viewed through the prism of the economic and social disadvantage suffered by many Indigenous Australians.

However, as we hope we have shown, the analysis of the Tribunal's role in that process conducted Mr Corbett and Professor O'Faircheallaigh was flawed.<sup>199</sup> Their

195. *Evans*, above n 179. The remainder concerned either the application of the expedited procedure or whether negotiation in good faith had occurred.

196. One issue that might be considered for an appeal is the Tribunal's view that the effect of a future act on the enjoyment of registered native title rights and interests is not to be considered on a worst case scenario but by looking at the actual effect of the future act in question on those rights and interests as they exist, or are exercised, in the locality concerned. For a discussion of relevant Tribunal decisions, see *Australian Manganese Pty Ltd/Western Australia/Stock* [2008] NNTTA 38, [36]–[39] (Deputy President Sumner).

197. Representative bodies and others have made submissions seeking substantial changes to the NTA: see <[www.ag.gov.au/www/agd/agd.nsf/Page/RWP73DB7F92B8E8CE99CA25723A00803C08](http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP73DB7F92B8E8CE99CA25723A00803C08)> (accessed 26 June 2009).

198. P Agius, R Howitt, S Jarvis & R Williams, 'Doing Native Title as Self-Determination: Issues from Native Title Negotiations in South Australia' (Paper presented at the International Association for the Study of Common Property Conference, Brisbane, 7–9 Sep 2003.)

199. As has been noted elsewhere: 'Political scientists devoting themselves to specialized study of ... administrators ought to be ... advised to do law and political science. But most of them don't': Shapiro, above n 13, 770. Doing so would certainly assist those who endeavour to analyse the administration of a statute as complex and, some might say, as controversial as the NTA.

doomsday 'policy' conclusion is that that the Tribunal's application of the right to negotiation provisions of the NTA will, in the long term:

[R]esult in hostility towards mineral development from native title groups, ... preclude development of positive relationships between native title parties and mining companies and ... 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.<sup>200</sup>

While it is hardly a flattering portrayal of the process, commentators looking at it more from a grantee party's perspective have expressed the opposite view.

The 'right to negotiate' process has also, in an ironic manner, further encouraged the development of lasting community relationships. As Hunt has stated, the process's very 'unworkability' with regard to obtaining grants of title has encouraged agreements: 'If used in conjunction with commercial negotiations, the 'right to negotiate' procedure has benefit in a negative sense because, in my experience, neither the native title claimants nor the ... company really want to follow the whole tortuous process right through to the final conclusion of a determination in the NNTT'.<sup>201</sup>

Other commentators coming from the perspective of native title parties acknowledge that:

Importantly, it [the NTA] provided a set of procedural rights relating to 'future acts' including ... the development of natural resources ... . While, for mining companies, the issue is one of gaining access to areas under Aboriginal-owned titles or subject to claim by Aboriginal people, the potential for indigenous people to obtain benefits from agreements is considerable.<sup>202</sup>

Therefore, those representing native title parties in right to negotiate matters need to ensure that those potential benefits are realised to the greatest extent possible. This means being aware of the legal regime within which the right to negotiate arises, maximising the opportunities it presents for native title parties and minimising the risks. Experience shows that negotiations that do not take proper account of the underlying legal principles can and do lead to a result which is 'detrimental to the

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200. Corbett & O'Faircheallaigh, above n 3, 176, see also 155.

201. P Gillies, B Cleworth & G Kapterian, 'Gove: Forgotten Catalyst for Native Title or Are We Just Where We Started? Native Title and the Mining Industry Issues in Australia from Gove to the Present Day' (2008) 1 Int'l J Private Law 137, 145.

202. M Langton & O Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the Resource Curse and Australia's Mining Boom' (2008) 26 J Energy & Natural Resources Law 31, 40-1. It has also been said that: '[T]he NTA [through the right to negotiate process] created the ability for native title claim groups to pro-actively intervene in order to preserve their own heritage': D Ritter, 'Many Bottles For Many Flies: Managing Conflict Over Indigenous People's Cultural Heritage In Western Australia' (2006) 13 Public History Rev 125, 165.

native title party' and 'inferior to that [which] the grantee party ... placed on the negotiating table'.<sup>203</sup>

It is trite to say that getting the best out of the right to negotiate for native title parties is no easy task. However, if a matter does come before the Tribunal for a future act determination, the best results will be obtained in cases when credible, relevant materials are presented by the native title party that fully address the relevant criteria found in the NTA.<sup>204</sup> Unfortunately, this is not usually the case, in the Tribunal's experience. As has been said elsewhere:

It may be that if grantee parties in some cases have nothing to fear from the Tribunal this is because of the terms of the NTA, the nature of the project and lack of evidence [from the native title party] of native title rights and interests or sites or other section 39(1)(a) factors.<sup>205</sup>

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203. Sumner, above n 9, 51; Corbett & Faircheallaigh, above n 3, 172–3. *Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia* [2006] NNTTA 19 (Deputy President Sumner,) is a particularly sobering example of this phenomenon. It is discussed extensively in Sumner, above n 9, 47–51.

204. The same can be said in relation to expedited procedure objection inquiries and a 'negotiation in good faith' inquiry.

205. Sumner, above n 9, 53.

**APPENDIX I**

1. *Western Australia v Thomas* (1996) 133 FLR 124
2. *Re Koara People* (1996) 132 FLR 73 (*Koara (No 1)*)
3. *Minister for Mines (WA) v Evans* (1998) 163 FLR 274 (*Koara (No 2)*)
4. *Western Australia/Champion/Resolute Ltd* [1999] NNTTA 219
5. *Western Australia/Strickland/Crook* [1999] NNTTA 167
6. *Western Australia v Thomas* (1999) 164 FLR 120
7. *Western Australia/Strickland/Plutonic Pty Ltd* [1999] NNTTA 46
8. *Western Australia v Evans* (1999) 165 FLR 354
9. *Western Australia/Thomas/Allen* [1999] NNTTA 103
10. *Western Australia/Champion/Coumbe* [1999] NNTTA 245
11. *WMC Resources Ltd v Evans* (1999) 163 FLR 333; [1999] NNTTA 372
12. *Anaconda Nickel Ltd v Western Australia* (2000) 165 FLR 116
13. *Townson Holdings Pty Ltd/Harrington-Smith/Western Australia* [2003] NNTTA 82
14. *Wongatha People/Down/ Western Australia* [2004] NNTTA 106
15. *Western Australia/Strickland/Glengarry Mining NL* [1999] NNTTA 3
16. *Wongatha People/Western Australia/Andrei* [2004] NNTTA 81
17. *Western Australia/Strickland* [1998] NNTTA 2
18. *Northern Territory/Risk/Phillips Oil Company Australia* [1998] NNTTA 1
19. *Hunter/Western Australia/Gulliver Productions Pty Ltd* [2004] NNTTA 105
20. *Western Australia/Daniel/ North* [1999] NNTTA 58
21. *Placer (Granny Smith) Pty Ltd/Western Australia/Harrington-Smith* [2000] NNTTA 67
22. *Western Australia/West Australia Petroleum Pty Ltd/Hayes* [2001] NNTTA 41
23. *Bissett v Mineral Deposits (Operation) Pty Ltd* (2001) 166 FLR 46
24. *Victorian Gold Mines NL v Victoria* (2002) 170 FLR 1
25. *Summons v Victoria* (2003) 176 FLR 1
26. *Western Australia/Hughes /Rough Range Oil Pty Ltd* [2004] NNTTA 108
27. *Cameron/ Hoolihan/Queensland* [2006] NNTTA 3
28. *The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia* [2006] NNTTA 19
29. *Gulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Hunter/Karajarri Traditional Lands Association (Aboriginal Corporation)/Western Australia* [2006] NNTTA 33
30. *Borinelli/Western Australia/Empire Oil Company (WA) Limited* [2007] NNTTA 9