National Native Title Tribunal
Supplementary Submission to the House of Representatives Standing Committee on Industry and Resources

INQUIRY INTO
RESOURCES EXPLORATION IMPEDIMENTS

28 March 2003

[This Supplementary Submission updates the Tribunal's Submission dated 20 July 2002. It follows the numbering used in the original Submission]

The Hon Christopher Sumner AM
Deputy President
National Native Title Tribunal

1. EXECUTIVE SUMMARY

(1) On 26 July 2002, the National Native Title Tribunal made a submission to the House of Representatives Standing Committee on Industry and Resources Inquiry into Resources Exploration Impediments.

(2) Since that time there have been some important developments which require the submission to be updated. In particular:

- decisions of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, *Western Australia v Ward* [2002] HCA 28 and *Wilson v Anderson* [2003] HCA 29 have further developed our understanding of native title.
- On appeal Queensland's Alternate State Procedures were found to be valid by the Full Federal Court in *Queensland v Central Queensland Land Council* [2002] FCAFC 371 but the Queensland Government has decided not to retain those Procedures but return to the Commonwealth right to negotiate regime under the *Native Title Act* 1993 (Cth).
- as a result of the Northern Territory Government using the *Native Title Act* it no longer has a backlog of exploration licences.

3. BACKGROUND TO THE FUTURE ACT REGIME UNDER THE *NATIVE TITLE ACT* 1993

Update: As at 25 March 2003 in Western Australia, 65.4% (original submission 67.2%) of s 29 notices which asserted the expedited procedure did not attract objections and were cleared for grant.

3.1 National Future Act Processes

Correction: Page 6, third dot point should read:

- 'Of the tenements notified under expedited procedure provisions, and which are out of the notification period 775 (44%) were not objected to by native title parties, effectively clearing them for grant.'

4. PROMOTION OF AGREEMENTS

4.10 Indigenous Land Use Agreements (ILUA)

The following is an updated table of the ILUA statistics to 25 March 2003. It shows a breakdown by State, type and agreement subject matter of all 74 ILUAs registered in Australia as of 25 March 2003. Readers should note that many ILUAs cover more than one subject area. The subject areas below indicate the primary purpose of the ILUA.

Type of Agreement	Agreement Subject Matter	NSW	VIC	NT	QLD	WA	SA	Total
Area Agreement	access				7			
	extinguishment		1	1				
	infrastructure	1			9			
	mining	2	3	12	12	1		
	pipeline		2					
	government				5			
	development	1	4		3		1	
Area Agreement Total		4	10	13	36	1	1	65
Body Corporate Agreement	access				8			
	infrastructure				1			
Body Corporate Agreement Total					9			9
TOTAL		4	10	13	45	1	1	74

4.12 Resolution of matters by arbitration

Although not directly related to prospecting or exploration tenements, the following are some examples of important projects which have been approved following NNTT arbitration or by agreement after arbitration commenced. They indicate that where negotiations in good faith have not produced an agreement resort to arbitration is possible and the Tribunal will make a determination.

- *Century Zinc Project* (Qld): (see above in original submission)
- *Mungari Industrial Park* (Kalgoolie, WA): Compulsory acquisition of native title rights and interests for establishment of an industrial park. Determination with conditions on 20 February 1998 following a decision that the Government party had negotiated in good faith.
- *Wickham Point* (Darwin): Compulsory acquisition of native title rights and interests for establishment of LNG plant. Determination with conditions after inquiry on 29 September 1998 following a decision that the Government party had negotiated in good faith.
- *Yallourn Energy* (Vic): Expansion of coalfields. Determination by consent after 3 days of hearing on 17 September 1999.
- *Normandy Pajingo* (Qld): Agreement following commencement of arbitration and decision that the Government party had negotiated in good faith.
- *South Blackwater Coal* (Qld): Agreement following commencement of arbitration and NNTT decision that the Government party had negotiated in good faith.
- *Murrin Murrin Project - Anaconda Nickel* (WA): Various determinations that Mining Leases may be granted subject to conditions.

- *Burrup Peninsula* (WA): Compulsory acquisition of native title rights and interests for a petro chemical industrial estate with potential capital investment of $6 billion. Agreement on 16 January 2003 following a decision that the Government party had negotiated in good faith and after hearing completed and decision pending.

5. SIGNIFICANT DEVELOPMENTS IN THE LAW OF NATIVE TITLE

Since July 2002, the High Court has delivered three decisions that have had significant effect on the law of native title.

- ***Western Australia v Ward* [2002] HCA 28 (delivered 8 August 2002)**

  Some of the major points emerging from the majority decision are as follows:

  - native title is a bundle of rights that can be partially extinguished;
  - any particular native title right in that bundle will be extinguished if it is found to be inconsistent with any non-native title rights that exist (or existed in the past) over the area claimed. If the degree of inconsistency is only partial, then native title is extinguished only to the extent of the inconsistency;
  - there is an exception where the NTA and analogous state and territory native title legislation otherwise provide (e.g. s 238 of the NTA). Where this is the case, the native title right is suspended to the extent of any inconsistency for the duration of the non-native title interest, rather than being extinguished;
  - proof of recent use or occupation of the claim area is not necessarily required. As yet, there is no decision from the High Court as to whether or not a spiritual connection alone would be sufficient under the NTA;
  - the pastoral leases considered in this case were granted under either the WA or NT legislation and were found to be non-exclusive pastoral leases (save for a special lease referred to below). They were also 'previous non-exclusive possession acts' as defined in the state native title legislation and the NTA and confirmed as being acts that partially extinguished;
  - the grant of such a pastoral lease is not necessarily inconsistent with native title rights and interests continuing to exist in relation to the leased area. Many native title rights and interests may have survived the grant of the pastoral lease (i.e. those native title rights in the bundle that are *not* inconsistent with the rights granted under the pastoral lease), However, a native title right to control access to, and the use of, the leased area was found to be inconsistent with the pastoral lessee's rights to access and use the land and therefore that native title right was extinguished. As there was insufficient material before the High Court to allow for a final determination of the degree of inconsistency between the remaining native title rights claimed and the rights under the lease this matter was remitted to the Full Federal Court;
  - a reservation in favour of Aboriginal people does not define the rights of the native title holders in relation to the lease area, nor does it give the pastoralist the right to exclude native title holders from the land. The state and territory native title

legislation however, provides that the lessee's rights, under the lease, prevail over the native title rights;

- a special lease for grazing purposes granted under s. 116 of the Land Act 1933 (WA) was found to be an exclusive pastoral lease i.e. a pastoral lease that conferred a right of exclusive possession on the lessee. This is completely inconsistent with the survival of any native title and therefore the grant of this lease completely extinguished native title;

- there can be no native title rights over resources that are minerals or petroleum because any such right was extinguished when certain aspects of the WA and NT regimes came into force;

- the grant of a mining or general purpose lease under Western Australian legislation is not necessarily inconsistent with native title rights and interests continuing to exist over the leased area. However, as with pastoral leases, a native title right to control access to, and the use of, the leased area is inconsistent with the right granted under the mining lease to access and use the land for mining purposes and therefore, that native title right is extinguished. Other native title rights and interests (i.e. those that are not inconsistent with rights under the lease) survive but lessee's rights have priority. As there was insufficient material before the High Court to allow for a final determination of the degree of inconsistency between the remaining native title rights claimed and the rights under the lease, this matter was remitted to the Full Federal Court.

- ***Members of the Yorta Yorta Aboriginal Community v Victoria*** **[2002] HCA 58 (delivered 12 December 2002)**

This case is significant for its clarification of the meaning of 'traditional' laws and customs, as that expression is used in the definition of native title found in the NTA. Some of the major aspects of the majority decision are:

- those seeking a determination that native title exists must show that they have a vital society i.e. a body of persons that has been and continues to be united in and by its observance and acknowledgment of a body or system of laws and customs from the time of the assertion of sovereignty to the present;

- traditional laws and customs are those that find their origin in the body of laws and customs acknowledged and observed by the claimants' ancestors at the time of the assertion of sovereignty;

- showing that knowledge of the traditional ways has survived, especially in the case where the original society or community has dispersed, may not be sufficient;

- some changes or adaptations to law and custom over time or interruption of the enjoyment or exercise of native title rights or interests, may not necessarily be fatal to a native title application;

- when the society whose laws or customs existed at sovereignty ceases to exist, the rights and interests in land and waters to which these laws and customs gave rise, cease to exist i.e. native title ceases to exist. It is not sufficient to show that the content of

the former laws and customs have been adopted by some new society, even where that new society is made up of the descendants of the society that existed when sovereignty was asserted.

- ***Wilson v Anderson* [2002] HCA 29 (delivered 8 August 2002)**

This decision concerned the effect of a perpetual pastoral lease granted under s. 23 of the *Western Lands Act 1901* (NSW) on native title.

The majority found that the lease was an exclusive pastoral lease i.e. it conferred a right of exclusive possession on the lessee. This is completely inconsistent with the continued existence of native title. Further, the lease in question is a previous exclusive possession act and is confirmed as completely extinguishing native title under the state's native title legislation. Therefore, unless the NTA or the state analogue otherwise provides (and this was not the case here), native title is wholly extinguished over the leased area.

Conclusion

Determining whether or not native title currently exists in relation to a particular area of land and waters and, if so, to what extent, is a complex exercise that involves multiple steps, including (in most cases) an examination of the history of dealings with the area concerned. It is only at the end of this long process, that it can be determined which of the rights and interests that the relevant Indigenous people possess under their traditional law and custom, will be recognised as native title. Those seeking to access and use land over areas where native title may exist, can use the future act regime, including indigenous land use agreements, to ensure that any interest they obtain over the area is valid.

8. THE DIFFERING APPROACHES OF STATE AND TERRITORY GOVERNMENTS

8.1 Western Australia

8.1.3 State Government Initiative to Address the Backlog of Mineral Tenements

Following the release of the Technical Taskforce Report on Mineral Tenements and Land Title Applications in November 2001 the WA Government established the Heritage Protection Working Group (chaired by Member Bardy McFarlane of the NNTT) and a Mining Recommendation Working Group to consider options raised in the Taskforce Report for addressing the backlog of exploration and mining tenements to deal with their future processing.

Both these Groups (which contain representatives of Government, industry and NTRBs) are actively working towards finalisation of recommendations. The Heritage Protection Working Group is considering the adoption of heritage agreements based on each NTRB region. When finalised the heritage agreements will provide a basis for the expedited procedure to be attracted without objection once agreed to by the proponents, prospectors or explorers. The Group is also examining the use of a Register which will avoid the need for repeated heritage surveys over the same area. When in place it is expected that the number of objections will be reduced.

The Mining Recommendations Working Group is examining, among other things, how to deal with the issue of Mining Leases which are only to be used for further exploration. A major part

of the backlog are Mining Leases (of which 3 214 are yet to be submitted to the NTA process). Most of these Mining Leases will only be sought to enable further exploration and will never be used for productive mining (see above).

According to the WA Department of Industry and Resources as at 28 February 2003, the backlog consisted of:

Applications	Prospecting	Exploration	Mining	Other	Total
Applications awaiting submission to NTA processes	1 742	2 477	3 214	133	7 566
Applications currently in the NTA advertising period	413	578	101	4	1 096
Applications subject to NTA processes (objection/negotiation/mediation / determination)	434	651	1 816	100	3 001
TOTAL	2 589	3 706	5 131	237	11 663

As already explained problems caused under the NTA by Mining Leases granted initially only for the purposes of exploration and not intended for productive mining were pointed out by the Tribunal in determinations it made in 1996. If this issue can be dealt with in one or other of the ways suggested by the Technical Taskforce, then the backlog of Mining Leases will be more easily dealt with.

8.2 Queensland

8.2.4 Queensland reverts to the Right to Negotiate Provisions of the Native Title Act 1993 (Cth) to Process Mineral Tenements

On 27 March 2002, the Full Federal Court overturned Wilcox J's decision and held that the Commonwealth Attorney-General's s 43 determinations were valid (*Queensland v Central Queensland Land Council Aboriginal Corporation* [2002] FCAFC 371), thus reinstating Queensland's Alternative State Provisions. Despite this decision the Queensland Government has decided to abandon its Alternative State Provisions and revert to processing mineral tenements through the right to negotiate provisions of the *Native Title Act* 1993 (Cth). Legislation is currently before the Queensland Parliament. All new applications for mineral tenements made after 31 March 2003 and those already made but not notified under the Alternative State Provisions before 31 March 2003 will be processed through the NTA Scheme.

The legislation enables the Minister to condition prospecting permits and exploration licences to cover the matters referred to in s 237 of the NTA which specifies when the expedited procedure is attracted.

The Government, Queensland Mining Council and Queensland Indigenous Working Group are attempting to negotiate an agreement which will enable the expedited procedure to be attracted, if agreed to by proponent prospectors and explorers.

8.4 Northern Territory eliminates Exploration Licence Backlog

As a result of its use of the expedited procedure under the NTA since 6 September 2000, the backlog of exploration licences resulting from the requirements of the NTA has been eliminated.

As at 1 March 2003, of the 670 notices which asserted the expedited procedure 381 (i.e. 57%) did not result in an objection. Different approaches to objecting to the expedited procedure were adopted by the Northern Land Council (NLC) and Central Land Council (CLC). Until recently the NLC objected to the expedited procedure in most cases whereas the CLC was more selective. The NLC have recently changed its approach and less objections are now expected from native title parties represented by them.

Many objections were resolved by agreement, for instance, the NLC and Rio Tinto reached agreement which led to the withdrawal of a considerable number of objections.

The Tribunal has conducted inquiries and made determinations on the expedited procedure in 81 matters. The expedited procedure was found to be attracted in 78 matters. In each of these matters the Tribunal has provided reasons for its decisions. The matter of *Moses Silver* (*Moses Silver/Ashton Exploration Australia Pty Ltd/Northern Territory*, NNTT DO01/13, John Sosso, 1 February 2002) was treated as a test case and provides a useful guide to the reasons for deciding that the exploration licences could be fast-tracked. It is important to understand that whether the expedited procedure is attracted will depend on facts particular to the claim group objecting and the relevant State or Territory legislation covered the matters dealt with in s 237 of the NTA (i.e. interference with community or social activities, sites of particular significance to the native title parties and major disturbance to land). In the Northern Territory in all but three cases the Tribunal found that the Aboriginal site protection legislation and conditions specifically targeted to reducing the likelihood of the interference and disturbance referred to in s 237 meant that the expedited procedure was attracted. Evidence from the native title party on their community and social activities and the existence of sites of significance mainly over the pastoral estate was considered in the context of the Northern Territory's legislative and regulatory regime. Whether similar findings will be made in other States will depend on a native title party's evidence and the regulatory requirements for exploration in those States.

There are currently only seven active objections in the Northern Territory some of which may proceed to an inquiry and determination.

Section 29 notices were also given in relation to Mineral Claims, Mineral Leases and Extractive Mineral Leases where the notice did not assert the expedited procedure. Currently there are 71 applications which are subject to the normal right to negotiate. The Northern Territory Government has informed the Tribunal that it intends to process those by negotiation which may lead to the Tribunal being requested to mediate (s 31(3) NTA) or arbitrate (s 35 NTA) or the registration of an ILUA.