ATTORNEY-GENERAL'S DEPARTMENT

Native Title Division

19 August 2002

Ms Bev Forbes
Committee Secretary
Standing Committee on Industry and Resources
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Ms Forbes

INQUIRY INTO RESOURCE EXPLORATION IMPEDIMENTS

The Native Title Division of the Commonwealth Attorney-General's Department appreciates the opportunity to make a submission to the inquiry by the House of Representatives Standing Committee on Industry and Resources into any impediments to increasing investment in mineral and petroleum exploration in Australia.

The Division is responsible for the formulation and provision of policy advice to the Attorney-General on native title and for assisting the Attorney-General in the administration of *Native Title Act 1993* (other than Division 6 of Part 2 and Part 11). Functions of the Division include:

- advising on the operation of the *Native Title Act 1993*;
- liaising with State and Territory governments on the implementation of alternative native title regimes;
- developing agreed conditions for the provision of financial assistance to State and Territory governments in relation to certain native title costs and expenses;
- giving policy advice and assistance to Commonwealth departments and agencies undertaking activity potentially affecting native title; and
- managing Commonwealth involvement in native title litigation.

I attach the submission of the Attorney-General's Department to this inquiry. If you would like any further clarification of the matters raised in the submission I can be contacted on the telephone number provided below.

Yours sincerely

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ATTORNEY-GENERAL'S DEPARTMENT

Native Title Division

ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION TO THE INQUIRY INTO RESOURCES EXPLORATION IMPEDIMENTS

1. WHAT IS NATIVE TITLE?

Native title is an existing interest

1. In the *Mabo* case,[1] the High Court found that the common law of Australia recognises rights and interests in relation to land held by Aboriginal peoples and Torres Strait Islanders under their traditional laws and customs. Native title is recognised by the common law where:
   - the rights and interests are possessed under the traditional laws and customs acknowledged and observed by the relevant Aboriginal or Torres Strait Islander groups;
   - the Aboriginal peoples and Torres Strait Islanders, by those law and customs, have a connection with the land; and
   - their title has not been extinguished by an act of government.[2]

2. The nature of native title is likely to vary from group to group, depending on the use of the land or waters under the traditional laws and customs in each case. Native title rights may therefore include non-exclusive access rights and rights of exclusive possession.[3]

3. Native title is now defined in subsection 233(1) of the NTA as follows:

   (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

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1 *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

2 At common law, native title is capable of extinguishment by legislative or executive actions which reveal a 'clear and plain intention' to have this effect. For example, grants of interests conferring exclusive possession on third parties (eg. freeholders) will extinguish native title, because exclusive possession is wholly inconsistent with the continued exercise of any native title rights. However, the High Court has also found that native title may coexist with some interests (eg. some pastoral leases). Native title is also extinguished where the claimants have lost their connection with the land or waters so that they are unable to prove they have a continuing traditional association with the land or waters in question.

3 Native title may be possessed by a community, group or individual depending on the content of the traditional laws and customs. It is inalienable other than by surrender to the Crown or pursuant to traditional laws and customs.

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

4. The Commonwealth argued in the recent High Court *Yorta Yorta* case that this definition reflects the common law definition referred to in paragraph 1 above. The High Court has reserved its judgment in that case.

5. It is important to be aware that native title rights and interests are *existing* rights. The source and content of native title are found in the traditional laws and customs observed and practised by the indigenous community claiming native title. It is an existing legal right to lands and waters in Australia and offshore.[4] Native title rights and interests are not rights that are granted by government, such as statutory rights of the kind found in the *Aboriginal Land Rights (Northern Territory) Act 1976*. Native title cannot be withheld or withdrawn by Parliament or the Crown because it is not 'granted' though it can be extinguished by an act of government. Native title rights and interests are enforceable against the whole world.

6. The High Court in the recent decision of *Ward*[5] provided some clarification of important principles about native title, particularly in relation to mining leases in Western Australia.

7. As to whether native title rights can exist in relation to minerals and petroleum, the High Court found that on the evidence presented in that case, no relevant native title right or interest was established and therefore no question of extinguishment arose.[6] While not central to the Court's conclusions, it also stated that, even if native title could exist in relation to petroleum or minerals, those rights would have been extinguished in Western Australia by the relevant mining and petroleum legislation.[7]

8. A majority of the Court also found that, although the grants of the mining leases under

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[4] For the purposes of the NTA, an 'offshore place' means "any land or waters to which this Act extends, other than land or waters in an onshore place". An 'onshore place' means "land or waters within the limits of a State or Territory to which this Act extends" (section 253 of the NTA). The Act extends to the coastal sea of Australia and each external Territory and to any waters over which Australia asserts sovereign rights under the *Seas and Submerged Lands Act 1973* – section 6 of the NTA. *Mabo* left unresolved the question whether offshore native title rights and interests are recognised by the common law. In October 2001, the High Court found in the *Croker Island* case (*Commonwealth v Yarmirr; Yarmirr v Northern Territory* (2001) 184 ALR 113) that native title rights may exist offshore, but that native title rights offshore cannot be exclusive because exclusive rights would be inconsistent with the common law rights to fish and navigate, and the international law right of innocent passage.

[5] *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 (8 August 2002) (Ward).

[6] Ward at [382].

[7] Ward at [383]. Justice Callinan expressed similar views in respect of Northern Territory minerals legislation at [640].

the *Mining Act 1904* (WA) at issue in the case were not necessarily inconsistent with the continued existence of all native title rights and interests,[8] the grant of mining leases extinguished any native title right to control access to the land.[9]

9. Consistent with the reasoning in *Ward* and the provisions of the NTA, mining rights will prevail over native title rights and interests where the rights are not inconsistent. The Act provides that, if a mining lease was validly issued, activities permitted by the lease can be carried out regardless of the existence of native title.[10] In other words, the existence of native title interests cannot prevent the carrying on of such activities.

2. FACILITATING FUTURE ACTIVITY – THE FUTURE ACT REGIME UNDER THE *NATIVE TITLE ACT 1993*

10. The NTA sets out a comprehensive regime for the recognition, protection, extinguishment and impairment of native title. The 'future act regime' in the NTA lays down procedures which must be complied with before acts 'affecting' native title can be validly done. The purpose of the future act regime is to strike a balance between enabling future activity such as mining to progress, while at the same time ensuring that the rights of native title holders are taken into account, including where those native title rights have not yet been determined.

11. When governments perform acts which 'affect' native title by extinguishing or being otherwise wholly or partly inconsistent with its continued existence, enjoyment or exercise ('future acts'), they must comply with the future act regime.[11] 'Act' is defined widely to include the making or amendment of legislation, and the grant and renewal of licences and permits, and could include some executive actions. For instance, the grant of a mining lease that 'affects' native title (as so described) will be a future act.[12]

12. Those future acts that are identified in the 10 relevant Subdivisions of the NTA can be done validly.[13] For example, the renewal or extension of term of an exploration licence may be granted pursuant to a registered Indigenous Land Use Agreement (ILUA) under Subdivision E, or could be a renewal of a permissible lease etc., thereby falling under Subdivision I. Alternatively, it may pass the 'freehold test' under Subdivision M. Where an act could fall within more than one Subdivision between E and N, the Subdivision which comes first in the alphabet applies.[14] This is important, because the Subdivisions

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8 Ward at [296], [308] and [341].

9 Ward at [308-309].

10 See section 44H of the NTA, which ensures that such rights can be exercised notwithstanding the existence of native title.

11 Set out in Division 3 of Part 2 of the NTA. A 'future act' is defined in section 233 of the NTA as an act which, apart from the NTA, affects native title to any extent.

12 Future acts are generally those done since 1994 when the NTA came into operation. Some of those may however be 'past acts' or 'intermediate period acts'.

13 The relevant Subdivisions are Subdivisions E to N in Division 3 of Part 2 of the NTA. Section 24OA of the NTA provides that a future act which affects native title but is not allowed by the future act regime is invalid.

14 Section 24AB of the NTA.

contain different provisions in relation to the procedural rights conferred on native title parties before an act is done, the compensation entitlements of native title holders, and the effect of the act upon native title. **A schedule setting out the application of the relevant Subdivisions is attached.**

13. Each Subdivision sets out the following:

- a description of the type of act or class of act to which the Subdivision applies;
- the procedural rights conferred on native title parties (other than Subdivision L which relates to low impact future acts);
- whether failure to carry out those procedures will make the act invalid;
- the effect of the doing of the act on any native title – in the great majority of cases the **non-extinguishment principle** applies. This means that native title is not extinguished by the future act, but is suppressed to the extent of any inconsistency between the act and native title for so long as the act in questions continues[15]. Where rights given by the act are consistent with native title rights, the former prevail;[16] and
- an entitlement to compensation (other than Subdivision L which relates to low impact future acts) and who has primary liability to pay that compensation.

14. In general, compliance with the procedural requirements of the Subdivisions is not necessarily a pre-condition of validity,[17] although native title holders, and possibly registered native title claimants, may take legal action to prevent an act being done before the procedural requirements are complied with. However, where the right to negotiate (or its equivalent under State or Territory law[18]) applies, failure to comply with these provisions results in invalidity.

15. Generally, other than in relation to low impact future acts coming within Subdivision L, notice of a proposed future act to Representative Aboriginal/Torres Strait Islander Bodies[19] (representative bodies) is a minimum procedural requirement. In addition, all registered native title holders and registered native title claimants must be notified of proposed future acts (other than where the future act is agreed to under an Indigenous Land Use Agreement[20]) as a minimum.[21] In some cases an opportunity to comment must

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15 For instance, if the act is the grant of a mining lease, the suppression of the inconsistent rights continues for the duration of the lease.

16 For instance, if the future act is the grant of an exploration permit, any native title affected by that grant is suppressed for the length of time that the permit subsists to the extent that the native title in question is inconsistent with that grant. Where the permit does not give the permit holder exclusive possession, it is possible that native title holders could continue to have limited access to the permit area for the term of the permit.

17 *Lardil and Ors v Queensland* [2001] FCA 414.

18 See further in Part 3.

19 These are indigenous bodies recognised under the NTA that provide support and assistance to those claiming native title and determined native title holders.

20 Registered native title claimants and bodies corporate will normally be parties to an ILUA.

21 Exceptions to this are in Subdivision F, Subdivision H in relation to legislation, and subsections 24KA(7), 24MD(6A) and 24NA(8) of the NTA.

also be given. Notice can be of a class of acts as well as individual acts. For instance, notice may be given of a proposal to grant a mining lease or about a proposal to issue a series of permits.[22] Where it is necessary to give notice to the public as well as native title parties and representative bodies, that public notice must be given in the 'determined way', that is, in accordance with the requirements of the *Native Title (Notices) Determination 1998* that are relevant to that type of act.

16. The provisions of the future act regime of particular relevance to the grant of mining and petroleum tenements and the enactment of mining and petroleum legislation are:

    i) Indigenous Land Use Agreements (Subdivision E);

    ii) Renewals and extensions of leases, licences etc (Subdivision I);

    iii) Acts passing the freehold test (Subdivision M);

    iv) Acts affecting offshore places (Subdivision N).

i) Indigenous Land Use Agreements: Subdivision E

17. Subdivision E provides that a future act that is the subject of an ILUA registered under Part 8A of the NTA is valid.[23] Validity is a consequence of registration of the ILUA and operates even if this type of future act would otherwise be invalid under the NTA or would require compliance with conditions such as the right to negotiate.[24] For instance, an ILUA can provide that the grant of a mining lease over an area where native title may exist is valid, and that the right to negotiate does not apply.[25]

18. Registration of an ILUA can also validate a future act that has already occurred invalidly, such as where a mining lease has been issued that should have, but did not, go through the right to negotiate process.[26]

19. In addition to any other effect it has at law, an ILUA has effect as a contract while it is registered on the Register of Indigenous Land Use Agreements, and all persons holding native title in relation to any of the land or waters covered by the agreement are bound by its terms and conditions, even if they are not parties to the agreement and if they have not authorised its making.[27] Pre-registration notification provides an opportunity to object to those persons who may be bound by a registered ILUA but who are not a party to the agreement.

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[22] However, notice may not need to be given for acts covered by subsections 24MD(6A) and 24NA(8) of the NTA.

[23] Future acts covered by a registered ILUA will be valid if sections 24EB or 24EBA of the NTA are complied with.

[24] Subsection 24EB(2) of the NTA provides that where a future act is done pursuant to a registered agreement, the act is valid. Subsection 24AB(1) of the NTA clarifies that the right to negotiate will not apply to future acts authorised by the agreement.

[25] See subsection 24EB(1)(c) of the NTA.

[26] See section 24EBA of the NTA.

[27] See section 24EA of the NTA.

20. ILUAs may cover any matter concerning native title, in addition to the doing of future acts. An ILUA therefore provides the opportunity to put in place mechanisms for dealing with a range of relevant issues including heritage and site clearance, access, employment, consultation on the future use of land and compensation.

21. Importantly, ILUAs provide the framework for establishing an agreed cooperative and ongoing relationship between native title parties, developers and governments without the need for adversarial and expensive litigation proceedings.

ii) Renewals and extension of mining permits: Subdivision I

22. Subdivision I may be relevant to the exercise of an option to renew or extend a mining or petroleum tenement where such acts are to be done pursuant to rights or arrangements created on or before 23 December 1996.[28] This Subdivision also allows for renewals, regrants or extensions of leases, licences, permits or authorities validly granted on or before 23 December 1996 in certain conditions.[29]

23. A renewal etc. of a mining lease which creates a new right to mine will generally be subject to the right to negotiate process.[30] However, renewals and extensions of the terms of valid mining tenements where the renewal or extension is in similar terms to the original grant, will not attract the right to negotiate processes.[31]

iii) Mining and the Freehold test: Subdivision M

24. Acts which affect native title but which do not pass any of the tests in the previous subdivisions will need to pass the 'freehold test' in Subdivision M in order to be done validly under the NTA. In the case of a non-legislative act (eg the grant of a mining or petroleum tenement), it will pass the 'freehold test' if it could be done on freehold land and there is a law that makes provision in relation to the preservation or protection of areas or sites in the area that are of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.[32]

25. An example of a non-legislative future act which passes the freehold test is the grant of a mining lease over land in relation to which there is native title when that kind of mining lease could be granted over freehold land[33]. In Western Australia, for example, mining leases fall into this category as do the grant of exploration and miscellaneous licences, and the grant of a renewal or extension of term.[34] If an act does not pass the freehold test (that is, if it could not also be done on freehold land) then the act could not be validly done under Subdivision M.

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28 See definition of 'pre-existing right-based act' in section 24IB of the NTA.
29 See definition of 'permissible lease etc. renewal' in section 24IC of the NTA.
30 Paragraph 24ID(1)(a) and subsection 26(1A) of the NTA.
31 See section 26D of the NTA.
32 Paragraph 24MB(1)(b) and (c) of the NTA.
33 A law required by paragraph 24MD(1)(c) of the NTA must also exist.
34 See National Native Title Tribunal (NNTT) Decision in WO98/224 & Others.

The right to negotiate

26. An act covered by Subdivision M is valid subject to the application of the 'right to negotiate' provisions in Subdivision P.[35] The right to negotiate provisions apply to, among other things, future acts covered by Subdivision M (ie they are acts that could be done on freehold land) where the act is done by the Commonwealth, a State or a Territory and where the act is the creation of a 'right to mine'.[36]

27. The 'right to negotiate' is a statutory right given under the NTA to native title holders and registered native title claimants in relation to certain kinds of future acts. If the right to negotiate applies to the grant of a mining lease but the procedures are not complied with, the mining lease will be invalid under the NTA.[37] Under the 1998 amendments to the NTA, the right to negotiate provisions were streamlined. For instance, the right to negotiate does not now apply to mining and petroleum tenements:

- in relation to which a registered ILUA states that the right is not to apply;[38]
- created for the sole purpose of constructing infrastructure associated with mining;[39]
- which are 'low impact' exploration, prospecting or fossicking grants, grants for the purpose gold or tin mining in surface alluvium, or opal or gem mining grants in relation to which a State or Territory Minister has sought and been granted an exemption by the Commonwealth Minister;[40]
- which are certain renewals of mining leases;[41]
- that relate to land on the seaward side of the high-water mark.[42]

28. Where the right to negotiate applies to a future act such as the grant of a mining or petroleum tenement, section 29 of the NTA requires the Government responsible for the

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35 Section 24MD of the NTA provides that, subject to Subdivision P (which establishes the right to negotiate), an act is valid.

36 See subsection 26(1) of the NTA. Section 353 of the NTA provides the following definition of 'mine':
mine includes:
(a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or
(b) extract petroleum or gas from land or from the bed or subsoil under waters; or
(c) quarry;
but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:
(d) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or
(e) processing the sand, gravel, rocks or soil by non-mechanical means.

37 Section 28 of the NTA.

38 Paragraph 26(2)(a) of the NTA.

39 Subparagraph 26(1)(c)(i) of the NTA.

40 Paragraphs 26(2)(b), (c) and (d) of the NTA. See sections 26A (approved exploration etc. acts), 26B (approved gold or tin mining acts) and 26C (excluded opal or gem mining) of the NTA. See further in Part 4 of this submission.

41 Paragraph 26(2)(c) and subsection 26D(1) of the NTA.

42 Subsection 26(3) of the NTA.

act to notify all registered native title bodies corporate, registered native title claimants and representative bodies for the area that will be affected by the act, a person who requested the act be done, and the public. The Government must give all native title parties to the process an opportunity to make submissions regarding the proposed future act,[43] and the parties must then negotiate in good faith with a view to obtaining the agreement of the native title parties to the doing of the act. If agreement is not reached within 6 months, any party may apply to the arbitral body[44] for a determination about whether or not the act can be done and, if so, on what conditions.[45]

The expedited procedure

29. A mining or petroleum tenement 'attracts the expedited procedure' if the State or Territory proposing to make the grant includes a statement to that effect in the section 29 notice. It is open to native title holders who have a determination of native title or have a registered claim to object to the inclusion of such a statement on the basis that the grant is likely to interfere directly with the carrying on of the community or social activities of the native title holders, or to interfere with sites of particular significance or involve a major disturbance to the area.[46] Objections can be made to the National Native Title Tribunal (NNTT) (or equivalent or recognised State or Territory body), which is empowered to decide whether an act attracts the expedited procedure. If the tribunal upholds the objection, the right to negotiate applies to the grant; if it does not uphold the objection, the grant can be made without further reference to the NTA.

iv) Offshore activities: Subdivision N

30. The decision of the High Court in the *Croker Island case*[47] established that non-exclusive native title rights may exist offshore. If the grant of an offshore petroleum exploration or mining tenement were to 'affect'[48] native title it would constitute a 'future act.' Subdivision N provides that any future act done offshore is valid. This Subdivision operates as a 'catch-all' in relation to future acts offshore, however, it only applies to future acts not falling within an earlier Subdivision.

31. There is **no right to negotiate** offshore as the 'right to negotiate' provisions do not apply to any act that is on the seaward side of the low-water mark.[49] However, Subdivision N states that in relation to acts done offshore, registered native title bodies corporate and registered claimants have the **same procedural rights as they would have if they held 'corresponding rights and interests' that are not native title rights and interests.** Where, for instance, the holder of a fishing permit has a right to be notified about the

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[43] Paragraph 31(1)(a) of the NTA.
[44] Generally the National Native Title Tribunal (NNTT).
[45] Sections 35 and 38 of the NTA. There is also provision for ministerial override of a determination made by the NNTT or a State/Territory arbitral body provided certain procedures are followed – section 42 of the NTA.
[46] Section 237 of the NTA.
[47] *Commonwealth v Yarmirr; Yarmirr v Northern Territory* (2001) 184 ALR 113.
[48] See paragraph 11.
[49] Subsection 26(3) of the NTA.

issuing of a petroleum exploration permit or the release of acreage, then any native title holders with rights to fish also have a right to be notified by the Federal Court.

3. MINING AND ALTERNATIVE STATE PROVISIONS

32. The NTA enables the States and Territories to enact their own legislation to apply to future acts to which the right negotiate would otherwise apply. Where a State or Territory scheme is in place, their alternative legislation operates instead of the NTA. Under the NTA, the available options for alternative provisions include:

- a section 43 right to negotiate regime to apply instead of the NTA right to negotiate provisions;
- a section 43A alternative procedural rights scheme to apply instead of the NTA right to negotiate on pastoral lease and reserved lands; and
- alternative procedural rights to apply in relation to exploration, prospecting and fossicking (section 26A) and gold and tin mining in surface alluvium (section 26B) instead of the NTA right to negotiate, and exemption from the right to negotiate for opal and gem mining (section 26C).

33. The operation of these regimes depends upon a determination by the Commonwealth Minister that the State/Territory scheme complies with the statutory criteria set out in the relevant sections of the NTA. These determinations are disallowable instruments and decisions by the Commonwealth Minister to make a determination in relation to an alternative regime are also subject to judicial review.

34. To date the Commonwealth Minister has made 24 determinations under the above-mentioned sections of alternative regimes in relation to 5 separate jurisdictions.[50] Of those 24 determinations, 10 were disallowed by the Senate. Of those 14 determinations which were not disallowed, 4 have been found to be invalid by the Federal Court, although this decision is the subject of an appeal to the Full Federal Court. Hence, 10 alternative regimes are currently operating. These are:

- two section 26A determinations in relation to mining and petroleum respectively, in New South Wales;
- two section 26C determinations in relating to opal and gem mining around Lightning Ridge in New South Wales;
- three section 26A determinations in relation to mineral development, exploration and prospecting permits respectively, in Queensland; and
- three section 43 determinations regarding land acquisition, mining and opal mining in South Australia.

[50] Three determinations were made in relation to Northern Territory legislation; 13 in relation to Queensland legislation, 3 in relation to South Australian legislation; 4 in relation to New South Wales legislation; and 1 in relation to Western Australian legislation.

4. THE RELEVANCE OF THE FUTURE ACT REGIME FOR MINING

Balancing interests and the nascent character of native title

35. Although the *Mabo* decision was handed down over ten years ago, the law in relation to native title is still developing. For instance, it was only in October 2001 that the High Court found that non-exclusive native title could exist offshore. This highlights that there are a number of important issues about the nature of native title which are still to be determined by the High Court, including the nature and scope of native title under the NTA, and its abandonment and extinguishment. The *Ward* case,[51] handed down on 8 August 2002 provided some important clarification, including that native title is more akin to a 'bundle of rights' than 'ownership' and as such could be partially extinguished. The *Yorta Yorta* case, in which the High Court has reserved its judgment, promises to provide further clarification.

36. As at 5 August 2002 there were 43 determinations of native title across Australia. Of these, 24 have been made by agreement between the parties. In addition, 51 Indigenous Land Use Agreements have been registered with a further 31 in the registration process.

37. Also of particular importance was the streamlining of the right to negotiate process in the 1998 amendments. The right has been removed where it is inappropriate because of the nature of the rights being granted, the minimal impact on the land, or the limited native title rights that can exist. This streamlining has been particularly relevant for mining, with a specific set of mining activities exempted from the right to negotiate process.

38. Importantly, the right to negotiate is only available to registered native title claimants or registered native title bodies corporate; that is, they have to first pass the new, more stringent registration test.[52] This ensures that those negotiating with developers have a credible claim, thereby removing the ambit and unprepared claims which were clogging the NNTT, causing uncertainty for State, Territory and local governments, and delaying many resource developments.[53] In addition, the registration test has led to the merging of a number of existing native title claims, making it easier for those in the industry who deal with native title parties.

39. The NTA also allows for a State or Territory to apply its own regime in relation to mining and relevant compulsory acquisitions in certain circumstances, enabling State and Territory governments to integrate native title procedures into their own land management systems.[54] These provisions provide States and Territories with the

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[51] *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 (8 August 2002) (Ward).

[52] Sections 190A to 190D of the NTA.

[53] Although a claim can continue in the Federal Court even if it fails the registration test, it will generally not attract the procedural rights given to registered claims, for example the right to negotiate.

[54] The NTA provides a process for States and Territories to replace the right to negotiate with other procedural rights on pastoral lease and reserved land. These provisions are set out in paragraph 32 above.

opportunity to implement native title processes which are relevant to conditions at the local level.

40. The statistics provided by the NNTT in their submission to the current inquiry indicate that the future act regime is increasingly delivering certainty and results for indigenous and mining groups. For instance, the NNTT notes that 'the vast majority of applications for exploration related tenements in Western Australia (11,351 notices or 67.5% of all those submitted) have been granted without attracting an objection to the expedited procedure and, apart from the statutory four month notification period, have not incurred delays.'[55] As of June 2002, approximately 97% of future act maters generated in Australia were based in Western Australia. The NNTT also notes that, as of the date of their submission, the Tribunal had not determined that a future act cannot be done.[56]

Agreement-making

41. The ILUA provisions introduced in the 1998 amendments to the NTA have proved a popular option. One of the benefits of negotiating an ILUA is that certainty is provided for all parties by providing that a registered ILUA will bind all native title holders in an area, not just parties to the agreement, and that future acts carried out in accordance with a registered ILUA will be valid.[57] In addition, ILUAs can cover a wide range of issues. Allowing parties to agree on procedures that are tailored to meet their particular needs also provides flexibility.

42. After examining evidence of the first three years of experience with the new ILUA regime, the Parliamentary Joint Committee (PJC) on Native Title and the Aboriginal and Torres Strait Islander Land Fund,[58] unanimously concluded:

> The ILUA system was developed after broad consultation and enjoyed widespread support at the time of its introduction in September 1998. ILUAs were seen to offer a practical, quicker and more cost-effective means of resolving competing land uses in the native title context at a local level. About three years of experience have demonstrated that ILUAs have the capacity to live up to their promise, with a number of agreements now registered, and many more in the process.[59]

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55 See NNTT Submission at page 5.

56 Ibid at page 3.

57 Sections 24EA and subsections 24EB(1) and (2) of the NTA.

58 The Report of the inquiry of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund into Indigenous Land Use Agreements (the PJC Report) was adopted unanimously by the Committee and tabled in both houses of Parliament on 26 September 2001.

59 PJC Report, paragraph 8.8.

43. More specifically, the PJC found that:

> ... the registration provisions of ILUAs contained within the Act provide a fair and workable balance between the needs of parties to complete commercial transactions, and the need to ensure indigenous interests have been adequately secured.[60]

44. The mining community has taken advantage of the flexibility and certainty provided by ILUAs to negotiate innovative agreements that allow exploration and mining tenements to be granted.[61] For instance, mining companies have entered into broad 'framework' agreements that are structured to avoid the multiple negotiation of similar issues in relation to each new project or activity in an area which may affect native title.[62] Attempts to negotiate State-wide ILUAs by State governments to address backlogs of exploration permits also represent growing recognition of the potential usefulness of ILUAs, but experience to date shows that these negotiations are complex.[63]

45. ILUAs allow for mutual respect, recognition and goodwill between indigenous people, government, developers and the general public. It is likely that as these relationships mature, and as experience, capacity and confidence in the process is gained, the expectations of parties negotiating ILUAs will gradually become more aligned and the process of agreement-making will become quicker and easier.

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[60] PJC Report, paragraph 7.70. The PJC also concluded that:
- ILUAs offer greater certainty to all parties, are cost-effective, and engage stakeholders in a positive dialogue, laying a positive groundwork for future relationships between all relevant groups;
- ILUAs have the potential to address numerous practical issues that litigation cannot resolve, such as the provision of jobs, improved infrastructure or better services;
- addressing these issues at the local level allows communities to develop their own solutions and act to strengthen local communities in the process.

[61] The growing interest of the mining industry in using ILUAs was remarked upon by the PJC. After considering the many submissions made by industry, the PJC concluded that the mining industry seems to have embraced ILUAs as a very practical vehicle for obtaining the permits they require. See PJC Report at paragraph 5.36.

[62] Examples include:
- the agreement concluded between Giants Reef Mining Ltd with the Central Land Council over 7500 sq km around Tennant Creek;
- the Kalkadoon ILUA made between the Queensland Government and a number of mining companies including MIM Holdings Ltd. It operates by enabling explorers to opt into the ILUA by signing a Deed. See http://www.nrm.qld.gov.au/mines/nativetitle/kerg.html.;
- the statewide framework agreement made between the South Australian Government, ALRM, SAFF and SACOME.

[63] See (2002) 21 *AMPLJ* 234. A statewide Model ILUA was launched for Queensland on 1 October 2001. A Model ILUA is designed as a basis for future ILUAs. See http://www.nrm.qld.gov.au/mines/nativetitle/ilua.html. See also Ben Zilmann, 'State-wide ILUAs – Friend or Foe?' [2001] AMPLA Yearbook who argues at 536 that a standard agreement which is successful in achieving support from all key stakeholder groups would go a long way towards simplifying the future act process which miners and native title claimants alike often find to be daunting and complicated.

Native title and mining development

46. Native title is one of the factors mentioned as a reason for delays in the processing of mining lease applications. Available evidence suggests that the position is not straightforward. A number of recent analyses suggest that the backlog of mining applications are the result of a complex mix of local, regional and national economic, political and legal factors. In Western Australia, for instance, the Auditor-General recently found that while native title lengthened the time to obtain a mineral lease, significant delays occurred in the initial recommendation to grant by the Mining Registrar and by applicants not responding to requests for information.[64] Lower world commodity prices can also affect levels of exploration.

47. The situation also varies from region to region. For example, the Queensland Mining Council has cited difficulties with native title, as contributing to a decline in exploration.[65] In contrast, exploration activity in the Northern Territory has been described as being at an 'all time high'.[66]

48. It is also argued that there is a lack of necessary expertise and experience for parties to participate effectively in negotiations, and that this is compounded by an absence of a guaranteed outcome and lack of financial resources. The Government recognises that it is important that all parties are adequately resourced and have access to the skills and expertise necessary to be able to participate actively in the native title process. The Government therefore keeps the resourcing of the native title system as a whole under regular review.[67]

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[64] The Auditor-General notes "irrespective of the impact of native title, the mineral titles application process can take as long as 22 months. Significant delays occur in the initial recommendation to grant by the Mining Registrar and by applicants failing to respond to requests for information. Of the 1,798 applications lodged in the first six months of 2000, 50 per cent had still to be referred under the Native Title Act 1993 (Cth) at the time of this audit examination." See *Level Pegging: Managing Mineral Titles in Western Australia*, Report No 1 - June, 2002, at page 7.

[65] "Exploration hits lowest level for 20 years", *Australian Mining Times*, 1 July 2002, at page 24.

[66] "Territory exploration hits an all time high", *Australian Mining Times*, 1 July 2002, at page 6.

[67] Government reviews of the resourcing of the native title system have resulted in an increase of funding in recent budgets. The Government committed an additional $86 million to native title over four years in the 2001-2002 Budget.

Schedule

FUTURE ACTS

Subdiv of the NTA	Future acts# and other activities covered	Validity of act	Procedures	Effect on native title	Compensation
E	Any acts covered by a registered ILUA – onshore and offshore	Valid only if ILUA is registered at the time.	Registration (notice to representative body)	Extinguished if native title is surrendered, otherwise the NEP* applies	Under ILUA, other than in exceptional circumstances
F	Any acts with non-claimant protection (that is, acts done in an area where there is unopposed non-claimant application or native title is determined not to exist) – onshore and offshore	Valid only if done while 's.24FA protection' in place.	Application for non-claimant determination made including notice to representative body, and no application registered in response within timeframe	Determined by the common law	Yes
G	Authorisation of primary production activity on pastoral and agricultural leases and grazing and taking water on land adjacent to freehold etc – onshore and offshore ° includes aquaculture leases	Valid.	Notice to registered claimants, bodies corporate and representative bodies and opportunity to comment in some cases	NEP* applies	Yes
H	Authorisation of acts relating to surface and subterranean water, living aquatic resources and airspace – onshore and offshore	Valid.	Notice to registered claimants, bodies corporate and representative bodies where act is lease, licence, permit etc, and opportunity to comment	NEP* applies	Yes

Subdiv of the NTA	Future acts# and other activities covered	Validity of act	Procedures	Effect on native title	Compensation
I	Acts done as a result of pre-1996 undertakings and renewals, regrants and extension of term of valid grants – onshore and offshore	Valid.	Procedural rights depend on the type of activity. 1. Where the act extinguishes native title, notice to registered claimants, bodies corporate and representative bodies, and the opportunity to comment. 2. Where the act is a renewal of a non-exclusive agricultural lease, or a non-exclusive pastoral lease for a longer term than the original, or in perpetuity, section 24MD(6B) (which include the right to object and be consulted) procedural rights apply. 3. Where the act is the renewal, re-grant, remaking or extension of the term of a lease etc that creates a right to mine, the right to negotiate will apply.	Pre-1996 undertaking acts which give exclusive possession extinguish, otherwise NEP* applies	Yes

Subdiv of the NTA	Future acts# and other activities covered	Validity of act	Procedures	Effect on native title	Compensation
J	Certain acts done on area reserved or proclaimed pre-1996 – onshore and offshore	Valid.	Must give notice to registered claimants, bodies corporate and representative bodies where act is a 'public work' or the creation of a plan of management for a national park, and opportunity to comment	Public works extinguish, otherwise NEP* applies	Yes
K	Acts relating to construction or use of facilities for services to the public – onshore	Valid.	Where land is subject to non-exclusive pastoral or agricultural lease then same procedural rights as lessee; otherwise same procedural rights as freeholder##	NEP* applies	Yes
L	Low impact acts (which cannot be grants of freehold, leases, or acts that allow excavation, mining, construction of fixtures, storage etc of garbage etc). Act may only be done before native title determined to exist – onshore and offshore – and cannot continue thereafter.	Valid.	No procedures required	NEP* applies	No

Subdiv of the NTA	Future acts# and other activities covered	Validity of act	Procedures	Effect on native title	Compensation
M	Legislation that applies in the same way to native title holders as it would if they held freehold title, or other acts that could be done on the land if the native title holders were freeholders (eg compulsory acquisition and mining) and there is a law in relation to the protection of sites of particular significance – onshore	Valid, subject to compliance with the right to negotiate where it applies.	Right to negotiate applies to some mining and compulsory acquisitions for 3rd parties; otherwise, native title holders get the same procedural rights as freeholders##; other compulsory acquisitions invoke a right to be consulted in addition to the rights of freeholders	Non-discriminatory compulsory acquisition extinguishes; otherwise NEP* applies	Yes
N	Acts done offshore	Valid.	Same as would be applicable if the native title holders had corresponding rights or interests##	Non-discriminatory acquisition extinguishes, otherwise NEP* applies	Yes

\# A future act must be one which extinguishes native title rights and interests, or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise (section 227 of the NTA).

* Non-extinguishment principle (section 238 of the NTA).

\## One way in which native title holders can be taken to have been notified where others would have such a right is for the representative body and registered native title claimants to be notified; other procedural rights can be taken to have been satisfied where any registered claimants have received those rights (otherwise the representative body must be given an opportunity to comment).