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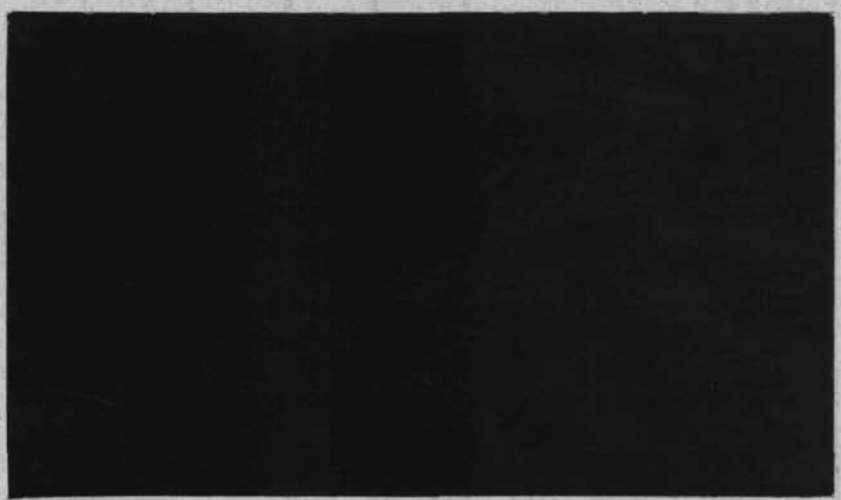

DISCUSSION PAPER

The right to negotiate and native title future acts: implications of the Native Title Amendment Bill 1996

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Professor Jon Altman
Director, CAEPR
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December 1996

ABSTRACT

The paper describes the right to negotiate process that has been established under the future acts regime of the *Native Title Act 1993* and presents a preliminary review of key amendments to the current process proposed by the Howard Government. The right to negotiate is critical to mainstream land management and resource development on claimed native title lands, and so remains contentious and subject to mounting industry and government criticism concerning transactions costs and alleged unnecessary delays. At the same time, there remains considerable confusion about its nature and operation, and a lack of recognition of actual outcomes. In order to assess the implications of amendments proposed in the Native Title Amendment Bill 1996, the paper first describes the key statutory components and flow of the right to negotiate as it currently stands. The focus is on how the legislative framework has been practically implemented, highlighting difficulties and outcomes to date. The foreshadowed amendments to the right to negotiate are then critically assessed, including: the proposed exclusions mechanism; the conjunctive right to negotiate and project acts; parallel processing; compulsory acquisition powers; Ministerial intervention; and the new claims registration test. The paper assesses the capacity of the amendments to either relieve or exacerbate identified difficulties, and considers their broader implications for native title.

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Introduction[1]

This paper describes the right to negotiate process that has been established under the future acts regime of the *Native Title Act 1993* (NTA) and presents a preliminary review of the key amendments to the current process proposed by the Howard Government. The right to negotiate is critical to mainstream land management and resource development on claimed native title lands, and so remains contentious and subject to mounting industry and government criticism concerning transaction costs and alleged unnecessary delays. At the same time, early ambivalent Aboriginal attitudes to the process are fast transforming with the realisation that it constitutes a core element of the recognition of Indigenous rights to land (Dodson 1996a; O'Donoghue 1996).

The right to negotiate is a complex assembly of interconnected statutory parts, only some of which have recently been applied. There remains, therefore, considerable confusion about its nature and operation (Commonwealth of Australia 1996a: 2), and a lack of recognition about actual outcomes to date. In order to realistically assess the implications of the proposed amendments, I will firstly describe (in a substantially simplified form) the key statutory components and flow of the right to negotiate as it currently stands. I will also focus on how the legislative framework has been practically implemented, highlighting some of the difficulties and outcomes to date. The foreshadowed amendments by the Commonwealth Government are then critically assessed against this 'real world' context, in terms of their capacity to either relieve or exacerbate identified difficulties.

Future acts - the current situation

The legislation defines a range of future government actions called 'future acts' (ss226, 227 and 233), in which there is a presumption of effect upon native title. It then allows for specific 'permissible future acts' (s235) by government to proceed on claimed native title land, on the basis of a form of 'freehold equivalent test'; that is, if the act could be done by governments on freehold title land, then it can also be done on native title land. In general, permissible future acts do not extinguish native title:[2] the acts can be done and prevail over the existing native title for the duration of the act, after which native title rights and interests again have full effect (s238(8)).

A statutory right is provided to native title claimants and holders to negotiate over certain permissible future acts before they can legally take

place. Permissible future acts which attract the right to negotiate include the following (s26(2)):

- the creation or variation of a right to mine, including exploration, prospecting and quarrying (s253);
- the variation and extension of the period of a mining right, except where the variation or extension is a legally enforceable right; and
- the compulsory acquisition by government of native title land where the purpose is to transfer rights or interests to a party other than government.

The legislation currently provides for other permissible future acts to be added to, or excluded from, this list by the relevant Commonwealth Minister, though there have been none to date (s26(2)(e) and s26(3)(4)). The right to negotiate does not apply where there is an unopposed non-claimant application; where there is a legally enforceable right to renew; and to offshore areas.

Current s29 notices - initiating the right to negotiate

The right to negotiate currently consists of three stages: notification, negotiation and arbitration, with negotiations potentially running over the entire three stages (see Diagram 2). There is also a filtering process into the right to negotiate known as the 'expedited procedure' which is part of the right to negotiate process, but has substantially different conditions applying (see Diagram 1).

Government is required to give what is called a 's29 notice' to a number of parties,[3] of its intention to do an act on land over which native title exists or is claimed to exist, and over which the right to negotiate applies. This notification period lasts two months and the right to negotiate is effectively invoked when the notice is first issued by the government.

The legislation stipulates three classes of parties able to become negotiating parties; namely, the government, grantee and the native title parties (s253). The government and grantee parties automatically become negotiating parties at the point the s29 notice is issued. If there is already a native title claim registered with the National Native Title Tribunal (NNTT) for the same area of land over which the future act is proposed, or there are already native title holders, then they become a native title party with the right to negotiate.

Aboriginal people who do not have a native title claim already registered with the NNTT, but who want to secure the right to negotiate must, within the two-month notification period, register a claim over the same area of

land covered by the future act (s30). Once a claim is registered, the claimants are classed as a native title party and secure the right to negotiate. Native Title Representative Bodies have no legal standing as a negotiating party, though they may represent the interests of a native title negotiating party at its request. If there is no native title claimant or holder registered with the NNTT, either before or during the s29 notice period, then the future act in question is cleared for grant.

The two-month period of a s29 notice is the only window of opportunity through which Aboriginal people can secure the right to negotiate. The period operates as an effective sunset clause; no retroactive right can be secured after the two months has passed, no matter how substantial the impact of any subsequent native title claim or determination. There has been criticism by some Native Title Representative Bodies, in particular those in Western Australia where the vast majority of s29 future act notices occur, concerning the workload and resource implications associated with the notification period, especially if a native title claim must be fully prepared and registered with the NNTT in that time.

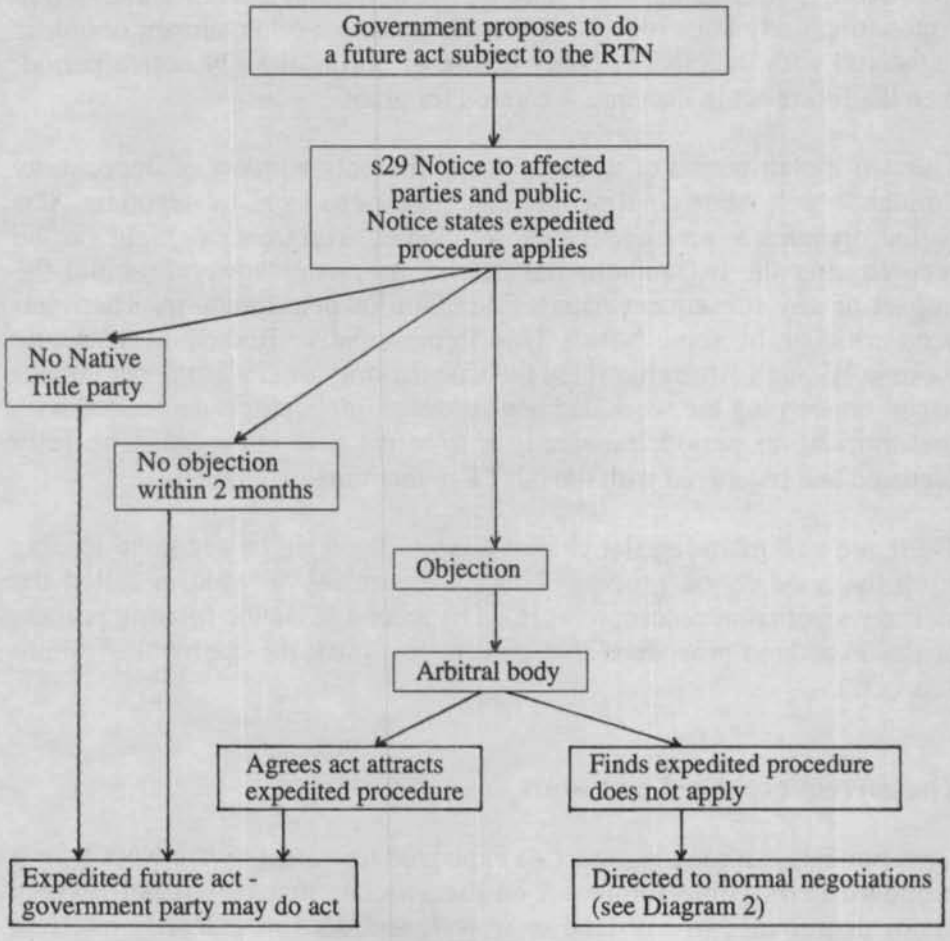
There are two main legislative pathways to the right to negotiate leading from the notification process. The main pathway is what is called the 'normal negotiation procedure' (s31). The second is via the filtering process of the 'expedited procedure' that aims to fast-track the approval of future acts (s32).

The current expedited procedure

Governments can seek to attract an expedited treatment by the NNTT for a proposed permissible future act on the grounds that it will not involve major disturbance to any land or waters, and does not directly interfere with any community life or sites of particular significance to the native title holders or claimants (s237) (see Diagram 1). A statement to such effect and seeking expedition must be included in the government's s29 notice (s29(4)). The majority of future acts for which governments are currently seeking to attract the expedited procedure are exploration and prospecting licences.

At the expedited stage there is effectively no full-blown right to negotiate; what is being exercised is a more restricted 'right to object' by a native title party to the future act being expedited, and that objection must be lodged with the NNTT within the two-month notification period (see Diagram 1). The NNTT then determines whether or not the future act attracts the expedited procedure, after considering evidence addressing statutory criteria.

Diagram 1. The current expedited procedure of the right to negotiate (RTN).

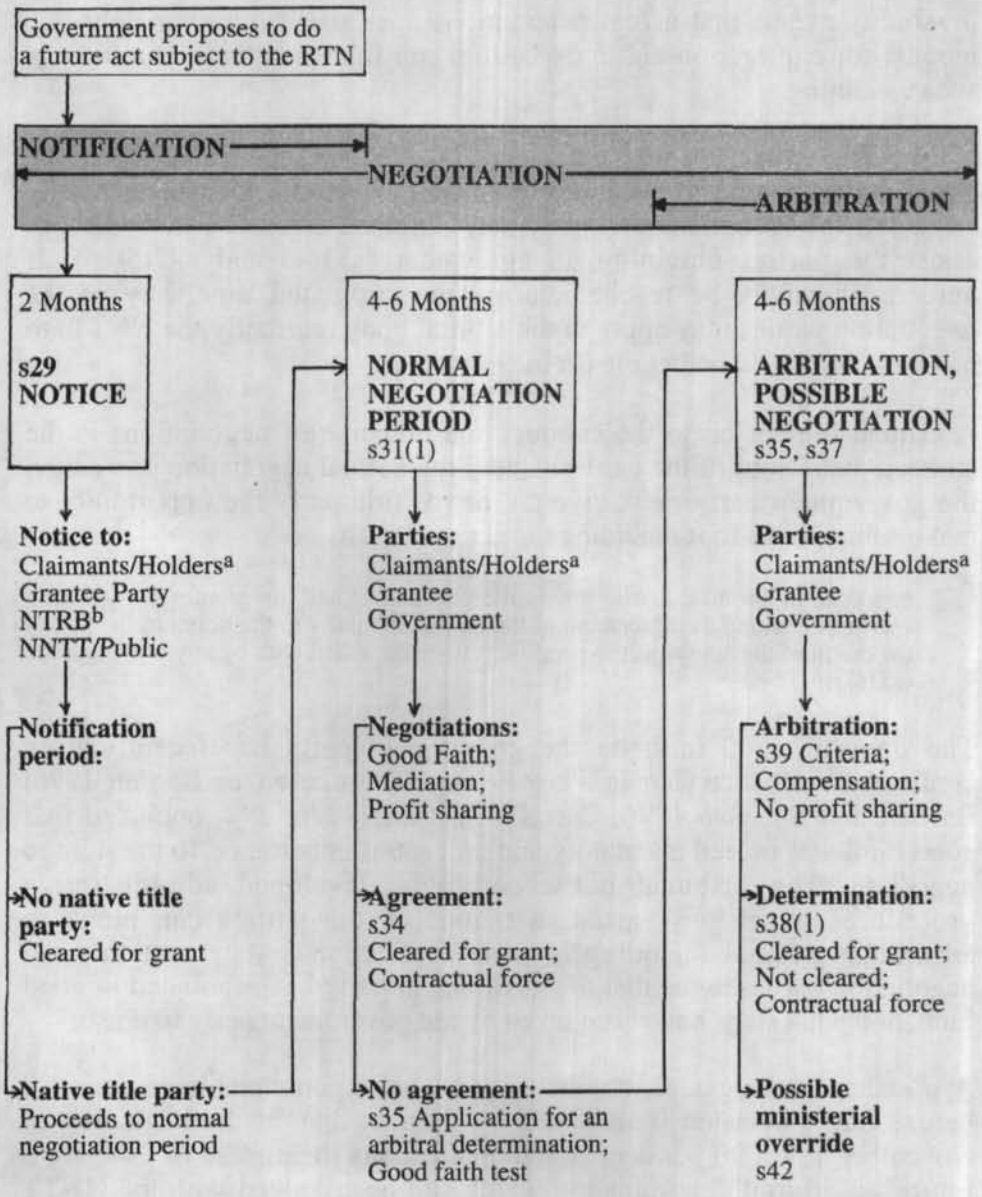


The current normal negotiation procedure

The heart of the right to negotiate lies in the normal negotiation procedure (see Diagram 2). Permissible future acts subject to that procedure consist of those exploration licences that have been filtered through the expedited process (having sustained an objection by a native title party), and those acts for which government has not sought to attract the expedited process in the first place. The majority of these latter future acts are mining leases.

Time limits apply to the normal negotiation period: it must proceed for at least four months if the proposed act is exploration or prospecting, and for at least six months in any other case (including mining) (s35). Parties cannot agree to shorten this period of time, but may extend it.

Diagram 2. The current right to negotiate (RTN) procedure.



a. Native title claimants or native title holders.
b. Native Title Representative Bodies.

It is important to be clear about what these time limits mean in practice. The period for negotiation legally commences from the point at which the s29 notice is first given, not from the conclusion of the two-month notification period. The general practice to date has been that negotiations

only effectively begin when all the participating native title parties have been finally identified; that is, at the end of the notification period. This invariably means that actual negotiations are carried out over only two months for exploration and prospecting, and four months for future acts such as mining.

If the parties come to a negotiated agreement, a copy must be given to the NNTT and the terms of such an agreement have contractual force. At any stage during negotiations, any party may call upon the NNTT to mediate to assist the parties obtaining an agreement (s31(1) and s32(5(b)). If agreement cannot be reached during the stipulated time, any of the negotiating parties may apply to the arbitral body (currently the NNTT) to have it determine whether the act may proceed.

A critical dimension to the conduct and outcome of negotiations is the strategic behaviour of the parties. Under the normal negotiation procedure, the government party must give the native title party the opportunity to make submissions to it regarding the act; and must

> negotiate in good faith with the native title parties and the grantee party with a view to obtaining the agreement of the native title party to the doing of the act; or the doing of the act subject to conditions to be complied with by any of the parties (s31(1)).

The onus of good faith on the government party has recently been confirmed by Justice Carr in a key Federal Court case (see Bartlett 1996; Bartlett and Sheehan 1996; Carr 1996). Carr (1996: 29) concluded that good faith was indeed mandatory and of 'central importance' to the right to negotiate. The Tribunal has accordingly developed administrative procedures which now mean that none of the parties can move to arbitration without including in their application a statement that the negotiation parties agree that the government party has negotiated in good faith, and what steps have been taken by the government party to do so.

A measure of the extent to which good faith negotiations have occurred before Carr's decision is indicated by the fact that, at the beginning of November 1996, 90 per cent of the applications (being 224 of 248) for a future act arbitral determination which had been lodged with the NNTT were withdrawn by the State Government, presumably with the intention of recommencing 'good faith' negotiations. In this instance, the government party's previous interpretation of its negotiating responsibilities has been the direct cause of significantly greater costs to all the parties and added delay.

Conspicuous by its absence in the legal matter of the onus of good faith is the native title party. Many Aboriginal groups and their organisational representatives have proven themselves to be immensely effective

negotiators. Arguably, there is no reason why, once a native title party has asserted a right to negotiate, they should not be required to do so from the same benchmark of good faith as other negotiating parties.

Negotiations may encompass a consideration of rent-type payments to the native title party, worked out by reference to profits, income, or product produced by the grantee party as a result of its future economic activities on the land. This has served as a financial incentive to private bargaining and has facilitated agreements between the grantee and native title parties.[4] However, concern has been expressed by native title parties that the current legislation does not provide mechanisms by which negotiated agreements and conditions can be monitored or enforced over time.

Outcomes of the expedited and negotiation procedures to date

The workload of administering and responding to the future acts and right to negotiate regime has grown exponentially for all negotiating parties and for Native Title Representative Bodies.[5] At November 1996, some 6,924 permissible future acts had been referred to the NNTT via a s29 notice (Table 1). The majority of all future act referrals to the NNTT come from Western Australia where the State government is using the expedited procedure in relation to all its applications for prospecting and exploration licences (Industry Commission 1996: 188). Some 76 per cent of all referrals to the NNTT are future acts for which government is seeking to attract the expedited procedure. Of those future acts seeking to attract the expedited procedure and which are out of the notification period (being 4,520), an overwhelming majority of 94 per cent have been expedited and cleared for grant by the arbitral body.

Of the total future acts which government has sought to have expedited, only 6 per cent have attracted native title objections during the notification period. Of those, 25 per cent have been resolved through agreements between the native title, grantee and government parties. Those with objections have taken between 2-4 months for the NNTT to deal with (Industry Commission 1996: 222). The expedited procedure is clearly operating as a 'fast-track' for exploration. However, recent Federal Court decisions concerning the criteria for attracting expedition may mean that, under the current legislation, the rate of sustained objections to the expedited procedure by native title parties may start to rise.

Of the total of 6,924 future acts referred to the NNTT, 1,647 did not seek to attract the expedited procedure and are potentially subject to the right to negotiate. The vast majority of these future act referrals are mineral tenements, of which 295 have been cleared for grant because either no native title party appeared during the notification period, or a negotiated

agreement has been reached. At the end of October 1996, there had been 32 negotiated agreements over 72 titles arising out of the right to negotiate, a number of which include agreement with multiple claimant groups.

Table 1. The status of mineral tenement future act referrals to the NNTT at 8 November 1996.

Type of dealing	Referral to NNTT	Status of future act referral			
		In notification	Cleared for grant	Objection to expedited	Subject to negotiation
Non-expedited leases and licences	1,647	183	295	-	1,169
Expedited licences	4,787	624	3,930	233	-
Expedited renewals amalgamations and extensions	483	133	319	31	-
Expedited permits	7	0	3	4	-
Total expedited	5,277	757	4,252	268	-
Total referred to NNTT	6,924	940	4,547	268	1,222

Source: Future Act Unit Database, NNTT.

Of the 1,647 mineral tenement future acts not seeking to be expedited, approximately 1,169 are currently out of the notification period and subject to an active right to negotiate. While these future acts with an active right to negotiate constitute only 17 per cent of the total future acts referred to the NNTT (being 6,924), they represent a 71 per cent 'response rate' by native title parties to the total number of non-expedited mineral tenements (being 1,647) referred to the NNTT. It is clear from this that native title parties and their representative organisations are focusing their response attention for s29 notices, on the mining lease form of permissible future act, rather than on the expedited exploration form.

The current arbitral phase

If negotiating parties cannot reach agreement at the end of the 4-6 month negotiation period, any of the three parties may apply to the NNTT as the current arbitral body for what is called a 'future act determination' as to whether the act may proceed (ss35-42).[6] In other words, if a negotiated agreement is not voluntarily arrived at between the parties within a specific

time, an arbitral mechanism ensures a determined outcome. To date, the government party has always been the applicant for such a determination.

Upon such an application, the NNTT must hold an inquiry and make a determination on the basis of criteria listed under s39 as to whether the act may be done and, if so, subject to what conditions.[7] Again, time limits apply: the NNTT must take all reasonable steps to make its determination within four months for an exploration or prospecting act, or within six months for other cases (including a mining grant). The resulting determination has contractual force and is binding upon all parties.

Contrary to the prior negotiating period, the NNTT may not determine a condition that has the effect that the native title negotiating party is entitled to payments worked out by reference to profits, income or product produced by the grantee party (s38(2). Importantly, negotiations may continue in parallel with arbitration, and parties may still independently come to a negotiated agreement. If this occurs, the NNTT must cease the inquiry and not make a determination. In this way, negotiation is given some primacy over arbitration, until such time as matters become deadlocked.

Outcomes of the arbitral phase

At early November 1996, 248 applications for a future act determination had been lodged with the NNTT although, as noted above, the majority of these have subsequently been withdrawn by the State government consequent upon Justice Carr's judgement. In the first arbitral hearings conducted early in 1996, all the mining leases in question were cleared; some subject to conditions (see Seaman, Smith and McDaniel 1996; Sumner, O'Neil and Neate 1996).

Some of the practical difficulties encountered in extracting outcomes from the right to negotiate process have been highlighted during the arbitral stage. For example, there is a general assumption that the legislation currently provides native title claimants and holders with two rights to negotiate: the first being over the exploration phase (via the exploration licence) and the second at actual mining (via the mining lease). This *is* the case where an exploration licence future act is not expedited and must proceed though the normal negotiation period. It is *not* the case when exploration licences are successfully expedited, in which case a right to negotiate can only be secured by a native title party at a later mining stage, if one occurs. But it is also *not* the case in a large number of the mining future acts currently referred to the NNTT in which substantial exploration is contained within the mining lease.

Specifically, in Western Australia, mining leases are generally not granted in response to successful exploration having already been conducted under a separate exploration licence. Rather, exploration and prospecting licences are being converted to mining leases to enable exploration to continue, in many circumstances where no mining is immediately anticipated. Mining leases are granted in Western Australia for 21 years with a further right of renewal of 21 years. Under these leases, exploration could conceivably continue for 42 years without a mine being developed.[8] These particular mineral leases essentially impose a conjunctive arrangement between current exploration and future mining within a single permissible future act.

A number of practical difficulties for negotiations and arbitration flow from this situation. During the right to negotiate period for such an 'exploration-focused' mining lease, the native title party is negotiating without any real opportunity to consider the most important effect; namely, the effect of actual mining operations on native title. The same difficulty subsequently confronts the NNTT in attempting to assess the effect of a proposed mining lease over which mining might never occur. The grantee party is unable to present evidence about the likely nature of an eventual mine, and the native title party, in turn, cannot reasonably respond with evidence of impact about an unknown mining operation.

In these circumstances, an arbitral determination regarding the effect of mining on native title is being carried out at the exploration stage of a mining lease. As the legislation currently stands, the NNTT has no power to make a two-stage (disjunctive) arbitral determination. It cannot make a conjunctive determination that the mining lease may be granted and future mining may therefore occur, with a disjunctive rider that the matter of the act's effect upon native title be 're-arbitrated' if mining eventuates. There is also no legislative mechanism to enforce an arbitrated condition that requires future negotiations and s39 criteria to be taken into account.

The character of the right to negotiate

Under the current legislation the right to negotiate is not an unfettered right; there are clear limits - participation is legally circumscribed and there are statutory conditions attached to the conduct and content of negotiations. The right to negotiate procedure is not the same as claim mediation and is not concerned with determining whether native title exists or not. It is clearly the intention of the current legislation that both the negotiation and arbitration stages may proceed with native title claimants as the negotiating parties without it being necessary to determine their native title status.

Arguably, it was also the intention of Parliament that such negotiations would be conducted with 'a credible native title interest in land' (Commonwealth of Australia 1993: 2880). Because of the currently low threshold test for registration of a native title claim, the issue of the negotiating legitimacy of native title claimants has been a matter of mounting concern for industry, government and Aboriginal groups. Multiple, overlapping native title claims to the same area of land can increase transaction costs for all negotiating parties and create complex negotiation agendas. Nevertheless, as a result of the sunset clause effect of a s29 notice, there is no legal uncertainty as to who the negotiating parties are. Furthermore, grantee and government parties are assured that the outcome of the right to negotiate is a legally valid future act, regardless of the eventual native title status of the claimants. Once done, a future act cannot be made invalid by later claims over the same land. To that extent, the right to negotiate as it currently stands provides significant certainty about the legal validity of future acts.

Importantly, the right to negotiate is not a right of veto for native title parties. It is a right for them to be asked, and even to demand a veto. But there is no right to enforce a veto. The entire negotiation process is based on the legal fact that it is a right to agree. At most, it is a right to propose and agree to conditions about the doing of a future act and to seek compensation and other benefits for the potential impairment of native title; at the least, it is a right to *agree* to disagree. The stage at which a decision *can* be made to veto a future act is when exercised by the NNTT in arbitration. Finally, that arbitral determination - whether it be a clearance or a veto of the future act - can subsequently be overridden by the relevant State, Territory or Commonwealth Minister.

Proposed amendments to the right to negotiate

The first amendments to the *Native Title Act 1993* were proposed by the Keating Government which introduced the Native Title Amendment Bill 1995. That Bill lapsed in January 1996. The new Coalition Government then developed and introduced, in two stages, a number of proposed amendments: the Native Title Amendment Bill 1996 which was introduced in the House of Representatives on 27 June 1996, and a second set of amendments referred to as the Exposure Draft 1996, on 17 October 1996. The current Bill is in the House of Representatives, though both it and the Exposure Draft will not be debated until February 1997.

A number of complex and far-reaching amendments are mooted to the right to negotiate procedure. Substantial changes are proposed to the current mechanism for excluding certain future acts from attracting the right to negotiate; to the native title claim registration test; to the processing of s29 notices; and to the current, generally disjunctive nature

of the right to negotiate. The Commonwealth Government's underlying aim in amending the right to negotiate is to 'streamline the ... processes so that unnecessary delays are eliminated while maintaining the protection of the legitimate interests of native title holders'; to 'ensure that the ... processes are able to operate effectively with State and Territory approvals processes for future acts'; to provide a 'more flexible approach' and give 'increased flexibility to the States' (Commonwealth of Australia 1996b: 2-3, 15).

Amendment - excluding exploration

A major proposed amendment is to 'reconstruct the current exclusions power' by removing the current criteria for exclusions (s26(4)) and replacing it with 26A which refers to a new 'approved scheme acts', and 26B which lists criteria for excluding mining acts when classed as 'later acts' and as renewals. Under 26A exploration, fossicking, quarrying and prospecting as individual or sets of future acts may be classed as an 'approved scheme act' for exclusion from the right to negotiate by Ministerial determination on the basis of certain preconditions. State governments would be able to seek Ministerial determinations for excluding particular acts from the right to negotiate.

The preconditions for exclusion would include that:

- the exploration acts or class of acts is '*unlikely* to have a *significant* impact on land or waters' [italics added];
- the relevant Representative Body is notified;
- the relevant native title holders and claimants are notified; and
- they have a right to be heard about whether and how the act is to be done, if that right is also available to other persons (such as with a freehold interest in land) in that particular State or Territory in which the act is to occur (for example, such as the right to be heard by the relevant State Mining Warden's Court) (amendment 26A(4)(5) and Commonwealth of Australia 1996b: 20-1).

Under the current criteria, the Commonwealth Minister must not determine that a future act is excluded from the right to negotiate unless the Minister considers the act will have 'minimal effect on any native title concerned' (s26(4)). The amendment proposes a more restricted criterion directed not to the act's effect on native title, but to its impact on 'land and waters'. Under the amendment, the Minister would also have considerable interpretative discretion as to what would constitute the likelihood of the act having a 'significant' impact.

The effect of this amendment, if comprehensively used by the Minister, would be to remove exploration substantially from the right to negotiate and to reduce the involvement of native title parties to those of State statutory consultation and notification procedures. The right to negotiate would therefore become largely focused on the proposed grant of mining leases. In these circumstances, there would appear to be no need for the current expedited procedure, given that after the proposed exclusions, the remaining exploration future acts would be of such a nature as to require them to proceed through the normal negotiation procedure.

Amendment - the 'once-only' right to negotiate

The amendments propose a conjunctive relationship between an exploration act that remains within the right to negotiate regime, and any subsequent creation of a right to mining via a mining lease. In such circumstances, the mining act is classed as being a 'later act' (amendment 26B(2)). Such a conjunctive arrangement would attract a 'once-only' right to negotiate. In other words, if the right to negotiate is initiated at the exploration licence stage and a negotiated agreement or arbitral determination is made, the amendments propose that the grantee party would not have to proceed through the right to negotiate process when it applies for the later act of mining.

However, conjunctivity between the exploration licence and mining lease stages of a future act would apply only if the exploration agreement provided that, if the later act of mining were done, 'certain conditions' which had been negotiated or arbitrated would be complied with by the government party or the grantee party (new s26B(2)).

There are potential implications arising in respect to this amendment which may need to be considered more thoroughly. Some of these have been highlighted already by the situation encountered at the current arbitral hearing stage with certain 'conjunctive-style' Western Australian mining leases (see discussion above regarding current outcomes of the arbitral phase; and Seaman, Smith and McDaniel 1996). Part of the problem arises from having to negotiate an agreement and conditions at the exploration stage in respect to an entirely unknown future mining scenario. Under the proposed amendment, the native title party would likely be seeking to negotiate conditions at exploration that entertain the possible future mining scenarios, that establish procedural guidelines and agreements as to how future negotiations would be conducted, and to negotiate possible protections and benefits.

These conjunctive negotiated or arbitral conditions in respect to future mining would need to be so expressed that, whenever they come into operation during the life of the exploration or subsequent mining lease,

they clearly inform the negotiating parties of their respective obligations. However, there is no mention in the amendments of how compliance with agreement conditions negotiated at exploration are to be assessed and enforced over time, or by whom. The Government's Exposure Draft simply suggests that, if conditions are not complied with, the mining title would be invalid (under s28) 'to the extent that native title was affected' (Commonwealth of Australia 1996b: 22).

As the conjunctive 'once-only' amendment currently stands, if conditions for 'later acts' of mining are not comprehensive, enforceable and do not protect native title, it is possible that litigation will increase as native title parties attempt to reassert their right to negotiate at the later mining stage. If, on the other hand, conditions are shown to be appropriate and enforceable, then the situation may not be dissimilar to that currently operating in the Northern Territory where conjunctive agreements are negotiated at the exploration stage for an entire mining project.

While the Northern Territory Land Councils note that there remain problems with such conjunctivity and have called for legislative amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) to ensure 'fair principles for all parties involved in exploration and development', both major Land Councils also point to the detailed conditions and benefits that have been negotiated in conjunctive agreements (Central Land Council 1994: 53; Northern Land Council 1994: 36). Furthermore, negotiations under the ALRA do not have the benefit of the mandatory requirement that exists under both the current NTA and the proposed amendments for the right to negotiate to be conducted according to the fair principle of good faith.

Another proposed exclusion from the right to negotiate are mining titles which are renewed, re-granted or extended, regardless of whether there is already a legally enforceable right for this to occur. This exclusion may occur only where the existing lease has previously been subject to a right to negotiate, and only if the renewal covers the same lease area.

Amendment - project acts

Operating in tandem with the conjunctive right to negotiate is the proposal for government to be able to combine, at the s29 notice stage, currently separate future acts into what is called a single 'project act'. This amalgamated set of acts would incur a 'once-only' right to negotiate.

There has been criticism of this approach in the recent Aboriginal and Torres Strait Islander Commission (ATSIC) paper *Proposed Amendments to the Native Title Act 1993: Issues for Indigenous Peoples*. The paper (ATSIC 1996: 20) suggests that project acts will curtail the native title

party's ability to affect each major component of a project. Brennan (1996: 24) also argues that this amendment could create unwieldy and difficult 'mega-negotiations' at the exploration stage with unrealistic financial expectations in respect to large projects.

However, the amendments indicate that it would not be possible to apply the expedited process to any of the constituent acts, and that the 'project' approach would not prevent different conditions being negotiated for the constituent acts. It has also been pointed out by Mick Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner, perhaps based upon the experience of Aboriginal participation in mining agreements in the Northern Territory, that such 'bundling together' of the many licences and leases required by a single development may provide scope for reducing the complexity of negotiations over multiple, separate acts about what is, on the ground, one continuing project (Dodson 1996b: 4). Arguably, another advantage of such amalgamated project acts is the reduction in time and costs taken by onerous separate negotiations, and a consequent reduction in the number of meetings and the inevitable (and well-documented) stress that flow from these to Aboriginal participants.

Amendment - compulsory acquisition

The key amendment to the exclusions mechanism is to the current coverage of compulsory acquisitions that are subject to the right to negotiate. The amendment (26(2)(d)(ii)) provides the Commonwealth Minister with the power to determine that the right to negotiate does not apply to particular compulsory acquisitions by government of land for the purposes of a third party, where the purpose is to confer rights on that party to privately construct a public infrastructure facility. Such infrastructure is defined inclusively in the amendments (s253) to include highways, railways, electricity transmission or distribution facilities, dams, pipelines,[9] cabling, and so on, and must be provided or operated for the general public. Inevitably, a number of such infrastructure projects will be associated with resource development projects involving mining, gas, petroleum and electricity production.

The amendment would result in a potentially significant exclusion from the right to negotiate of what are, in fact, profit-based infrastructure developments by private industry, on the basis that these are being increasingly 'contracted out by government' and are therefore 'akin to compulsory acquisitions for the Government's own purposes' (Commonwealth of Australia 1996b: 19). The exclusion of such private sector infrastructure developments has critical implications, not simply for the exercise of the right to negotiate, but more widely for native title. This is because of the related amendment to s23(3)(a) and (b) to provide that the actual government process of carrying out a compulsory acquisition under

a Compulsory Acquisition Act (be it Commonwealth, State or Territory legislation) will extinguish native title.

As the legislation currently stands, the act of acquisition by government does not of itself extinguish native title, though the activities which are done giving effect to the purpose of the acquisition (for example, the actual construction and subsequent operation on the land of a pipeline, dam or highway) may do so. The Commonwealth has moved under the amendment (new s23(3)(a)) to make clear that extinguishment will occur at the point of government's initial administrative procedure of acquisition. The potential consequence of the combined effect of amendments s26(2)(d)(ii) and s23(3)(a) is to significantly expand the extinguishment of native title.

Amendment - parallel processing and prescribed documents

It has been argued that State governments could issue a s29 notice when they receive an application for a mining tenement. This would allow a State's own administrative approval processes and the right to negotiate to proceed in parallel, thus minimising delay (Industry Commission 1996: 223). Currently, this is not the case; the two processes are carried out sequentially. A potentially beneficial amendment is that State and Territory governments will be able to enter into negotiations earlier, so that the NTA process and State procedures can run in parallel.

While the ATSIC discussion paper on the amendments (1996: 19) argues that this will lessen the amount of information available to native title parties about the activities proposed under a future act, the experience of some native title parties to date has been that, for a number of reasons, there is already an absence of such detailed documentation. In fact, the issue of access by the negotiating native title party to the relevant information should be considered separately to the matter of the parallel processing amendment, which has clear benefits.

Prior to the introduction of the Native Title Amendment Bill 1996, the Commonwealth Government released an outline of proposed amendments, stating that s29 notice requirements would be amended 'to require more detailed information to be given about the proposed activities to which the right to negotiate applies, so that potential claimants would be able to make a judgement about the likely impact of the proposed activity on native title' (Commonwealth of Australia 1996c: 15). This view appears to have been translated in amendments to the s29 notification process to the effect that the notice must 'be accompanied by any prescribed documents and include any prescribed information' (new s29(2A)). Such documents and information would be prescribed under regulations (s253) yet to be written.

Evidence tendered to, and conditions established by, the first arbitral hearings by the NNTT (Seaman, Smith and McDaniel 1996; Sumner, O'Neil and Neate 1996) may provide some pointers to what is envisaged. One arbitral condition applied to the mining future acts in question was that, in the event that the grantee party submits to the Western Australian State Mining Engineer a proposal (commonly known as a Notice of Intent) to undertake developmental or productive mining or construction activity, the grantee party must give to the native title party a copy of the proposal, excluding sensitive commercial data, and a plan showing the location of the proposed mining operations and related infrastructure including proposed access routes (Seaman, Smith and McDaniel 1996: condition 3.1 and p.16).

While the actual format and content of each Notice of Intent varies according to the nature of the mining project, the Western Australian Department of Minerals and Energy's guidelines list the type of information which should be in a Notice of Intent, including: a detailed summary and list of commitments which would be available for public search; a detailed description of the project; proposals for environmental impact and management; and social impacts specific to Aboriginal sites, non-Aboriginal heritage and other land users.

As noted above, an outcome of the exclusion amendments would be to largely focus the right to negotiate on mining as a permissible future act, or as a 'once-only' conjunctive arrangement at the exploration stage. Accordingly, the information contained in the detailed Notice of Intent would be highly pertinent to securing informed negotiations, assist in ensuring native title parties can negotiate in good faith, and provide a cost-efficient form of prescribed documentation that could be attached to a s29 notice. As one possible type of 'prescribed' information, a Notice of Intent would have the added advantage of integrating the Commonwealth's intention that critical information be made available to the native title party, with the administrative procedures and requirements of the relevant State departments and legislation.

Amendment - the new claim registration test

The amendments propose a new and substantially higher claim registration test to be applied to all claims lodged on or after 27 June 1996. Claims which do not satisfy the new test will be removed from the Register of Native Title Claims. The potential impact of this new test on the right to negotiate is significant. The test will be applied retrospectively to all claims lodged and accepted by the Tribunal before the *Native Title Amendment Bill 1996* (27 June 1996), whenever a new s29 notice is issued which relates to the same area of land.

As a result of this amendment, a number of the existing 367 claims lodged with the Tribunal at 27 June 1996 could potentially lose their existing right to negotiate over any new future acts (although they will retain the right for future acts already being entered into before that date). Importantly, about 50 per cent of all existing claims are in Western Australia, which is also where the majority of future act referrals are occurring. It is likely that the vast majority of native title claims in that State will, at some stage, be subject to the new registration test.

While the s29 notice period has been extended to three months, enabling more time for claim preparation in response to notice of a future act, the new claim registration test will require more detailed documentation and research. This is likely to have workload and resource implications for Native Title Representative Bodies throughout Australia, but particularly in Western Australia where Representative Bodies may have to undertake considerable work re-examining claims already accepted by the Tribunal.

Amendment - time limits and Ministerial intervention

The amendments propose important changes to the timing of the notification, negotiation and arbitration components of the right to negotiate process. The Commonwealth states that 'the current limits for negotiation on the issue of a mining lease or compulsory acquisition will be shortened from six to four months after the issue of the section 29 notice' (Commonwealth of Australia 1996d: 3). It is important to be clear what this change means in practice.

First, the s29 notice period has been extended to three months. However, the amendments also state that, in the absence of a negotiated agreement, an application for an arbitrated determination by the Tribunal can be made four months after the issue of the s29 notice, regardless of whether the future act is exploration or mining. In other words, an application for an arbitrated outcome can be made only one month after the end of the new three-month notice period.

Given that negotiations generally do not commence until the end of that period, this means one month will be available for the normal negotiation period, as opposed to a full four months under the current arrangement. The effect is to create a very fast-track negotiation period, arguably making it virtually impossible for any of the parties to conduct equitable and bona fide negotiations.

The amendment package reduces the period for arbitration from six to four months. It also proposes the possibility of early Ministerial intervention at any time after the s29 notice period, during both the normal negotiating period and arbitration, in order to make a form of expedited determination

in cases of 'urgent' and 'significant' future acts. This would effectively mean that no negotiation period would be available during the right to negotiate process. This form of Ministerial intervention enables the Minister to assume a de facto arbitral power, pre-empting the arbitral mechanism, but without having to take any s39 criteria into account.

Amendment - the conduct of negotiation and arbitration

The mandatory good faith condition has been amended to cover all negotiating parties, though its coverage is tightened to the effect that a failure to negotiate about matters unrelated to the effect of the particular future act on the claimed native title rights and interests will not indicate a failure to negotiate in good faith. It remains to be seen what such matters might encompass. Good faith will only act as a condition precedent to arbitration for the party making the application; an amendment which would appear to require a lesser onus of proof of good faith from the two negotiating parties not directly making the future act determination application.

New criteria are included for consideration during the negotiation and arbitration phases. For the negotiation period, the amendments direct the parties' attention to the effect of any co-existing non-native title rights and uses of the same land on the extent and operation of the claimed native title. While this is only a matter for voluntary consideration during negotiations, it is made a mandatory criterion under s39 for an arbitral determination. The effect here is to potentially call on the Tribunal to make a de facto determination as to the nature of the current native title in operation, with the assumption being that other non-native title rights and uses will inevitably diminish the extent of native title and therefore diminish the possible effects of the future act on that native title.

Another important amended addition to s39 criteria is that the arbitral body *must* consider 'any economic or other detriment to any person other than a native title party if the act is not done' (s39(d)(a)). Important issues remain as to what such 'detriment' might consist of and who it may be suffered by; for example, apart from the legal negotiation parties, what other interested stakeholders will be able to legally assert detriment to the Tribunal under this criterion?

Conclusion

The primary focus of amendments to the right to negotiate and the coverage of future acts appears to be to facilitate resource and other developments on native title lands. This will be achieved by reducing the time taken for the negotiation process; by transforming the right of negotiation to an offer of consultation in some cases; by enabling certain

activities to be removed entirely from its coverage; and, via the new claim registration test, by reducing the future coverage of claimant groups able to secure the right. On paper, the amendments appear to speed up the right to negotiate process by fast-forwarding arbitration and in determined cases, by the Ministerial power to make expedited determinations, but at the expense of the current balance in the legislation between mainstream land management and development, and native title recognition and protection.

Changes to the right to negotiate based on the perception of unnecessary and substantial delays do not appear to be based entirely on the empirical data. In particular, the Industry Commission has recently concluded that 'it appears that the NNTT has managed the right to negotiate process without, so far, incurring excessive delays' (Industry Commission 1996: 224). Furthermore, the database of the Tribunal's own Future Act Unit indicates that the overwhelming majority of exploration licences are being cleared for grant via the expedited process, taking between 2-4 months; that some early negotiations with native title parties over non-expedited exploration licences and mining leases are leading to agreement; and that in the first two arbitral determinations of proposed mining leases there has been approval of all the future acts in question; in one case with conditions. The amendments appear to make the current expedited procedure almost unnecessary by virtue of the potential Ministerial exclusion of exploration from the right to negotiate. If this exclusion mechanism is used comprehensively, then the only exploration future acts subject to the right to negotiate will presumably be those which involve significant disturbance to land and waters.

The potential bottleneck of s35 applications for arbitral determination of future acts that were before the NNTT at early November 1996, and which might have been the cause of delay due to processing the sheer number involved, has been temporarily averted. This is by reason of the Western Australian Government recently withdrawing the greater majority of its s35 applications, subsequent to the Carr judgement on good faith. At this point, the good faith conduct of the right to negotiate has not really been tried and tested. If carried out by all parties, as envisaged under the amendments, good faith negotiations may assist in achieving agreement outcomes, and lessening the need for recourse to arbitration.

The amendments potentially streamline the negotiation process and reduce transaction costs for all negotiating parties by establishing a 'project acts' framework for negotiations over a single development. However, whether the proposal for a conjunctive, 'once-only' right to negotiate will result in a significant diminution of the right to negotiate and a reduction in the number of negotiations remains to be seen, and arguably depends on a number of factors. Firstly, a critical issue will be the time at which the future act project is referred to a s29 notice - in other words, whether the

right to negotiate is invoked at exploration or mining. A second critical factor will be the availability of detailed relevant information to the native title party from which they can proceed to negotiate in good faith and make informed decisions.

A third factor, will be the extent to which negotiated conditions for future mining scenarios will have contractual force over time and will be able to be enforced. Important issues about conjunctive conditions are still to be resolved in the context of the common law of native title; for example, do agreement conditions for a 'project act' or for 'later acts' of an exploration licence run with the grant itself, with the land over which the grant exists, or with the native title? Given that the identity of the grantee party may change over the years of a particular grant, can agreement conditions be enforced across different grant holders? Importantly, there are no mechanisms under either the current legislation or amendments which enable such conditions to be monitored and enforced over time. There is an obvious potential monitoring role here for Native Title Representative Bodies.

One of the Howard Government's stated objectives in amending the right to negotiate is to ensure that 'the ... processes are able to operate effectively with State and Territory approvals processes for future acts'; and to give 'increased flexibility to the States' (Commonwealth of Australia 1996b: 15). Certainly, difficulties arising from the lack of integration and harmony between State legislation and administrative procedures, and the NTA, have been noted (see Industry Commission 1996: 223; Seaman, Smith and McDaniel 1996: 32-9). However, a trend apparent in amendments aimed at achieving such integration and flexibility is to entrench and expand the current 'freehold equivalent' approach to native title and consequent rights under State and Territory laws.

Currently, the NTA defines permissible future acts as being acts which can be done over ordinary freehold land and so may also be done over native title land. Similarly, the NTA currently provides claimants and holders with a qualified right to compensation where native title might be extinguished or impaired as a result of future acts. It may be a qualified right as a result of the 'similar compensable interest test' under s240 where compensation is able to be granted if the relevant State or Territory law also provides for compensation for the specific activity being carried out, and then only at the equivalent State or Territory rates (see also s51(3)). The amendments appear to propose a more radical realignment of the somewhat uneasy current balance between native title as a 'freehold equivalent' right, and native title as being something entirely different and resting in common law and in Indigenous law and custom. The overall effect of the amendment package is potentially to favour a freehold equivalence reading of native title by subjecting it more frequently to the

authority and interpretation of various State legislation. This may result in native title being increasingly transformed into a State-based right, subject to the inevitable State variations of arrangements and expression.

The question then arises, if native title is to be read more essentially as a freehold equivalent right, resting more within State and Territory jurisdictions, how far should one take the freehold equivalence test? Will the concepts and definitions of the NTA be widened or reduced as a result of the establishment of State arbitral bodies and the incorporation of native title into State and Territory land-management regimes? For example, if freeholders have a right of veto over mining in certain circumstances in a specific State, do native title claimants and holders in that State also have the same right? If certain freehold leases in Western Australia alienated before 1899 have a mining and royalty right attached to them, would not native title to land in that State also have the same mineral and royalty rights?[10] The latter issue was raised and given a beneficial reading by Justice Lee in a recent Federal Court decision (Lee 1996: 10-11).[11]

Finally, when the *Native Title Act 1993* was originally passed, the right to negotiate was a compromise position secured by an Aboriginal leadership in exchange for not gaining a veto over mining, and for agreeing to the validation of past acts by government. In other words, the right to negotiate was itself a product of strategic Aboriginal negotiation. It remains to be seen, however, whether the right will remain a robust one, or whether the proposed package of amendments will result in a significant restriction of the right to negotiate and of the broader exercise and beneficial interpretation of native title.

Notes

1. The author is a part-time member of the National Native Title Tribunal. However, the views expressed in this paper are entirely those of the author as a Research Fellow at the Centre for Aboriginal Economic Policy Research, and are not to be attributable in any way to the Tribunal, or any of its other members.

2. Acts giving effect to the compulsory acquisition of native title may extinguish that title (s23(3)).

3. Notice must be given to a number of parties, including:
   - any registered native title body corporate for the land or waters that will be affected by the act (called a 'native title party');
   - any registered native title claimant for the area of land or waters (also called a 'native title party');
   - if the act is to be done at the request or application of a person (for example where it is the grant of an exploration licence or mining lease) to that person (called the 'grantee party');
   - to any Native Title Representative Body established in relation to the land or waters;
   - to the arbitral body in relation to the act (currently this is the Tribunal); and to the public.

4. See Smith (forthcoming) for a discussion of some of the difficulties encountered within the Aboriginal domain and between negotiating parties during the right to negotiate. One particular concern is with the negotiating legitimacy of the native title party (in particular, whether the self-nominating native title party is the 'right' party to negotiate with, and who are the 'right' Aboriginal spokespersons to represent their interests in the negotiating arena). Another related concern is distributive equity between native title claimants, and for future native title holders, when 'upfront' monies are paid directly to particular native title claimants during the course of negotiations. These 'upfront monies' do not have to be held in trust pending a future claim determination, as do compensation payments. If such 'upfront' payments are merely financial inducements to clear future acts quickly, then the monies become rewards to claimants for using their right to negotiate as an effective leverage. But, if such payments are intended as implicit recognition that native title bestows to particular people certain rights and interests in land, and so requires a compensatory return for impairment then, arguably, *all* cash benefits derived under agreements or directly during negotiations should be held in trust until native title is determined (see Smith forthcoming, and Altman 1996).

5. In November 1996, the NNTT had listed 6,924 future acts subject to the right to negotiate, an increase of approximately 40 per cent over the number listed in March 1996.

6. Under the NTA, State governments are able to establish their own future act regime and arbitral body under separate State legislation. To date, only South Australia has introduced its own arbitral body, the Environment and Resources Development Court which has jurisdiction concurent with the Supreme Court of South Australia. Accordingly, the NNTT does not operate as the arbitral body in that State.

7. In making its determination, the arbitral body must take into account the following criteria listed under s39 of the NTA:

   (a) the effect of the proposed act on:
      i any native title rights and interests; and
      ii the way of life, culture and traditions of any of the native title parties;
      iii the development of the social, cultural and economic structures of any of those parties to the lands or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the lands or waters in accordance with their traditions;
      iv the freedom of access by any of those parties to the lands or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the lands or waters in accordance with their traditions;
      v any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions; and
      vi the natural environment of the land or waters concerned.

   (b) any assessment of the effect of the proposed act on the natural environment of the land or waters concerned;
      i made by a court or tribunal; or
      ii made, or commissioned, by the Crown in any capacity or by a statutory authority;

   (c) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the lands or waters concerned;

   (d) the economic or other significance of the proposed act to Australia and to the State or Territory concerned;

(e) any public interest in the proposed act proceeding;

(f) any other matter that the arbitral body considers relevant.

8. See Seaman, Smith and McDaniel 1996 for a discussion of this particular type of mining tenement future act.

9. The Commonwealth's *Outline of Proposed Amendments to the Native Title Amendment Bill 1996* provides as an example of such a private infrastructure project, 'a gas pipeline supplying a city' (1996d: 7).

10. In Western Australia, freehold land alienated before 1 January 1899 can not have exploration licences or mining leases granted over it to anyone but the actual freeholder except under specific circumstances - and then only with a significant royalty right flowing to the freeholder - because mining rights remain with the freeholder (except for gold, silver and precious metals) of those particular blocks of land.

11. Justice Lee noted that in Western Australia, although an application for a mining tenement can be made to 'private land' under s27 of the *Western Australian Mining Act 1978,* that does not include a freehold estate alienated before 1 January 1899, except for the mining of gold, silver and precious metals. In drawing out the implications of that particular situation for native title, Lee states that 'It should be assumed that any hypothetical holding of 'ordinary title' referred to in sub-para 235(5)(b)(i) [of the NTA] ... would include the rights of a freehold estate that would have applied in the period during which native title has been held, and, therefore, with regard to most land in respect of which native title is claimed, the rights of an estate in freehold created before 1 January 1899 are likely to be relevant' (Lee 1996: 10). A similar argument was briefly put to the NNTT in its first arbitral hearing by counsel for the native title party (see Seaman, Smith and McDaniel 1996, Transcript of Evidence, 19 April 1996: 314).

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