Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

OPERATION OF THE NATIVE TITLE ACT

Inquiry Into The Effectiveness Of The National Native Title Tribunal

Submission No:17

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RIO TINTO LIMITED

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Submission to Inquiry
on
National Native Title Tribunal

Conducted by
The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund

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1. INTRODUCTION

1.1 Rio Tinto's submission is in response to an invitation made by the Committee for comments regarding the effectiveness of the National Native Title Tribunal (**NNTT**), established under the *Native Title Act* 1993 (Cth) (**NTA**). The more the workability of the NTA is improved, the greater will be the acceptance and preparedness of the entire community to deal with native title in a non-adversarial manner. It is therefore clearly in the interests of all stakeholders that the NNTT operates effectively.

1.2 Rio Tinto was formed in 1995 by the merging, under a dual listed companies structure, of the Australian based CRA Limited and the United Kingdom based The RTZ Corporation plc. The Group is headquartered in London, has a corporate office in Melbourne, and has operations in some 20 different countries worldwide. Some 45% of its assets are in Australia and New Zealand. It is predominantly engaged in the mining and smelting of minerals and metals and is a major producer of iron ore, coal, copper, diamonds, borax and aluminium. It also produces substantial volumes of gold, nickel, zinc, titanium oxide, uranium and industrial salt.

1.3 Rio Tinto's operations in Australia are Hamersley Iron, Robe Iron, Argyle Diamond Mines, Three Springs Talc and Dampier Salt in Western Australia; Ranger Uranium and Merlin Diamonds in the Northern Territory; Coal & Allied, Northparkes Copper/Gold and Peak Gold in New South Wales; Pacific Coal and Comalco Aluminium in Queensland, plus Comalco's smelter in Tasmania. The Company also conducts Australian and South Asian exploration from a base in Perth. A Group's technical services division servicing operations worldwide is based in Melbourne.

1.4 Rio Tinto's policy worldwide is to recognise and work with indigenous peoples. Rio Tinto's preparedness to pursue outcomes with native title parties by agreement is well established, as are the agreements it has negotiated since the commencement of the NTA in 1994.

1.5 Rio Tinto seeks consultative Aboriginal mine development and land access agreements with Aboriginal Traditional Owners and groups

affected by Rio Tinto operations. This is done wherever possible through the agency of designated Representative Bodies under common law contract or right to negotiate (**right to negotiate**) and Indigenous Land Use Agreement (**ILUA**) provisions in the NTA. Since 1996, Rio Tinto Group companies have signed 5 major mine development or 'future act' agreements and over 45 exploration access agreements with Aboriginal Groups. Recent examples are the *Eastern Guruma Agreement* between Hamersley Iron and the Guruma people in the Pilbara region of WA and the *Western Cape Communities Co-Existence Agreement* between Comalco Aluminium and Aboriginal peoples of the western Cape York region of North Queensland, registered as an ILUA in August 2001. In January 2002, Rio Tinto Exploration and the Northern Land Council signed an MOU and Model Exploration and Mining Agreement to provide for exploration access to native title land on pastoral leases in the Northern Territory. This agreement broke a four-year impasse on exploration access to pastoral land in the Northern Territory.

1.6 The majority of Rio Tinto's agreement negotiations have taken place outside NTA processes, reflecting the problematic nature of these processes and resource deficiency in relevant Representative Bodies. The NNTT is acknowledged as a frequent source of valuable advice, information and mediation.

1.7 The NNTT's functions are set out in s 108 of the NTA. Its functions are carried out by Tribunal members and, where provided in the NTA, by the Native Title Registrar. The NNTT may also retain consultants to provide any assistance or mediation that the Tribunal provides under the NTA.[1] In the 2000/01 financial year, the NNTT expended $25,334,000[2] and had an average staffing level of 213.[3] This amount is more than half of the total 2000/01 budget of all Representative Aboriginal / Torres Strait Islander Bodies (**Representative Bodies**) who have a far more demanding role in the operation of the NTA.

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1 NTA: s 131A.

2 The full year budget was $27,138,000, leaving a surplus of $1,804,000. The amount expended ($25,334,000) is referred to as the NNTT's budget for the purpose of this submission: NNTT *Annual Report 2000/01,* p. 43.

3 NNTT *Annual Report 2000/01*: p. 43.

1.8 The functions of the NNTT are predominantly that of a facilitator of processes which are driven by governments, Representative Bodies, proponents and, where the mediation of native title applications is concerned, also the Federal Court. Those functions that directly affect Rio Tinto are:

(a) the registration of native title determination applications (**native title applications**) by the Native Title Registrar under s 190A of the NTA which:
- determines whether Rio Tinto is required to satisfy the right to negotiate provisions of the NTA in relation to the statutory rights of registered native title claimants;[4] and
- identifies registered native title claimants for the purpose of negotiating an Area ILUA.[5]

(b) the notification of native title applications by the Native Title Registrar under s 66 of the NTA after a registration decision has been made which enables Rio Tinto to become a party to a proceeding where its interests are affected;

(c) the mediation[6] of native title applications by a NNTT member to facilitate agreed determinations under sections 87 or 86F which provide the basis for certainty by resolving who holds native title over areas that may be subject to right to negotiate processes;

(d) the mediation of right to negotiate matters by a NNTT member to secure agreements under s 31(1)(b) of the NTA;

(e) the arbitration of right to negotiate matters by a NNTT member (expedited procedure objections under s 32(4) and determinations in relation to a proposed future act under s 38 of the NTA);

(f) the provision of assistance to persons wishing to negotiate an Indigenous Land Use Agreement (**ILUA**);[7] and

(g) the registration of ILUAs by the Native Title Registrar.[8]

2. RECOMMENDATIONS

2.1 Overall, the most significant restraint on the effectiveness of the NNTT is the inadequate funding of Representative Bodies to carry out their functions. Representative Bodies are a fundamental component of the native title system and constraints on their performance will necessarily impact on the effectiveness of the NNTT. Representative Bodies drive the NTA processes that the NNTT facilitate – without that drive there is nothing for the NNTT to facilitate. It is essential that the current imbalance between the funding of the NNTT and of Representative Bodies be rectified. Similarly, internal systems, review and provision of project management training for Representative Bodies would greatly facilitate improvement.

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4 NTA: Subdivision P of Division 3 of Part 2.

5 NTA: s 24CD(2)(a).

6 NTA: Division 1B of Part 4.

7 NTA: ss 24BF, 24CF, 24DG and 108(1B).

8 NTA: s 24DL, s 24CB(e) and s 24CK

Specific recommendations

Registration of native title applications

2.2 The legislative scheme for resolving overlapping native title applications should be revisited with a view to significantly reducing the number of overlapping native title applications, particularly as the resolution of the majority of native title applications by agreement, or otherwise, will not occur for a considerable period. The NTA could be amended to accommodate a process directed to the reduction of multiple registered overlapping native title applications in accordance with the following principles:

(a) upon the giving of notice by a government, a relevant Representative Body or a grantee party, the NNTT to mediate between the overlapping registered native title claimants to reach their agreement to reduce the number of registered native title applications to one;

(b) mediation to cease and the matter to be referred to another member of the NNTT for determination at the earlier of:

- 6 months;
- the request of one of the registered native title claimants; or
- the mediating NNTT member determines that there is no likelihood that agreement will be reached;

(c) the member of the NNTT to determine which of the registered overlapping native title applications shall remain on the Register of native title claims in accordance with the following principles:

- the determination process should only affect the overlap areas;
- when considering conflicting native title applications, the application certified by a Representative Body should have priority (ie. retained on the Register) over applications that are not certified;

- subject to the certification (priority) rule relating to conflicting native title applications, other grounds for removal of a conflicting native title application from the Register should be:
    - the removed registered native title claim group is the same as the retained registered native title claim group; or
    - if one or more of the registered native title claim groups is a part (subset) of another broader registered native title claim group, or so related as to be a part (subset) of the broader registered native title claim group – only the application lodged by the broader group should be retained on the Register; and
- where there is an agreed or disputed overlap between discrete native title claim groups, multiple overlapping claims can be retained on the Register;

(d) priority for the application of the mediation and arbitration process should be given to overlapping native title applications that are subject to future act processes; and

(e) the provision of appropriate resources to the NNTT and Representative Bodies.

The Committee should urgently convene an inquiry for the purpose of considering amendments to the NTA to give effect to this recommendation. (para. 3.6)

2.3 The NNTT should implement a practice of completing every registration test for native title applications within a relatively short period or regulations should be made[9] prescribing this requirement. (para. 3.11)

Mediation of native title applications

2.4 Representative Bodies and native title parties should have access to appropriate resources and appropriately qualified people to assist in the mediation of native title applications. Operational funding for Representative Bodies should be increased for this purpose. (para. 5.10)

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[9] NTA: s 215(1)(b).

2.5 The NNTT should structure the mediation of native title applications in a manner that ensures that non-native title parties are involved at the outset and their views and interests are accommodated from that stage, rather than the current practice where governments and native title claimants often exclude non-native title parties until they have reached an in-principle negotiated position. (para. 5.12)

Right to Negotiate

2.6 Representative Bodies and native title parties should have access to appropriate resources and appropriately qualified people to assist in the negotiation of right to negotiate agreements. Operational funding for Representative Bodies should be increased for this purpose. (para. 6.4)

2.7 The skills base within the NNTT for the mediation of large commercial agreements should be increased. (para. 6.6)

2.8 Although it is acknowledged that the time required to determine arbitral applications made under s 35 of the NTA will vary, the NNTT target for making such a determination in all cases should be within 6 months from the application date for all applications as is contemplated by the NTA. (para. 6.11)

Indigenous Land Use Agreements

2.9 The skills base of NNTT members should be increased, with a greater emphasis on persons capable of effectively mediating the negotiation of large commercial agreements. (para. 7.5)

2.10 The NNTT would be more effective in assisting with the negotiation of ILUAs if it committed greater levels of resources for that purpose. Such assistance should include the provision of:

- accurate geo-spatial information to the parties;
- funding for meetings relevant to the negotiations;
- where necessary, funding Representative Bodies and native title parties to obtain expert technical and legal advice; and
- where necessary, mediators expert in the negotiation of complex commercial agreements.

This could be clarified in regulations made under s 136H of the NTA. (para. 7.7)

2.11 Representative Bodies and native title parties should have access to appropriate resources and appropriately qualified people to assist in the negotiation of ILUAs. Operational funding for Representative Bodies should be increased for this purpose. (para. 7.9)

2.12 The Native Title Registrar should adopt a more practical approach to the assessment of an application for registration of an ILUA, based on substantial compliance,. Adopting such an approach would reduce cost and delay and the registration of an ILUA would not be threatened due to minor process transgressions. (para. 7.12)

Administrative/Procedural Matters

2.13 The NNTT should provide more specific results, based on real property descriptions, in response to searches of its registers. It should provide register extracts electronically via the internet. (para. 8.2)

2.14 The NNTT should seek to improve its website so that information relating to items such as future act determinations and the status of native title applications is easier to access. (para. 8.4)

2.15 The NNTT should ensure that the duties of its staff who provide important information to the public (such as case managers) are maintained in their absence. (para. 8.6)

2.16 Access to the NNTT's geo-spatial unit from other states and territories should be improved. Given its national operation, the NNTT should attempt to have its mapping system complement those of all state and territory agencies. (para. 8.8)

3. REGISTRATION OF NATIVE TITLE APPLICATIONS

Overlapping Claims

3.1 The added cost, complexity and delay associated with negotiation with multiple, competing native title parties is a significant inhibiter of agreements under the NTA.

3.2 One of the primary purposes of the registration test for native title applications introduced by the 1998 amendment of the NTA was the reduction of overlapping claim groups with whom governments and proponents are required to negotiate.[10] The removal of overlapping native title applications greatly simplifies the negotiation of agreements, significantly reducing the costs and time involved. Overall, the effectiveness of the NNTT in reducing the number of overlapping native title applications through the application of the registration test has been limited.

3.3 Since the introduction of the registration test, the NNTT has applied the test to all applications lodged under the old Act and all new applications made under the amended Act. This has placed a significant resource burden on the NNTT – in the 2000/01 year, it committed 10% of its budget ($2,509,000) to the registration test.[11]

3.4 Whilst it is acknowledged that the new registration test, the 1998 amendments to the making of native title applications[12] and the efforts of the Federal Court in managing native title applications, have effected a rationalisation of a number of overlapping claims, many overlapping claims remain registered. In particular, the NNTT's acceptance that each native title claim group can identify itself in a manner that satisfies s 190C(3) has largely negated the operation of that provision so that registered overlapping native title applications remain common.

3.5 Whilst the registration of overlapping native title applications remains a relatively easy option, the prospects of Representative Bodies resolving such disputes under s 203BF of the NTA are remote. There is no incentive for competing native title claimants to resolve disputes over overlapping native title applications if they can achieve the registration of their application[13] in any event.

3.6 ***Recommendation:*** The legislative scheme for resolving overlapping native title applications should be revisited with a view to significantly reducing the number of overlapping native title applications, particularly

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10 See NTA: s 190C(3), s 190B(3) and s 190(1).

11 NNTT *Annual Report 2000/01*: p. 43.

12 See NTA: s 61(1).

13 Which affords registered claimants the procedural rights in the right to negotiate (NTA: Subdivision P of Division 3 of Part 2) and requirement that they must be a party to an area ILUA (NTA: s 24CD(2)(a))

as the resolution of the majority of native title applications by agreement, or otherwise, will not occur for a considerable period: see Part 5. The NTA could be amended to accommodate a process directed to the reduction of multiple registered overlapping native title applications in accordance with the following principles:

(a) upon the giving of notice by a government, a relevant Representative Body, and where relevant, a grantee party, the NNTT to mediate between the overlapping registered native title claimants to their reach an agreement to reduce the number of registered native title applications to one;

(b) mediation to cease and the matter to be referred to another member of the NNTT for determination at the earlier of:

- 6 months;
- the request of one of the registered native title claimants; or
- the mediating NNTT member determines that there is no likelihood that agreement will be reached;

(c) the member of the NNTT to determine which of the registered overlapping native title applications shall remain on the Register of native title claims in accordance with the following:

- the determination process should only affect the overlap areas;
- when considering conflicting native title applications, the application certified by a Representative Body should have priority (ie. retained on the Register) over applications that are not certified;
- subject to the certification (priority) rule relating to conflicting native title applications, other grounds for removal of a conflicting native title application from the Register should be:
    - the removed registered native title claim group is the same as the retained registered native title claim group; or

- if one or more of the registered native title claim groups is a part (subset) of another broader registered native title claim group, or so related as to be a part (subset) of the broader registered native title claim group – only the application lodged by the broader group should be retained on the Register; and

- where there is an agreed or disputed overlap between discrete native title claim groups, multiple overlapping claims can be retained on the Register;

(d) priority for the application of the mediation and arbitration process should be given to overlapping native title applications that are subject to future act processes; and

(e) the provision of appropriate resources to the NNTT and Representative Bodies.

The Committee should urgently convene an inquiry for the purpose of considering amendments to the NTA to give effect to this recommendation.

Time requirements for registration

3.7 The NNTT has set a goal of completing the registration test for 70% of native title applications within 2 months.[14] No time requirements are imposed upon the Native Title Registrar by the NTA for carrying out the registration test other than that the Registrar must use his or her best endeavours to finish considering a claim by the end of 4 months after the notification date of a right to negotiate notice given under s 29.[15]

3.8 Where there are no s 29 notices, lengthy delays can occur particularly where the Registrar considers the claim will fail the registration test. This appears to occur predominantly with native title applications that are lodged without the assistance of Representative Bodies.[16] In those circumstances, the Native Title Registrar has adopted a practice that

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14 NNTT *Annual Report 2000/01*: p. 51.

15 NTA: s 190A(2).

16 NNTT *Annual Report 2000/01*: p. 52.

affords native title claimants a lengthy period in which to provide further information to satisfy the registration test.[17]

3.9 This can significantly extend the period of uncertainty regarding the status of a native title application and may act as a disincentive to, or significantly delay, a proponent proceeding with the negotiation of an indigenous land use agreement (area agreement)[18] (**Area ILUA**), particularly as all registered native title claimants must be parties to such an agreement[19].

3.10 As notification of a native title application will not commence until after the registration test has occurred,[20] lengthy delays in registration will also delay the process of determining the existence of native title either by mediation and agreement or otherwise by the Federal Court.

3.11 ***Recommendation:*** The NNTT should implement a practice of completing every registration test for native title applications within a relatively short period or regulations should be made[21] prescribing this requirement.

4. Notification Of Native Title Applications

4.1 In the 2000/01 year, the NNTT expended 9% ($2,259,000) of its budget on the public notification of native title applications by the Native Title Registrar under s 66 of the NTA.[22] This entailed, where possible, determining all interested parties affected by 161 claimant applications, 12 non-claimant applications and 24 ILUA applications, which resulted in extensive advertising and 43,374 notification letters.[23] The high costs appear to arise from difficulties in accessing accurate tenure information from States and Territories in a timely and cost effective manner.[24] Although not stated in the 2000/01 Annual Report, it would appear that

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17 See para 4.3.3 of NNTT *Registration Test Procedures for Claimant Applications*.

18 NTA: Subdivision C of Division 3 of Part 2.

19 NTA: s 24CD(2)(a).

20 NTA: s 66(6).

21 NTA: s 215(1)(b).

22 NNTT *Annual Report 2000/01*: pp. 43 and 91.

23 NNTT *Annual Report 2000/01*: pp. 89.

24 NNTT *Annual Report 2000/01*: pp. 87, 88 and 91.

the period required for the notification of a native title application can be lengthy and needs to be shortened.

5. Mediation of Native Title Applications

Mediation in 2000/01

5.1 In the 2000/01 year, the NNTT expended 31% ($7,780,000) of its budget on mediating claimant and non-claimant native title applications and compensation applications.[25] Whilst it attributes 93 'agreements' to this expenditure, it concedes that those agreements:

> …may include full consent determinations that provide for the recognition of native title, as well as framework agreements between parties that provide the groundwork for more substantive outcomes in the future.[26]

5.2 During the 2000/01 year, 13 consent determinations of native title were registered,[27] of which 11 were in the Torres Strait[28] and greatly facilitated by the attitude of the Queensland Government and the presence of few third parties.[29] No information was provided by the NNTT in its 2001/01 Annual Report as to the number of substantive mediations of native title applications which it is conducting, or the progress of such mediations. Conversely, no information was given as to the number of native title applications that are technically in mediation, but which are effectively in abeyance. It is therefore impossible to determine the effectiveness of the NNTT in relation to the expenditure of $7,780,000. However, it is reasonable to assume from the following that the overall effectiveness of mediation is significantly less than was originally anticipated.

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25 NNTT *Annual Report 2000/01*: pp. 43 and 69.

26 NNTT *Annual Report 2000/01*: p. 66.

27 NNTT *Annual Report 2000/01*: p. 54.

28 NNTT *Annual Report 2000/01*: pp. 55 and 56.

29 In fact the NNTT appears to have received considerable criticism for its role in the mediation of the claims in the Torres Strait: see *National Native Title Tribunal: Effective mediator or bureaucratic albatross? A users perspective* Indigenous Law Bulletin (July 2002) Vol. 5, Issue 18; pp. 4 – 7.

Prompt resolution of uncertainty

5.3 The mediation of native title applications[30] by a NNTT member after it has been referred to the NNTT by the Federal Court[31] has 2 purposes:

- to facilitate a prompt resolution of certain native title applications through agreed determinations under sections 87 or 86F of the NTA; and
- identify those native title applications in which an agreed resolution is not possible, in order that they may programmed for trial and ultimate determination by the Federal Court.

5.4 Overall, the resolution of native title applications through mediation has been slow and significantly fewer outcomes have been delivered than was envisaged when the NTA commenced in 1994, with 24 agreed determinations in over 8½ years. Part of the delay can be attributed to the reluctance of parties to settle native title applications whilst their legal position was uncertain. The recent decisions of the High Court in *Western Australia v Ward [2002] HCA 28* and *Wilson v Anderson [2002] HCA 29* have provided greater, but not comprehensive[32], clarity to the law, which it is hoped will provide the basis for a greater number of mediated settlements of native title applications in the future.[33] However, structural impediments to negotiated outcomes remain a significant concern.

Prioritisation of claims and Funding of Representative Bodies

5.5 Whilst the mediation of native title applications remains under the supervision of the Federal Court, the presiding NNTT member has considerable influence over the Court's approach to the mediation of each application through the provision of regular mediation reports to the Court.[34] For example, the Federal Court's Native Title Coordination Committee has determined that mediation reports should include a statement about the progress of mediation and an assessment about the prospects of mediation (in particular, whether the mediation should

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30 NTA: Division 1B of Part 4.

31 NTA: s 86B(1).

32 For example, the High Court is yet to give its decision in *The Members of the Yorta Yorta Aboriginal Community v Victoria* appeal.

33 The views of key stakeholders referred to at pp. 7 and 8 in a speech by G Neate, *Outcomes and Possibilities*, to the Geraldton Conference on 4 September 2002.

continue, or the mediation should continue with appropriate orders or directions from the Court, or mediation should cease).

5.6 The practice of the NNTT has been to give priority to the active mediation of a number of native title applications whilst the remainder[35] of applications in mediation are kept in abeyance, pending their reprioritisation. This approach has the acceptance of the Federal Court, State and Territory governments and Representative Bodies, predominantly due to the funding limitations in the native title system.[36]

5.7 The prioritisation of native title applications will delay the processing and resolution of many native title applications to the point where Rio Tinto does not envisage that the native title system will deliver certainty for the greater number of native title applications for many years. This has substantial cost and time implications for Rio Tinto's continuing operations. There is a perception amongst various native title stakeholders that part of the motivation behind prioritisation is the NNTT's preference to mediate claims that are 'winners', leaving the more difficult and demanding applications in abeyance.

5.8 A major source of the prioritisation of native title applications appears to arise partly from a major imbalance in the funding of the native title system. This imbalance has been created by the Commonwealth failing to increase the operational funding of Representative Bodies and native title parties despite:

- the Commonwealth's acceptance that actual workloads for the components of the native title system are much higher than the estimated workloads on which funding was provided in 1997-98;[37]
- the Commonwealth decision in May 2001 to increase the funding of all components of the native title system, other than Representative Bodies;

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34 NTA: s 86E and s 136G(3).

35 For example G. Neate, the NNTT President has acknowledged NNTT mediators are currently working on close to half of the approx. 590 active native title applications existing in June 2002: *Native Title Ten Years On: Peering At The Past, Perusing The Present And Predicting The Future*, delivered to the Brisbane Institute 4 June 2002. The President gave no indication of the extent of resources committed to individual applications being worked on.

36 See, for example, *Review of the Native Title Claim Process in Western Australia* (September 2002): para 8.9.1

37 Cwth. Attorney-General's Department Budget 2001-2002 Fact Sheet (22 May 2001) pp 1 and 2.

- the claims of Representative Bodies that they lack adequate resources to carry out their functions;[38]
- the concern of Aboriginal and Torres Strait Islander Commission (ATSIC) that the national funding allocation for Representative Bodies for their operations has not increased since the 1995/96 year;[39] and
- the Commonwealth's acknowledgement that the component parts of the native title system, which includes Representative Bodies[40], are interdependent such that:

> …any realistic assessment of the resource requirements of any individual component of the system must also take account of the ability of other participants in the system to respond in a timely and effective manner in the implementation of processes under the Act.[41]

5.9 In order to perform their critical NTA functions, Representative Bodies need to be appropriately resourced such that they have the confidence and trust of the people they represent, as well as the confidence of governments, proponents and other stakeholders with whom they deal. To achieve this, Representative Bodies must have the technical, administrative and logistical capacity to deal with native title matters within their region, including an appropriate level of technical resources, qualified staff and access to relevant experts.

5.10 ***Recommendation:*** Representative Bodies and native title parties should have access to appropriate resources and appropriately qualified people to assist in the mediation of native title applications. Operational funding for Representative Bodies should be increased for this purpose.

Role of Non-native title parties in Mediation

5.11 Rio Tinto is also concerned that on occasions the mediation process excludes non-native title parties until the native title claimants and government have reached a negotiated position. This situation usually occurs at the request and instigation of governments and native title parties, and ignores that in some instances there may be benefits for

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38 Supported by *Aboriginal and Torres Strait Islander Commission Review of Native Title Representative Bodies* S. Rashid and M. Love (May 1999) p. 74.

39 ATSIC Native Title Fact Sheet (1 May 2001) pp 1 and 2.

40 Cwth. Attorney-General's Department Budget 2001-2002 Fact Sheet (22 May 2001) p. 1.

41 Cwth. Attorney-General's Department Budget 2001-2002 Fact Sheet (22 May 2001) pp 1 and 2.

non-native title parties to be involved in mediation at an earlier stage, particularly given their consent is necessary for any agreed determination of native title,[42] particularly if a non-native title party has views contrary to those of the Government or the native title parties.

5.12 ***Recommendation:*** The NNTT should structure the mediation of native title applications in a manner that ensures that non-native title parties are involved at the outset and their views and interests are accommodated from that stage, rather than the current practice where governments and native title claimants often exclude non-native title parties until they have reached an in-principle negotiated position.

6. Right to Negotiate

Mediation generally

6.1 If requested, the NNTT must mediate among the parties to assist in obtaining their agreement in relation to the subject matter of the right to negotiate.[43] The mediation services are provided by a NNTT member, with the support of NNTT staff, and are generally effective. These services usually entail assisting parties by arranging meetings and helping parties focus on, and resolve, outstanding issues. In the 2000/01 year, the NNTT expended 4% of its budget ($1,004,000) mediating 26 future act agreements[44].

6.2 Rio Tinto's experience, particularly in the Northern Territory, is that mediation is unlikely to succeed if a native title party adopts an adversarial approach. In those circumstances the arbitral processes of the Act were successful in bringing about an attitudinal change that led to resolution of Rio Tinto's backlog exploration licence applications by agreement. However the establishment costs involved for the NNTT in dealing with the number of native title applications and objections to the expedited procedure lodged by native title parties prior to the change in attitude were significant: see para. 6.8.

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42 See *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 at para. 10.

43 NTA: ss 31(3) and 108(1B).

44 NNTT *Annual Report 2000/01*: pp 43 and 70.

Funding of Representative Bodies for the negotiation of agreements

6.3 The effectiveness of the NNTT as a mediator in the negotiation of agreements is linked to the ability of Representative Bodies and native title parties to effectively participate in the mediation. Rio Tinto is commonly approached by Representative Bodies and native title parties seeking funding as a precondition to the negotiation of agreements on the basis that there is insufficient funding for negotiations to occur. Such demands, if met, are an additional cost burden for Rio Tinto in the negotiation of agreements. If the demands are not met, the likelihood of an agreement is remote. There appears little likelihood that this situation will alter, given the Commonwealth's decision not to increase operational funding for Representative Bodies: see paras. 5.8 and 5.9.

6.4 ***Recommendation:*** Representative Bodies and native title parties should have access to appropriate resources and appropriately qualified people to assist in the negotiation of right to negotiate agreements. Operational funding for Representative Bodies should be increased for this purpose.

Mediation of large commercial agreements

6.5 Rio Tinto believes that the NNTT could be more effective in mediation if a greater number of NNTT members and staff were skilled in the mediation of large commercial agreements. Parties negotiating large commercial agreements require expert facilitation skills in the range of areas dealt with by agreement, as well as process advice or general mediation.

6.6 ***Recommendation:*** The skills base within the NNTT for the mediation of large commercial agreements should be increased.

Arbitral Processes

6.7 The NNTT is required to make arbitral determinations:

- of objections to the expedited procedure;[45] and
- whether a future act can or cannot occur, and if so, the conditions to be complied with. [46]

6.8 In the 2000/01 year, the NNTT expended 8% ($2,008,000) of its budget dealing with 517 objections to the expedited procedure under s 32(4) of the NTA.[47] Part of this significant cost is attributed to the cost of setting up a larger registry in Darwin to deal with high anticipated workloads.[48] Rio Tinto is generally satisfied with the effectiveness of the NNTT in dealing with objections to the expedited procedure.

6.9 In the 2000/01 year, the NNTT effectively dealt with 12 determinations under s 38 of the NTA at a cost of $753,000.[49] The NNTT noted that the small number of determinations was due to future act matters being typically resolved by parties negotiating rather than arbitral processes.[50]

6.10 The NNTT target for making a s 38 determination in response to an application under s 35 of the NTA is stated in the 2000/01 Annual Report as '70% made within 6 months of application'.[51] Given the scheme of the NTA is for the NNTT to attempt to resolve all arbitral applications within 6 months,[52] this target is surprising.

6.11 ***Recommendation:*** Although it is acknowledged that the time required to determine arbitral applications made under s 35 of the NTA will vary, the NNTT target for making such a determination in all cases should be within 6 months from the application date for all applications as is contemplated by the NTA.

7. Indigenous Land Use Agreements

Negotiation assistance provided by the NNTT

7.1 If requested, the NNTT must assist the persons wishing to negotiate an ILUA.[53] The assistance provided is usually mediation services by a NNTT member, with the support of NNTT staff that involves arranging

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45 NTA: s 32(4).
46 NTA: s 38.
47 NNTT *Annual Report 2000/01*: pp 43 and 78.
48 NNTT *Annual Report 2000/01*: p. 79.
49 NNTT *Annual Report 2000/01*: pp 43 and 74.
50 NNTT *Annual Report 2000/01*: p 74.
51 NNTT *Annual Report 2000/01*: p 74 (Table 8).
52 See NTA: s 36(1) and (3).
53 NTA: ss 24BF, 24CF and 24DG.

meetings and helping parties focus on outstanding issues. However, the 'assistance', contemplated by sections 24BF, 24CF and 24DG is not limited to the provision of mediation services. Section 136H of the NTA provides for the making of regulations that may make provision for the way in which assistance is to be provided by the NNTT under any provision of the Act. No regulations have been made, leaving the NNTT with substantial discretion over the assistance it provides.

7.2 In the 2000/01 year, the NNTT expended 8% of its budget ($2,008,000) on providing assistance in negotiations relating to 63 ILUAs.[54] The amount per ILUA is $32,170, approximately $60,000 less than the amount targeted by the NNTT.[55]

7.3 Rio Tinto is concerned that the NNTT does not provide a level of assistance in the negotiation of large commercial ILUAs that accords with the scope and importance of those agreements. Generally, Rio Tinto will utilise the ILUA provisions of the NTA for large commercial agreements which typically:

- have process/negotiation costs over $1,000,000;
- have considerable precedent value;
- offer a large range of benefits to Aboriginal people; and
- provide significant regional economic benefits.

7.4 Parties negotiating large commercial agreements require expert facilitation skills in the range of areas dealt with by agreement, as well as process advice or general mediation. The NNTT could be more effective in facilitating large commercial ILUAs if a greater number of NNTT members and staff are skilled in the mediation of such agreements.

7.5 ***Recommendation:*** The skills base of NNTT members should be increased, with a greater emphasis on persons capable of effectively mediating the negotiation of large commercial agreements.

7.6 The Native Title Registrar should, upon receiving notice of negotiations of an ILUA, provide sufficient Geo-spatial information to ensure that an

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54 NNTT *Annual Report 2000/01*: pp 43 and 63 – 66.

55 See the Table on p 63 of the NNTT's *Annual Report 2000/01*. The NNTT's figures attribute all of the ILUA expenditure to the 20 registered ILUAs rather than all ILUAs in which it was involved: see bottom of p 65 and top of p 66. This provides a highly inflated attribution of expenditure per ILUA.

ILUA complies with the requirements of the NTA. In particular, all overlapping native title applications for an area subject to Area ILUA area or ILUA (Alternative Agreement) negotiations should be identified and brought to the notice of negotiating parties. An ILUA has been deregistered due to negotiating parties and the NNTT not being aware of an overlapping registered native title application over a small part of the agreement area– NNTT processes should ensure that this does recur.

7.7 ***Recommendation:*** The NNTT would be more effective in assisting with the negotiation of ILUAs if it committed greater levels of resources for that purpose. Such assistance could include the provision of:

- accurate geo-spatial information to the parties;
- funding for meetings relevant to the negotiations;
- where necessary, funding Representative Bodies and native title parties to obtain expert technical and legal advice; and
- where necessary, mediators expert in the negotiation of complex commercial agreements.

This could be clarified in regulations made under s 136H of the NTA.

Funding of Representative Bodies

7.8 The effectiveness of the NNTT as a mediator in the negotiation of ILUAs is linked to the ability of Representative Bodies and native title parties to effectively participate in the negotiation. Rio Tinto is commonly approached by Representative Bodies and native title parties seeking funding as a precondition to the negotiation of agreements on the basis that there is insufficient funding for negotiations to occur. Such demands, if met, are an additional cost burden for Rio Tinto in the negotiation of agreements. If the demands are not met, the likelihood of an agreement is remote. There appears little likelihood that this situation will alter, given the Commonwealth's decision not to increase operational funding for Representative Bodies: see paras. 5.8 and 5.9.

7.9 ***Recommendation:*** Representative Bodies and native title parties must have access to appropriate resources and appropriately qualified people to assist in the negotiation of ILUAs. Operational funding for Representative Bodies should be increased for this purpose.

Registration of ILUAs

7.10 The Native Title Registrar is responsible for the registration of ILUAs under the NTA.[56] In the 2000/01 year, the NNTT expended 4% of its budget ($1,004,000) on dealing with applications that led to the registration of 17 ILUAs[57]. The unit cost per registration of an ILUA was $24,128.[58]

7.11 The registration requirements under the NTA and the *Native Title (Indigenous Land Use Agreements) Regulations* 1998 are extremely complex. Particular care is required to ensure each pre-requisite for registration is met. Experience shows that the NNTT requires no less than strict compliance with the provisions. Such an approach can significantly add to the cost and time of negotiating an ILUA. The willingness of the NNTT to conduct pre-registration review of ILUA applications for compliance purposes is useful.

7.12 ***Recommendation:*** A more practical approach to the assessment of an application for registration of an ILUA, based on substantial compliance[59], should be adopted by the Native Title Registrar. Adopting such an approach would reduce cost and delay and the registration of an ILUA would not be threatened due to minor process transgressions.

8. Administrative/Procedural Matters

Searching registers

8.1 Whilst the NNTT's response to register searches (such as the Register of Native Title Claims and the Register of Indigenous Land Use Agreements) is relatively prompt, it would be beneficial to make the results of such searches more specific. The NNTT appears only to be able to provide results by local government area, even where a real

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56 NTA: ss 24BI, 24CK, 24CL and 24DL.

57 It is unclear precisely how many ILUA applications were made.

58 NNTT *Annual Report 2000/01*: pp 61.

59 Eg, *Trade Practices Act* 1974 (Cth) – Section 172(3), *Administrative Decisions (Judicial Review) Act* 1977 (Cth) – Section 11(9), *Environmental Protection Act* 1994 (Qld) – Section 93, *Mineral Resources Act* 1989 (Qld) – Section 392.

property description has been provided. It would also be beneficial if the NNTT could provide register extracts electronically via the internet.

8.2 ***Recommendation:*** The NNTT should provide more specific results, based on real property descriptions, in response to searches of its registers. It should provide register extracts electronically via the internet.

Website

8.3 The NNTT has a comprehensive website which is an invaluable tool. However, searching the website for material such as:

- future act determinations relating to specific issues; or
- the status of native title applications (which are not always listed in numerical order),

can be difficult.

8.4 ***Recommendation:*** The NNTT should seek to improve its website so that information relating to items such as future act determinations and the status of native title applications is easier to access.

Case managers

8.5 Case managers are usually helpful in response to requests for information relating to native matters for which they are responsible. However, individual case managers appear at times to be the sole repository of information so that it is difficult to obtain information if they are absent.

8.6 ***Recommendation:*** The NNTT should ensure that the duties of its staff who provide important information to the public (such as case managers) are maintained in their absence.

Geo-spatial unit

8.7 The NNTT's geo-spatial unit is located in Perth, which can cause difficulties when finalising ILUAs in other states. The mapping system used does not complement the system in some state agencies, which can cause difficulties.

8.8 ***Recommendation:*** Access to the NNTT's geo-spatial unit from other states and territories should be improved. Given its national operation, the NNTT should attempt to have its mapping system complement those of all state and territory agencies.