23 October 2012

Attorney-General's Department
By email: native.title@ag.gov.au

Dear Sir/Madam

The Chamber of Minerals and Energy – Submission on Proposed Native Title Amendment Bill 2012

The Chamber and its members

The Chamber of Minerals and Energy (**CME**) is the peak resources sector representative body in Western Australia, funded by its member companies who generate 95% of all mineral and energy production by value.

The Western Australian resources sector is diverse and complex covering exploration, processing, downstream value adding and refining of over 50 different types of mineral and energy resources.

In 2011, the value of Western Australia's mineral and petroleum production reached $107 billion, accounting for 92% of Western Australia's total merchandise exports and thus representing the majority of Western Australia's 46% contribution to Australian merchandise exports. Royalty payments to the State Government totalled $4.9 billion in 2011.

The prospects for future growth are encouraging with $1.82 billion invested in minerals exploration in Western Australia in 2011, accounting for 51% of total national investment. This exploration is translating into significant further development, with the value of resource projects either committed or under construction at $166 billion.

CME members are major stakeholders in the native title system in Australia. Many of the projects undertaken by CME members involve 'future acts' under the *Native Title Act 1993* (Cth) (**NTA**), in relation to which procedural rights are afforded to native title holders and registered native title claimants.

The State of Western Australia is subject to the highest national volume of future act processes. Since 2000, 75% of the tenement applications and land acquisitions notified under s29 and 87% of future act determination applications occurred in Western Australia (see **Schedule 2**). Western Australia also contains the largest area of land where native title has been determined to exist or is under claim. As a result, proposed amendments to the NTA, particularly amendments to future act processes under the NTA, will impact members of the resources industry operating within the State.

CME members recognise long term productive relationships with Native Title Representative Bodies (NTRBs), Prescribed Bodies Corporate (PBCs), Aboriginal groups and traditional owners is inextricably linked to the resources sector maintaining and enhancing its 'social licence to operate'. Members recognise and respect the rights of native title holders and registered native title claimants and are committed to developing relationships with Aboriginal people and entities based on integrity, mutual respect and sustainability. While it is difficult to estimate the financial contribution of the resources industry in Western Australia to native title claimants and

communities, based on the publicly available commentary, several hundreds of millions of dollars per year are paid into trusts and other benefits management structures pursuant to native title agreements. Significant additional mutually beneficial commitments in relation to employment, training, education and business development are also made.

CME members are committed to working with key stakeholders to establish efficient and equitable legislation and processes to provide certainty to all parties and thanks the Commonwealth Attorney-General's Department for the opportunity to provide comment on the Exposure Draft of the *Native Title Amendment Bill 2012* (the **Bill**).

General Comments

CME notes the Bill has addressed some of the issues raised in initial discussions with the Attorney-General's Department; most significantly the discontinuation of the proposed provision in relation to changes to the expedited procedure process. In addition, the proposed provisions providing the National Native Title Tribunal (**NNTT**) with powers to intervene in right to negotiate processes and the proposal to extend the disregarding of historical extinguishment beyond parks and reserves have been discontinued. The willingness of the Government to work with stakeholders and respond to their practical experiences is welcomed by CME.

CME has also been invited to propose additional or alternative amendments consistent with this submission by the Attorney-General's Department. In the time available, it was not possible to consider the full impact of any alternative drafting and CME has, thus, confined any suggested re-drafting to that in **Schedule 3**.

The current proposed amendments are advanced under the Commonwealth government's native title strategy with a particular focus upon "improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes." CME supports these objectives but questions the alignment between the Bill and the stated objectives.

This submission details CME's concerns in relation to the proposed amendments associated with:

- negotiation in good faith;
- disregarding historical extinguishment;
- simplifying the process for amendments to Indigenous Land Use Agreements (ILUAs);
- broadening the scope of body corporate ILUAs;
- clarifying the coverage and scope of ILUAs;
- improving the authorisation and registration processes for ILUAs; and
- the minor technical amendment to section 47.

CME notes that, in the absence of an Explanatory Memorandum and only limited explanatory materials, it has been difficult to determine the intention and effect of some of the provisions and to measure that intention against the more broadly expressed objectives, not all of which appear to be best addressed by the Bill. In preparing this submission CME has relied on policy statements released by the Attorney-General's Department and the covering discussion document in addition to the Bill.

1. Negotiation in Good Faith (NIGF)

Support for overarching policy objectives

CME understands the proposed amendments in relation to NIGF are aimed at addressing:

(a) a lack of clarity about what constitutes NIGF negotiations; and

(b) the perceived inequity in the bargaining power of parties.

Clarity in native title negotiations is essential. However CME members have not encountered particular difficulties in this regard. Existing case law has delivered significant clarity albeit it is acknowledged that other parties have expressed the need for greater clarity. CME is committed to assisting the Commonwealth government achieve this objective.

Observations on the current provisions

From members' perspectives there has been a discernable attitudinal shift in the relationships between native title parties and members of the resources sector in Western Australia. Relationships are largely productive and in general parties have developed a sophisticated understanding of the future act regime. The value of an agreement, which may have its genesis in native title obligations, extends much beyond that initial starting point to heritage, environment and other cooperation. Further, the Western Australian government has invested significant resources into streamlining the future act processes in this State in recent years and to using its role as a negotiation party in right to negotiate matters to ensure they are progressed in accordance with the NTA and the State's approach to responsible development.

Overall, in our members' views, the system is working well, in part due to the significant level of case law developed over more than 15 years to guide parties as to the content of the obligation to NIGF. CME is committed to developing and maintaining good relationships between its members and other stakeholders in the native title process and is concerned some provisions in the Bill will undermine this positive advancement. CME would prefer to build on the advances already made rather than introducing significant changes which will require the meaning of NIGF to be revisited and a new body of decisions established.

Importantly, CME does not believe there is justification for an overhaul of the existing NIGF system. CME's position is supported by an analysis of the statistics available from the NNTT, detailed in **Schedule 2**. Critically, the statistics indicate between 1 January 2000 and the present:

- of a total of 7140 mining tenements or land acquisitions notified under section 29 of the NTA (including expedited procedure notifications), only 15% of the total applications notified were the subject of a future act determination application;
- the total average time between a s29 notice and a future act determination application was 39 months;
- only 105 tenements (or 1.5%) of the total notifications were the subject of contested determinations; and
- of these, NIGF was challenged only 31 times since 2001 and in 28 instances it was found the parties had negotiated in good faith. Only in 3 determinations (relating to 4 tenements) was it found the grantee party had failed to negotiate in good faith.
- **Thus, approximately 98.5% of tenements and land acquisitions notified under the full right to negotiate have either been granted via agreement or are continuing in the negotiation process (or are no longer being pursued)**.

These figures provide no justification for the proposed provisions and which will introduce fundamental changes to the system and will, in turn, have an overwhelmingly negative impact on the system.

Part of the motivation for amending the right to negotiate provisions of the NTA appears to be the decision of the Full Federal Court in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (30 April 2009). This decision essentially confirmed the NTA does not require negotiations to reach a particular stage before a party can seek a future act determination. There is a view that this decision undermined the NIGF process and illustrates the supposed difficulty in establishing a party has not negotiated in good faith.

CME submits to the contrary: *FMG v Cox* added further clarity on what it means to NIGF, in the context of the already significant amount of case law on the issue. The decision is not indicative of a systemic problem within the native title future act regime, has not diluted the right to negotiate regime and does not warrant the proposed legislative response. Whatever the view of

the particular merits of the parties' approach to negotiations in that decision, the fact that parties tend to use the negotiations under the right to negotiate to discuss wider matters which (may) require negotiation protocols and preliminary discussions, does not derogate from the workability of the process generally. This ability to use the right to negotiate to discuss wider issues has also led to agreements that are of much broader scope and benefit to native title parties than agreements confined to the grant of new mining tenements.

Concerns about proposed NIGF amendments

CME has three significant concerns, being that the proposed amendments:

1. change the standard;
2. change the onus; and
3. vary the indicia.

At a practical level, CME is concerned that the proposed amendments to NIGF will result in:

- a significant level of uncertainty;
- more delay in reaching future act outcomes;
- more future acts being the subject of litigation; and
- grantee parties taking a more rigid, legalistic (eg. increased use of formal written communications and legal representation) and adversarial approach to NIGF in an attempt to address what will be perceived as an increased risk (in terms of both likelihood and outcome) of litigation in relation to the NIGF requirements.

1. Changing the standard

Requiring the parties to use "all reasonable efforts" to:

- reach agreement; and
- establish productive, responsive and communicative relationships between the negotiations parties

creates a statutory expectation that an agreement will be reached, including an expectation that a relationship is of a particular standard. The meaning and effect of the obligation in the context of the legislation is unclear and could be unrealistic even where a proponent has the best of intentions.

The uncertain meaning of this new obligation will most likely generate litigation to clarify what it means. This was the experience with the original drafting of the provisions, which resulted in major "test cases" over a period of years.

This risks creating significant uncertainty for all parties in circumstances where Australia is beginning to struggle to sell itself as an attractive place to do business. CME urges that the existing test be maintained.

The proposed amendment requiring 8 months rather than 6 months negotiation is more likely to assist the Government's objectives of ensuring parties take the time to negotiate. This change would be preferable to the changes to the standard and the onus. Even so, CME does not agree additional time is necessary, and given it appears most parties attempt to negotiate for much longer than this anyway (see **Schedule 2**).

2. Changing the onus

This change could significantly increase the time and costs associated with determination and encourage the raising of "good faith" as a matter of course. This was anecdotally experienced under the original 1993 provisions and the primary motivation for the current provisions. The amendments go much further than the original Act and place the onus on a person seeking a

determination, requiring that party to show it has negotiated in good faith. It is unclear why the Government considers such a fundamental change is necessary.

CME does not believe this change would drive, for example, different and substantively improved engagement. It may only drive a more paper and process focused approach to engagement in order to limit the risk of litigation.

3. Varying the indicia

Subsection (2) specifies the criteria which must be considered when determining whether a party has negotiated in good faith. These provisions replicate, with minor amendments, s228 of the *Fair Work Act 2009* (Cth) (**Fair Work Act**) (see **Schedule 1**). CME has previously argued the application of workplace relations legislative provisions to the native title system is inappropriate and unnecessary.

The Njamal Indicia,[1] developed from consideration of the specific issues facing parties in native title negotiations, are directly relevant to native title and have been the subject of extensive arbitral and judicial consideration over 15 years. The cases that were litigated at the commencement of the NTA to establish clarity around the meaning of the requirements then, took a considerable period of time. The imposition of new requirements will mean that the community needs to go through this process again.

The codification of these principles within the NTA is not supported; rather, CME has advocated for regulations or guidelines supporting the NTA. Proceeding in this way provides the flexibility to modify the principles as they evolve without legislative amendments. Nevertheless, if the Government is intent on codification, the Njamal Indicia represent the correct indicia and would at least reduce the amount of litigation likely to be generated. CME's suggested alternative at **Schedule 3**.

CME's concerns in relation to specific sections of the Bill are as follows.

s31(1)(c)

The need for the inclusion of such a specific requirement in the context of provisions that require detailed negotiation about these matters needs to be understood.

To the extent there is a specific concern, it would be useful to understand what it is because on the face of things, this matter is covered by the existing provisions and case law. Thus its inclusion could be the subject of considerable scrutiny by Courts and the NNTT.

s31(2)

The amendment expressly contemplates circumstances where it will be reasonable to expect negotiations to canvas matters that are unrelated to the effect of the act on the registered native title rights and interests affected. This represents a broadening of the statutory requirements for negotiation.

While it is already common for parties to do this, the amendments change the expectation and raise questions that will inevitably require significant litigation to determine their meaning and extent. What are these additional things? When will it not be reasonable to refuse to discuss unrelated matters?

CME submits that if this provision is changed at all, the proposed additional words "parties in circumstances when it was reasonable to do so...." should be deleted.

s31A(1)

The difficulties with creating a statutory expectation that an agreement will be reached, including an expectation that the relationship is of a particular standard, are set out above at key issue 1.

[1] *See Western Australia/Johnson Taylor on behalf of the Njamal People/Garry Ernest Mullan,* [1996] NNTTA 34 (7 August 1996)

s31A(2) and (3)

CME's key arguments against replacing existing case law with *Fair Work Act* language are set out above at key issue 3.

Importantly, regardless of the mechanism relied upon to clarify NIGF requirements, CME advocates the Njamal Indicia are more appropriate than the provisions of unrelated legislation and does not support the proposed provisions.

The Njamal Indicia were developed in response to the specific issues facing parties in the native title regime, are more extensive and provide greater flexibility within the unique environment of native title negotiations. The criteria proposed in the Bill are too narrow, incompatible with the requirements of the native title system and are, therefore, not supported by CME.

The language contained within the proposal may be well tested under the auspices of the *Fair Work Act*, but not within the native title environment. The same language will therefore be tested by parties in the native title context through litigated determinations.

These amendments introduce a subtle shift in focus towards a concentration on the commercial aspect of negotiations, ignoring the multiplicity of issues that may be discussed in a native title negotiation, and in particular distracts from the core element of future act negotiations: the effect of the doing of the act on registered native title rights and interests (rather than merely the quantification of monetary compensation for impact on native title).

For example, the proposed section 31A(2)(c) raises the question of what is a 'reasonable' offer. Would there be a difference between what is considered a reasonable offer when it relates to a mining lease as opposed to an exploration tenement? Is there a difference between a reasonable offer in relation to exclusive possession native title land and non-exclusive possession native title land?

Further, from a commercial perspective, the definition of a "reasonable offer" could result in a reduction of monetary benefits to native title parties if a median offer is determined to be "reasonable". Companies who currently offer significant benefits to native title parties would have little incentive to offer above the determined "reasonable" amount.

CME reiterates its submission that further clarification of NIGF by regulation or guidelines is preferable to codification, but if the Government is intent on codifying the NIGF provisions, this should be done by reference to the Njamal Indicia and not the *Fair Work Act.* A table comparing the currently proposed criteria against the Njamal Indicia is at **Schedule 1**.

s35(1)(a)

Extending the minimum period before which a party can apply for an arbitral body determination from 6 to 8 months adds nothing to facilitate negotiations. Many negotiations already continue for much longer than the current 6 month minimum period and even after an application is made for an arbitral determination, negotiations can - and often do - continue. The statistics at **Schedule 2** identify the current length of negotiations and also demonstrate that of the tenement applications notified since 2000, only about 1.5% have been the subject of contested future act determinations.

The focus should be on quality rather than quantity. If negotiations are problematic, it would be in the interest of all parties to allow an application for an arbitral body determination sooner rather than later. Arbitrarily enforced delays do nothing to assist the process.

s36(2)

The proposed subsection 36(2) amends the NTA to prevent the arbitral body from making a determination unless the party making the application can satisfy the arbitral body that it has acted in accordance with the NIGF criteria in s31A. This is a reversal of the onus of proof and a fundamental shift from the current process. CME's key arguments against changing the onus are set out above at key issue 2.

Currently, good faith is only an issue if it is raised by a party. There is no basis for considering good faith in every future act determination application. This will not only draw on the resources of the NNTT by mandating additional inquiries but will effectively add 6 to 12 months to the process. The statistics show that good faith has only been determined as an issue 31 times and, in 28 of those cases, it was determined that the parties had negotiated in good faith.

The proposal places an additional administrative burden upon the arbitral body, currently the NNTT. This latter issue is of particular concern given the reduction of NNTT members over the last three years.

The proposed section 36(2) also potentially prejudices native title parties who may not wish to engage in negotiations relating to a resource proposal on their country due to the cultural significance of the specific land. Under the proposed provisions, they are effectively prevented from applying for a determination under section 38(1)(a) that the act must not be done, as they would be unable to meet the *good faith negotiation requirements* of section 31(1A)

The reversal of the onus of proof of NIGF reduces the flexibility to accommodate the need for an arbitral body determination in circumstances where NIGF is not at issue. For example, parties may have been unable to procure all necessary signatures due to logistical difficulties or parties may have negotiated in good faith but are unable to reach agreement. The proposed provision introduces an unnecessary degree of rigidity into the system and provides no discernable benefit to any party.

The inclusion of the words “until the application was made” in section 36(2) is perplexing and should be deleted. Arguably, to mitigate the risk of being found not to have met the ‘good faith negotiation requirements’, the provisions will encourage parties to apply for a determination as close as possible to 8 months from the notification day. Further, it does not allow the arbitral body discretion to determine that there has been negotiation in good faith overall where, as often occurs, there has been a period of disengagement immediately prior to the future act determination application being made.

s36(2A)

It is inappropriate to give the arbitral body the proposed powers. The requirement to negotiate in good faith should be (and already is) self regulating.

If the arbitral body is to have more flexibility to make appropriate orders where there has been a finding of absence of good faith, it may assist processes. For example, the arbitral body could be required to provide reasons and given power to refer a matter to independent mediation.

Parties should not be prevented from reapplying for a future act determination for a specific period of time if in the interim that have addressed the NIGF issues raised. Again, the principle should be the quality of the negotiations, not the duration. The 6 months (or proposed 8 month) timeframe is the appropriate basis on which to set the minimum duration of negotiations.

Summary

CME members support the policy objectives of clarity on NIGF requirements and equality between negotiation parties. However, the provisions as presented in the current Bill do not, in CME’s view, meet these stated policy objectives and, moreover, will add unnecessary and unwarranted complexity, uncertainty, cost and delay to the future act regime.

2. Disregarding historical extinguishment – s47C

The Bill proposes, through the agreement of the relevant government and the native title party, historical extinguishment in parks and reserves can be disregarded, leading to a revival of native title rights and interests. While CME members recognise the benefits the proposed provisions can deliver to native title parties, the current provisions contain shortcomings which need to be addressed before CME can support them.

There is a significant area of land in Western Australia to which this proposed provision would apply if it proceeds. The Western Australian government have advised that approximately 14.3 million hectares of land in the State is potentially subject to this proposed provision.

One of the stated objectives of the NTA was to deliver certainty to all parties through the resolution of native title. Thus, the impact of the proposal to revive native title rights and interests through revisiting determinations, exacerbated by the ongoing increase in the conservation estate in Australia, introduces ongoing uncertainty into the native title system and is not justified.

Allowing existing determinations to be changed involves a fundamental change to the underlying premise of the NTA. Native title determinations determine critical rights and interests of many parties and are binding *in rem*. Determinations are made by the Federal Court after either a lengthy hearing to determine the interests of all parties or a consent determination in which all parties consent on the basis their interests are recognised and protected. Allowing such a determination to be opened up and changed in the future by two parties diminishes the finality of the decision and undermines the parties' and the public's confidence in the certainty of the legal process.

CME advocates the provisions of the Bill need to go further to protect third party interests in any area where the use of this proposed provision is anticipated. Third party rights can exist in these areas and are not adequately addressed. Moreover, in a consent determination environment, all parties should have the right to negotiate about their interests and the effect any determination would have on those interests. The rights conferred on third parties by the amendments are insufficient.

The current proposal provides for the notification of the intention to disregard historical extinguishment in an area subject to s47C, allowing interested persons to comment within a two month period. However, this proposal does not go far enough in providing the appropriate protection of other interests in the area and is not supported. The Bill is silent on the status of any comment provided by an interested party and there is currently no obligation on either the government or native title party to accommodate any comment by a third party.

Reducing incentives for exploration and mining companies to identify and extract mineral resources has an impact on the national economy. This needs to be balanced with the desire to recognise native title rights and interests wherever possible. A mechanism to achieve this balance for all parties is to ensure, should a government intend to rely upon the proposed s47C provision, that all parties with interests in the area should be afforded the opportunity to be parties to the negotiation. This would provide all parties with the opportunity to address any potential impact flowing from the application of s47C on non native title rights and interests. The inclusion of third party interests in the negotiation process also promotes the maintenance of good relationships between the native title party and other land users in the area.

Importantly, third parties who have existing interests in an area where native title rights and interests are revived through the application of s47C should be absolved from any unintended compensation liability as a result of any impairment of native title.

To ensure consistency with the requirements of ss47A and 47B, CME submits the proposed s47C provision should also require the native title party to meet the requirements of ‘occupation’ before native title rights and interest could be recognised. The provision should not be treated differently from existing provisions where the extinguishment of native title rights and interests can be disregarded and ensure the interests of third parties are protected. For example, where s47B is invoked, no third party interests are included.

If despite the CME's submission, the Government permits as part of these amendments an ability to overturn existing determinations, to contain the impact of continued uncertainty introduced by this provision, a sunset clause whereby parties have a certain period, from the introduction of any amendments, to submit an application to revisit a determination to gain the benefits of the proposed s47C must be included.

CME also notes the NTA should not be promoted as the only means of securing changes in tenure and, indeed, may not be the most appropriate mechanism to achieve outcomes.

3. Simplifying the process for amendments to Indigenous Land Use Agreements (ILUAs) – s24ED

At present, the time, cost and effort involved in re-registering an ILUA after an amendment, and the possibility of objections being made, probably dissuades parties from making amendments which would otherwise assist in the more effective and appropriate implementation of the ILUA. CME therefore supports amendments to address this issue.

The proposed threshold definition in s24ED(1) could be linked to s199B(1)(a), (c) and (d) which set out the information (other than the parties' names and addresses) which must be recorded for each ILUA in the Register of ILUAs. Section 24ED could confirm the effectiveness of agreed and notified amendments provided they do not result in the need for the amendment of that information in the Register.

The proposed threshold for determining whether a future application for registration of an amended ILUA is required refers to the conditions that were required to be satisfied in order for the Registrar to register the ILUA. This is confusing because many of the requirements for registration relate largely to notification and authorisation, none of which are relevant to the proposed amendment process, rather than to the content of the agreement.

The proposed s24ED (or an amendment to s199B) could also provide for the Registrar to record on the Register the details of new parties to an ILUA following an assignment in accordance with the terms of the ILUA.

CME also notes that the process for the Registrar to make decisions as contemplated by section 24ED(c) is not detailed in the proposed Bill or covering discussion paper. Process issues which should be considered include:

- what information the Registrar can take into account in making a decision under section 24ED(c), and whether parties or others can provide extra information or make submissions;
- whether there is to be a specified process for those who are not parties to the ILUA to object to the amendment (taking into account natural justice requirements), and if so how will such third parties be notified of the proposed amendment;
- whether the Registrar will need to publish a decision and within what timeframe; and
- from what point will the amendments be binding.

4. Broadening the scope of body corporate ILUAs

This proposal is supported.

5. Clarifying the coverage and scope of ILUAs

This proposal is supported.

6. Improving the authorisation and registration processes for ILUAs

This proposal is supported except for the provision in 24CI(1) (1C) which allows the NNTT to order the disclosure of documents supporting the application of an ILUA to an objecting person. This potentially places confidential material into the public domain and could also contribute to intra-Indigenous disputes.

7. The minor technical amendment to section 47.

This proposal is supported.

Concluding comments

CME supports the Attorney-General's intention to improve negotiations between native title parties. However, as stated above, CME does not believe the Bill delivers on these objectives.

The new provisions contained in the Bill introduce additional administrative burdens upon the NNTT which currently has reduced capacity to operate effectively. If the Bill proceeds into legislature, the Commonwealth government must commit to increase the resources of the NNTT. Failure to do so risks paralysing the future act system in Western Australia.

CME submits the introduction of the Bill in its current form would, instead of achieving its stated objectives, have the effect of creating delays and confusion. CME does not, therefore, support the introduction of the Bill in its current form into Parliament.

CME calls for further consultation on the proposed amendments to ensure the alignment of any amendments with the Commonwealth government's stated policy objectives.

In addition, should the Bill proceed into Parliament, further stakeholder consultation should be ensured to accommodate changes to the Bill.

Yours sincerely

Reg Howard-Smith

Chief Executive

Schedule 1: Comparative table of good faith indicia

Proposed Good Faith Criteria	Fair Work Act 2009	Njamal Indicia
a) attended and participated in meetings at reasonable times;	(a) attending, and participating in, meetings at reasonable times;	(vii) failure to take reasonable steps to facilitate and engage in discussions between the parties;
b) disclosed relevant information (other than confidential or commercially sensitive information) timely manner;	(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;	(iii) the unexplained failure to communicate with the other parties within a reasonable time; (i) unreasonable delay in initiating communications in the first instance; (vii) failing to respond to reasonable requests for relevant information within a reasonable time;
c) made reasonable offers and counter offers;		(ii) failure to make proposals in the first place; (xv) failure to make counter proposals;
d) responded to proposals made by other negotiation parties for the agreement in a timely manner;	(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;	
e) given genuine consideration to the proposals of other negotiation parties;	(d) giving genuine consideration to the proposals of other bargaining	(xiv) adopting a rigid non-negotiable position;

Proposed Good Faith Criteria	Fair Work Act 2009	Njamal Indicia
	representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;	
f) refrained from capricious or unfair conduct that undermined negotiation;	(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;	(xiii) shifting position just as agreement seems in sight; (xvi) unilateral conduct which harms the negotiating process, e.g., issuing inappropriate press releases;
g) recognised and negotiated with the other negotiation parties;	(f) recognising and bargaining with the other bargaining representatives for the agreement.	(iv) failure to contact one or more of the other parties;
h) refrained from acting for an improper purpose in relation to the negotiations;		
		(v) failure to follow up a lack of response from the other parties;
		(vi) failure to attempt to organise a meeting between the native title and grantee parties;
		(ix) stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
		(x) unnecessary postponement of meetings;

Proposed Good Faith Criteria	Fair Work Act 2009	Njamal Indicia
		(xi) sending negotiators without authority to do more than argue or listen;
		(xii) refusing to agree on trivial matters eg a refusal to incorporate statutory provisions into an agreement;
		(xvii) refusal to sign a written agreement in respect of the negotiation process or otherwise;
		(xviii) failure to do what a reasonable person would do in the circumstances;

Schedule 2 - Right to Negotiate statistics

1. SUMMARY OF THE STATISTICAL FINDINGS

The statistics demonstrate that during the last 12 years of operation:

- (**Notifications**) A total of 7140 mining tenements or land acquisitions were notified under section 29 of the Act (including expedited procedure notifications).
- (**FADAs**) A total of 1084 future act determination applications were made. Even allowing for the existence of applications relating to the expedited procedure, only 15% of the total applications notified were the subject of a future act determination application.
- (**WA**) The vast majority of tenements and land acquisitions notified under s29 (75%) and future act determination applications (87%) occurred in Western Australia.
- (**Average negotiation period**) The average time between a s29 notice and a future act determination application was considerably longer than 6 months. The minimum State average was 8 months. The total average was 39 months.
- (**Total determinations**) There was a total of 746 tenements or land acquisitions, or slightly more than 10% of total notices where the Tribunal determined whether they could be done, be done subject to conditions or could not be done.
- (**Contested determinations**) However, only 105 tenements or 1.5% of these tenements were contested determinations. Most of the 10% of tenements that were determined (636 tenements), were determined by consent. That is, where agreement had been reached by the parties.
- (**98.5% of applications = agreement**) This means that 98.5% of tenements and land acquisitions notified under the full right to negotiate have either been granted via agreement or are continuing in the negotiation process (or are no longer being pursued).
- (**Good faith**) It has only been necessary to determine the question of whether a party negotiated in good faith 31 times since 2001. 28 determinations found that the parties had negotiated in good faith. 3 determinations found that the grantee party had failed to negotiate in good faith. Those determinations covered four tenements. This represents a minor proportion of both tenements notified and even future act determination applications where parties were unable to reach agreement.

2. CONTEXT

These statistics have been derived from a combination of detailed statistics provided by the NNTT between the period of 1 January 2000 – 11 October 2012 and the statistics available on the NNTT's website relating to future act determination applications and determinations. The source of the information is noted.

It should be noted that the period between 1 January 2000 and the present was chosen as a reasonable representation (almost 12 years) of the operation of the current right to negotiate regime. This is because amendments were passed at the end of 1998 that created significant change. 1 January 2000 was chosen as a starting point to take some account of a transitional period while the NNTT dealt with extant applications.

There are some potential inaccuracies with the information because it required some interrogation in order to summarise the position. These potential inaccuracies are noted.

3. NUMBER OF SECTION 29 NOTICES AND FADAS ISSUED[2]

This table shows the number of total tenements and acquisitions notified under the right to negotiate for the period 1 January 2000 – 11 October 2012. It includes notices that include a statement that the expedited procedure applies. This inclusion inflates the overall number of future act determination applications.

In summary:

- The average time between a s29 notice and a future act determination application was considerably longer than 6 months.
- Even allowing for the existence of applications relating to the expedited procedure, only 15% of the total applications notified were the subject of a future act determination application.
- The statistics below provide further detail around the 15% and indicate that the actual percentage of tenements the subject of an agreement (or still pending and therefore the subject of negotiation processes) is likely to be much higher due to the high number of consent determinations.
- The vast majority of notices and tenement applications occurred in Western Australia.

State	No. of mineral tenements notified under s29	No. of land acquisitions notified under s29	No. of FADAs	Average time between notice and FADA (months)
NSW	279	8	3	8.33
NT	406	8	2	22.74
QLD	601	0	126	13.77
SA	34	0	1	8.71
VIC	443	0	13	20.04
WA	5219	142	939	42.82
Total	6982	158	1084	39.01

[2] As per statistics provided in tabular form upon request by the NNTT.

4. WESTERN AUSTRALIAN BREAKDOWN

This table shows a manual breakdown of the mining tenements notified in Western Australia. It is based on the same statistics in the first table but the statistics required manual addition based on a judgement as to whether a particular form of tenement was advertised under the full right to negotiate or included a statement that the expedited procedure applies. That judgement is explained.

In summary:

- Of the tenements to which the full right to negotiate applied, only 10% were the subject of a future act determination application.
- This means that 90% of tenements advertised under the right to negotiate in Western Australia are either granted as the result of an agreement, are still pending and therefore the subject of negotiation processes (or were not pursued to grant).
- The statistics below provide further detail around the 10% and indicate that the actual percentage of tenements the subject of an agreement is likely to be much higher due to the high number of consent determinations.

	No. of tenements notified under s29	No. of FADAs
RTN applies[3]	4169	454
Expedited Procedure applies	1050	485
Total	5219	939

5. OUTCOME OF FADAS

The following statistics were provided by the NNTT. They breakdown the number of right to negotiate future act determinations (with some application related figures such as withdrawn applications). The figures count the number of tenements or land acquisitions in each category. These statistics were provided direct from the NNTT and are therefore reliable.

In summary:

- Extracting the applications that did not, or have not yet, progressed there were a total of 746 tenements or land acquisitions where the Tribunal determined whether they could be done, be done subject to conditions or could not be done.
- 746 tenements of a total 7140 means a total of slightly more than 10% is determined by the Tribunal.

[3] The following types of tenements were included: mining leases (M), coal mining leases (CML), petroleum exploration permits (EP), general purpose leases (G) and state agreement mineral leases (MLSA and MLSAAML).

- However, only 105 tenements or 1.5% of these tenements were contested determinations. Most of the 10% of tenements that were determined (636 tenements), were determined by consent. That is, where agreement had been reached by the parties.

- This means that 98.5% of tenements and land acquisitions notified under the full right to negotiate are granted via agreement (or continuing in the negotiation process or not pursued).

- The table does not clearly isolate statistics on the good faith issue. This is because good faith is a jurisdictional precondition to a determination. Those statistics are extracted below from an alternative source.

	NSW	NT	QLD	SA	VIC	WA	Total
Application not accepted	0	0	1	0	0	11	12
Application withdrawn	0	1	53	0	0	217	271
Consent determination –act can be done	0	1	12	0	9	521	543
Consent determination – act can be done subject to conditions	0	0	31	1	2	64	98
Determination - act can be done	2	0	11	0	1	39	53
Determinations - act can be done subject to conditions	1	0	15	0	1	29	46
Determinations - act cannot be done	0	0	0	0	0	6	6
Dismissed (s148(a) no jurisdiction)	0	0	0	0	0	44	44
FA terminated	0	0	1	0	0	1	2
Tenement withdrawn	0	0	0	0	0	1	1
No outcome (pending)	0	0	2	0	0	6	8
TOTAL	3	2	126	1	13	939	1084
TOTAL TENEMENTS AND LAND ACQUISITIONS S29 NOTIFIED (FROM TABLE 1)	287	414	601	34	443	5361	7140

6. BREAKDOWN OF FADAS AND DETERMINATIONS – ALTERNATIVE SOURCE

These statistics were obtained by interrogating the NNTT online database of future act determination applications and determinations.

In summary:

- It has only been necessary to determine the question of whether a party negotiated in good faith 31 times since 2001.
- 28 determinations found that the parties had negotiated in good faith.
- 3 determinations found that the grantee party had failed to negotiate in good faith. Those determinations covered four tenements.[4]

It should be noted that:

- These statistics count the number of determinations. They are not a true reflection of the total number of tenements or acts the subject of a particular decision because some decisions will cover more than one tenement.
- There is a discrepancy between the number of applications and the number of determinations. While it is not possible to verify this discrepancy, it is likely to be the number of applications that are withdrawn. Applications can be withdrawn because agreement continues to be pursued during the determination process and/or because a tenement application is withdrawn.
- Generally speaking, the statistics are consistent with the table above and provided by way of verification because they are available online.

Applications	
Future act applications	491
Objection applications	14,763
Total	15,254
Determinations – Expedited Procedure	
Consent determination: expedited procedure applies	5

[4] Mr Kevin Cosmos & Ors (Yaburara Mardudhunera People)/Mr Jack Alexander & Ors (Kuruma Marthudunera People)/Western Australia/Mineralogy Pty Ltd, [2009] NNTTA 35 (17 April 2009) – covered exploration licence

Angelina Cox & Ors on behalf of the Puutu Kunti Kurrama & Pinikura People/ Wintawari Guruma Aboriginal Corporation/Western Australia/FMG Pilbara Pty Ltd, [2008] NNTTA 90 (11 July 2008) – covered 1 mining lease

Western Australia/Arthur Dimer, Ollan Dimer, John Walter Graham, Sonny Graham, Katie Ray, Maureen Young, Georgina Schultz, Mabel Wilson, Jack Schultz, Betty Bullen, Graeme Pellew (Ngadju People, WC95/17); Cyril Barnes, Merle Forrest, Mercy O'Loughlin, Stevie Sinclair, Judy Slater, Elvis Stokes & Victor Willis (Central East Goldfields People, WC99/30)/Equs Limited, [2000] NNTTA 290 (9 August 2000) – covered 2 mining leases

Consent determination: expedited procedure does not apply	432
Objection – expedited procedure applies	183
Objection – expedited procedure does not apply	86
Objection – expedited procedure applies and Objection – expedited procedure does not apply	5
Objection - dismissed	1106
Objection – dismissed (not all applications dismissed please refer to decision)	8
Objection – application not accepted	6
Objection - reinstated	1
Objection – jurisdiction considered	2
TOTAL	1834
Determinations – Right to negotiate	
Consent determination –act can be done	244
Consent determination – act can be done subject to conditions	16
Determination - act can be done	26
Determination - act can be done subject to conditions	18
Determination – act cannot be done	3
Dismissed	20
Negotiation in good faith not satisfied	3
Negotiation in good faith satisfied	28
Future Act - Tribunal has jurisdiction	4
Future Act – Preliminary issue	6
TOTAL	368

Schedule 3 – Alternative Drafting

Section 31A(2)

1st preference

CME opposes the inclusion of section 31A(2) as outlined in the Submission. However, if the Commonwealth Government proceeds with the codification of NIGF criteria, CME proposes the following drafting, mirroring the Njamal Indicia.

2nd preference

(2) *Without limiting subsection (1), in deciding whether or not a negotiation party has negotiated in accordance with the good faith negotiation requirements, regard* ***may be had*** *to whether the negotiation party has done the following:*

- *(a) unreasonably delayed initiating communications in the first instance;*
- *(b) failed to make proposals in the first place;*
- *(c) failed, without reasonable explanation, to communicate with the other parties within a reasonable time;*
- *(d) failed to contact one or more of the other parties;*
- *(e) failed to follow up a lack of response from the other parties;*
- *(f) failed to attempt to organise a meeting between the native title and grantee parties;*
- *(g) failed to take reasonable steps to facilitate and engage in discussions between the parties;*
- *(h) failed to respond to reasonable requests for relevant information within a reasonable time;*
- *(i) stalled negotiations by unexplained delays in responding to correspondence or telephone calls;*
- *(j) unnecessarily postponed meetings;*
- *(k) sent negotiators without authority to do more than argue or listen;*
- *(l) refused to agree on trivial matters eg a refusal to incorporate statutory provisions into an agreement;*
- *(m) shifted position just as agreement seems in sight;*
- *(n) adopted a rigid non-negotiable position;*
- *(o) failed to make counter proposals;*
- *(p) unilateral conduct which harms the negotiating process eg issuing inappropriate press releases;*
- *(q) refused to sign a written agreement in respect of the negotiation process or otherwise;*
- *(r) failed to do what a reasonable person would do in the circumstances.*