

# Future act determination — s. 116 of Constitution

## ***FMG Pilbara Pty Ltd/Cheedy/Western Australia* [2009] NNTTA 91**

Daniel O'Dea, 13 August 2009

### **Issue**

FMG Pilbara Pty applied to the National Native Title Tribunal for two future act determinations under s. 38 of the *Native Title Act 1993* (Cwlth) (NTA) in relation to three mining leases. Among other things, the native title party argued that the Tribunal should construe s. 39 of the NTA so as to 'avoid the possibility of invalidity' by reason of s. 116 of the *Commonwealth of Australia Constitution Act 1900* (the Constitution). The Tribunal's consideration of this point is summarised here.

### **Background**

The native title party argued that a determination under s. 38 that the leases may be granted without the imposition of any conditions would prevent the Yindjibarndi People (the native title claimants) from exercising their registered native title rights, including the exercise of their religion.

### **Decision**

The Tribunal held that:

- the central issue was whether or not ss. 38 or 39 of the NTA were passed with the intention, design, purpose or effect of prohibiting the free exercise of religion of the native title party;
- section 116 of the Constitution applied to an administrative decision of the Tribunal;
- a future act determination made under s. 38 that the future act may be done with no conditions, or with conditions that did not require the native title party's agreement, was not a decision that would have the intention, design, purpose or effect of interference with the free exercise of the native title party's religious beliefs—at [21] and [24].

The native title party has appealed to the Federal Court pursuant to s. 169 of the NTA on, among others, the ground that Tribunal erred in law in its findings in relation to s. 116 of the Constitution.