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

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17 December 2002

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Dear Ms. Weeks

Please find attached the article, A Sick Institution? Diagnosing the Future Act Unit of the National Native Title Tribunal.

Yours faithfully

D. E. Fredd pp

DAVID RITTER
PRINCIPAL LEGAL OFFICER

A SICK INSTITUTION? DIAGNOSING THE FUTURE ACT UNIT OF THE NATIONAL NATIVE TITLE TRIBUNAL

David Ritter*

Introduction

The principal statutory instrument governing the relationship between the Australian nation state and Australia's Indigenous peoples' traditional interests in land is the Commonwealth's *Native Title Act 1993* (NTA). It is a legislative regime enacted as beneficial legislation that has as its first 'main object' the 'recognition and protection of native title.'[1] One of the principle utilities of the NTA was to establish the National Native Title Tribunal (the Tribunal) to act as an impartial mediator of native title claims and to oversee future dealings affecting native title, known as 'future acts'. The NTA demands that the Tribunal must, above all, conduct its business in a fair, just, economical, informal and prompt way.[2] Although native title in Australia has given rise to a vast literature, the effectiveness of the Tribunal has, curiously, not figured prominently. The texts about the Tribunal have largely been written from within the Tribunal itself, with external critiques few and far between.[3] The purpose of this article is to critically analyse one of the chief future act functions of the Tribunal, the administration of objections to the application of the expedited procedure. This process requires the Tribunal to inquire into whether an objecting Aboriginal group should have a right to negotiate over the grant of a mining tenement. In broad terms, it is argued that in administering objections to the expedited procedure, the Tribunal's bureaucratic ideology fails Indigenous people and in so doing, favours resource interests and governments.

The perspective of this article is from the parapet, looking over the current struggle between Indigenous representatives and the Tribunal over the limits of Indigenous power.[4] Seeing relations between Indigenous representatives and the Tribunal in this light reflects the notion that the 'intake section of a bureaucracy is a theatre of war between two cultures.'[5] Importantly though, this paper is not an attack on the Tribunal's staff or Members: it is about a bureau, not about individuals.[6] Accordingly, this article largely ignores actual decisions made by Members of the Tribunal and concentrates on the Tribunal's administration of process.[7] Such an approach is common to literature that attempts to expose inequalities and ambiguities that are latent in processes and structures that exhibit formal equality.[8]

The institutional babushkas

The expedited procedure for mining tenements is a number of conceptual and institutional steps removed from *Mabo v The State of Queensland (No 2)* (1992) (Mabo)[9] and it is important to understand the chain of connection between them in order to appreciate the significance of the former. Mabo recognised the existence of native title under the common law of Australia, but did not mandate any process for how native title would interact with interests in land that were yet to be created. Accordingly, in articulating a legislative response to Mabo, one of the chief aims of the Commonwealth Labor Government was to set out a process for the interaction of inchoate undetermined native title with the future creation of interests in land (future acts).[10] This system, eventually contained under part 3 of the NTA is known as the 'Future Act System'. In essence, the 1993 version of the Future Act System afforded a right to negotiate[11] to native title claimant groups in respect of (among other things) future acts that constituted the creation of a right to mine.

Thus Mabo begat the NTA, which begat the Future Act System, which begat a further system known as the 'expedited procedure'.[12] In a sense, the term 'expedited procedure' is a misnomer, because the expression refers to an absence of procedure or, more specifically, the exemption of a tenement from the right to negotiate. It may be that to Indigenous people 'the application of the expedited procedure' appears as no more than the latest in a long line of colonial euphemisms and is merely a coded way of the Government saying 'the resource interest does not have to talk to you about the grant of this tenement'. Importantly, the

expedited procedure is triggered in a somewhat circular way, by the government[13] issuing notice that the grant of a particular tenement is an act attracting the application of the expedited procedure because it regards the grant of the tenement as satisfying the definition of 'an act attracting the expedited procedure' contained in s 237 of the NTA. There is then a period in which native title claimant groups are eligible to object to the application of the expedited procedure.[14] If there is no objection then the tenement in question will be granted without further delay. As a matter of practice, the Western Australian Government considers that all supposedly low impact tenements, including exploration and prospecting licences are acts attracting the expedited procedure and does not exercise any discretion.[15] Rather, native title parties are effectively 'put to proof' to show that specific tenements are not acts attracting the expedited procedure.[16] Objections are made to the Tribunal, which must then hold an inquiry into whether the act is an act attracting the expedited procedure, or not.[17] The proceedings of this inquiry are adversarial with the government, the native title objectors and the tenement applicant (known as the 'grantee party') as parties.[18] If the Tribunal decides that an act does not attract the expedited procedure, then the full right to negotiate applies.

The first notices that particular tenements were acts attracting the expedited procedure were not issued until mid 1995. Objections quickly followed, precipitating the first inquiries, in which the Tribunal found that the grant of the mining tenements in question did attract the expedited procedure.[19] This result was replicated in many of the early Tribunal decisions, although a significant number of decisions were decided to the contrary. Appeals and cross appeals followed[20] and it was not until the issues came before the Full Court of the Federal Court of Australia, that the correct interpretation of the expedited procedure system was clarified. The Full Court's decision was to the effect that, of the competing interpretations of s 237, that which most favoured the native title party was the correct one as it was in accordance with the statute. Thus, in the early years of the expedited procedure system, the Tribunal had on many occasions favoured an incorrect interpretation of the NTA that favoured resource interests ahead of native title claimant groups.[21]

In 1998 the new conservative Liberal-National Coalition Government substantially amended the NTA.[22] Among the amendments was a significant change to the central concept underpinning the expedited procedure system contained in s 237 of the NTA. The emphasis of the section was significantly altered to specify that an act is an act attracting the expedited procedure if it:

> (a) is not likely to interfere directly with the carrying on of the community or social activities of the persons who are the holders of native title in relation to the land or waters concerned; and
> (b) is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders of native title in relation to the land and waters concerned; and
> (c) is not likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned.[23]

This change rendered some of the pre-amendment precedents obsolete. However, by 2002 a corpus of Tribunal and Federal Court case law has again developed and it appears that the effect of the amendments has been to make it significantly harder for Aboriginal groups to succeed in objecting to the application of the expedited procedure.[24]

The size of the issue (in principles, hectares and tonnes)

The chief advantage accruing to registered native title claimants prior to their determination of native title is access to the right to negotiate.[25] Further, even when a native title claim has been determined and a group is enjoying a determination of native title, arguably the chief outcome that can accrue to the native title-holders is a determination of ongoing access to the right to negotiate. It is a right that has also been judicially recognised as being of significant commercial value.[26] Thus, the application of the expedited procedure represents an extremely broad abbreviation of a previous benefit.[27] In this context, it is important to note that it is arguable that the right to negotiate is not a statutory creation, but is merely the parliament's expression of what is an existing element of native title at common law.[28] In other words, the application of the expedited procedure may be less reflective of the partial withdrawal of a statutory concession, and more the suppression of a critical element of a common law title: the abridgement of a fundamental right. It is also an 'expression of the internationally recognised human rights principle that Indigenous people have the right to effective participation in the development of their traditional lands'.[29]

Litigious battles over the application of the expedited procedure are, seen in this light, of profound meaning.[30]

This significance is to some extent recognised in the mandated priorities of statutory representative bodies (NTRBs) that represent Aboriginal native title claimants that are set out in the NTA. It is specified that NTRB's must themselves prioritise the performance of their statutory functions, but within that self-determined scheme NTRB's 'must give priority to the protection of the interests of native title holders'.[31] Given that the impact of the application of the expedited procedure is that once it applies there is nil capacity to protect native title in the face of the acts in question, it appears that this direction as to prioritisation has the affect of requiring that native title representative bodies makes contestation of the application of the expedited procedure among their top priorities.

In instructing their representatives to lodge objections to the application of the expedited procedure, in general terms it appears that Indigenous groups in Western Australia have two principal aspirations.[32] The first is the protection of heritage sites, usually through agreement that the grantee will pay for an Aboriginal heritage survey in order to ensure that no archaeological or ethnographic sites of significance are disturbed when exploration or prospecting is occurring. Obtaining a grantee's contractual commitment to Aboriginal heritage protection is a significant outcome because of the manifest ineffectiveness of such Aboriginal heritage protection legislation as exists.[33]

The second aspiration is simply to exercise the native title right of control. Traditionally, Aboriginal groups control their territory through complicated cultural protocols and in post-colonial Australian society this has evolved to include the engagement of professional advisors to enforce rights under legislation. That control over country has developed in this manner is entirely consistent with the fundamental principle that the exercise of native title need not remain frozen in time.[34] Just as the native title right to hunt can evolve from using a spear to using a rifle, it would seem logical that a native title right to have a say over one's country can go from adherence to tribal protocols to instructing lawyers.

An appreciation of the importance of the expedited procedure can also be gained from considering what is permitted pursuant to those acts that are routinely regarded by the Western Australian Government as not likely to interfere directly with the carrying on of community or social activities, or interfere with areas or sites of particular significance, or to involve major disturbance to any land or waters concerned. Prospecting licences have a maximum area of 200 ha with a term of four years and permit the prospector to extract or disturb up to 500 tonnes of material from the ground. The Minister may approve extraction of larger tonnages. Exploration licences allow for an area of a minimum of 1 graticular block (approximately 2.86 km^2 or 286 ha), up to a maximum 70 graticular blocks (approximately 197 km^2 or 19,700 ha). The term of an exploration licence is 5 years and the Minister may extend the term in certain circumstances. The holder of an exploration licence may extract or disturb up to 1000 tonnes of material from the ground and the Minister may approve extraction of a greater amount. In the conduct of the exploration or prospecting activity the proponent can drill, excavate costeans, dig test pits, blast, clear, overburden, create roads or tracks, clear seismic lines and, if required, build floor camps. Clearly, significant environmental and aesthetic change will occur as a result of the standard activities involved in exploration and prospecting.

Bureaucratic ideology

Bureaus have ideologies: 'a verbal image of that portion of the good society relevant to the functions of the particular bureau concerned, plus the chief means of constructing that portion.'[35] Some bureaus will be more overtly ideological than others because of the nature of their mission. The Tribunal openly evinces an ideology because the legislation upon which it is founded is itself nakedly ideological. The Tribunal is perhaps also more likely to recite its ideological pater noster, because it provides only indirect benefits to its users and is engaged in highly controversial work.[36] In other words, the Tribunal is often called upon to justify itself, its work, its mandate, its staffing levels and its budgets.

In the first year of its operation the Tribunal's self-justifications were infused with a proselytic spirit revolving around the central mission of mediating native title claims to resolution to the satisfaction of all parties and the enrichment of the nation.[37] This was the spirit of the preamble to the NTA which proclaimed the inauguration of a 'special procedure' for the 'just and proper ascertainment of native title rights and interests' in 'a manner that has due regard to their unique character.'[38] The Tribunal of this early period

though, was a Tribunal without a Future Act Unit, which was not formed until 1995. Shortly after its formation, some quickly began to discern an ideological drift. Richard Bartlett for instance wrote that hopes 'that the NNTT would provide an informal tribunal uniquely suited to the recognition and protection of native title' were 'foundering on the future act regime and a philosophy of decision-making which favours certainty and development and discounts native title and the right to negotiate.'[39] Central to the analysis pursued in this paper is the notion suggested by Bartlett, that it was the Future Act Unit that began to assume a different ideological character within the Tribunal. The Tribunal is not a simple unitary structure and indeed under the NTA, there is a complicated division of responsibilities among various statutory functionaries.[40] It is argued that, arising from these divisions, the Tribunal simultaneously espouses a number of different (competing) bureaucratic ideologies.

A key division within the Tribunal occurs between the Future Act Unit that deals with the future act system including the expedited procedure, and the Tribunal's Case Management Unit that deals with case-managing the mediation of native title claims.[41] These two units, with fundamentally divergent statutory mandates are required to justify themselves in different ways and in doing so, display disparate ideological proclivities. The mediation role of the Case Management Unit has necessitated that it adopt a consultative and democratic approach to its work, theoretically characterised by a high degree of reflexivity to the needs and perceptions of parties. On the other hand, the arbitral functions of the Future Act Unit have led it to display a more rigid adherence to procedures designed to produce expressed organisational goals. The former is more considerate of qualitative factors, the latter deals in quotas.

The Tribunal's own documents declare that 'the expedited procedure provisions' in particular, form 'a discrete process' from the rest of the statute, notwithstanding that such an approach appears contrary to the statutory scheme of the NTA and broader principles of statutory construction.[42] This radical declaration, appearing as it does in one of the Tribunal's official 'explanations' of how the Future Act Unit does business, is indicative that a different bureaucratic ideology underpins the operation of the expedited procedure system. Freed from the moorings of its statutory berth, the Future Act Unit has been at liberty to adopt the classic bureaucratic profile: an organisation seeing itself as a rational and objective instrument for realising explicit goals.[43] This is illustrated by the procedural guidelines adopted by the Tribunal in its administration of the expedited procedure system.

Power within the expedited procedure system

The rules of the expedited procedure system are not merely those contained within the NTA itself. There are also a variety of rules and administrative instruments implemented by the Tribunal ostensibly to specify with greater precision how the expedited procedure system is to operate. However 'bureaucratic rules and procedures operate unequally on the different sections of society entitled to claim benefits in the form of bureaucratically allocated goods and services.'[44] Thus, what on the face of it appear to be simple administrative arrangements on closer inspection disclose a pattern of substantive inequalities. Prior to May 2001, the Tribunal operated under a set of guidelines that were aimed to assist prospective applicants and their advisers in completing and lodging objections (the Original Guidelines) In substance, the Original Guidelines simply repeated the relevant words of the NTA and its regulations in a useful synthetic format and were silent as to interpretation However, in May 2001, the Tribunal published new 'Guidelines on Acceptance of Expedited Procedure Objection Applications' (the Guidelines).[45] The significance of these rules should be emphasised: an Aboriginal group that failed to comply with the Guidelines would be treated as if it had not lodged an objection and would miss out on any chance of accessing the right to negotiate. The Guidelines set out the kind of information that would have to be provided about the likely effect of the proposed act on each of the three elements of s 237 that would be deemed sufficient by the Tribunal to meet statutory requirements. In each case, the Guidelines required that objectors provide information at high level of factual specificity about activities, sites or area Clearly, the Guidelines imposed a harder standard on native title objectors than set out in the NTA.

After some folderol, the Western Australian Aborigin Native Title Working Group procured an opinion on the Guidelines from a Queen's Counsel, Mr Wayne Martin QC Mr Martin concluded that the Guidelines issued by the Tribunal had no legal force or effect, were not consistent with the NTA or its Regulations and in order to avoid errors would be desirable to withdraw the Guidelines as soon possible.[46] The Tribunal did withdraw the Guidelines b then, a short time later, introduced new 'Guidelines

Acceptance of Expedited Procedure Applications' in October 2001 (the New Guidelines) accompanied by a document called 'Explanation of Guidelines on Acceptance of Expedited Procedure Applications' (the Explanation).[47] The New Guidelines are an improvement in that they are substantially less onerous but they still do more than simply recite the applicable statutory provisions. They go further and explain, supplement and qualify those provisions,[48] ignoring Queen's Counsel's advice as to the grave dangers inherent in any attempt to paraphrase or restate a particular legislative provision or to define or illustrate a legislative provision in terms other than that used in the statute itself. The Aboriginal and Torres Strait Islander Social Justice Commissioner wrote to the Future Act Unit, expressing concerns about the New Guidelines, but the letter went unheeded.[49] In his *Native Title Report 2001*, the Commissioner stated starkly that:

> The position adopted in the NNTT's revised guidelines unnecessarily restricts the circumstances in which the NNTT can independently review whether governments have appropriately applied the expedited procedure exception to the right to negotiate ... The revised guidelines are thus inconsistent with international human rights norms ... The NNTT's approach is not required by, and arguably is contrary to, the terms of the NTA.[50]

In the result, native title objectors must currently navigate a procedural labyrinth in which they must heed not only the NTA and its regulations, but also the New Guidelines, the Explanation and an umbrella document called 'Procedures Under the Right to Negotiate'.[51] This profusion of bureaucratic edicts obviously increases the likelihood of inconsistency and confusion on behalf of the users of the bureau. Such activity is a classic bureaucratic 'pathology', diagnosed by Hogwood and Peters as hyperactivity, manifested in the needless promulgation of rules and attempts to 'do something even if something is not required, even if the action may be counter-productive.' [52] Thus development of procedures is seen as a kind of goal displacement, reinforcing the aphorism that 'procedures are the opiate of the bureaucrat'.[53]

It is arguable that the quasi-litigious raiment adopted by the Future Act Unit is also an outcome of these dynamics. Once an objection has been lodged and accepted the Tribunal will then administer quasi-litigious proceedings with the grantee party, the government party and the objectors as parties. The Tribunal has outlined extensive procedures enshrining this quasi-litigation. These procedures include conferences and the exchange of evidence and submissions, which contemplate the final disposition of an inquiry into the application of the expedited procedure within seventeen weeks of the end of the objection period.[54] Curiously, the adoption of an adversarial process for objection determinations does not appear to be prescribed by the terms of the NTA. Although the Tribunal must hold an inquiry, 'hearings' appear to be an incidental part of an inquiry rather than the prescribed embodiment of it.[55] The Tribunal has elected to adopt the formalistic and procedurally arduous model of adversarial quasi-litigation for resolving objections to the application of the expedited procedure, rather than any of the potential alternatives.

The nature of the Future Act Unit's procedural hyperactivity suggests a little more about the struggle over power within the expedited procedure system. Through successive drafts of the Guidelines, the Future Act Unit as an institution made a significant administrative effort, unauthorised by statute, to make it more difficult for Aboriginal people to object to the expedited procedure and access the right to negotiate.[56] The emphasis on specificity within successive drafts of the Guidelines in particular, makes it appear that the Future Act Unit is preoccupied with preventing Aboriginal people and their representatives from developing effective precedent documents.[57] If Aboriginal people develop effective precedent documents the Tribunal loses power, in that its power to decide whether or not the expedited procedure applies is negated by effective pleading. At an institutional level, no bureau easily surrenders power and it is suggested that the new drafts of the Guidelines reflect, in part, the Tribunal's desire to retain power over native title objectors. The control of language is a device commonly used by bureaus that attempt to assert their power over their clients by requiring them to 'learn a new language, tune in to new norms, bow properly to immense institutional power, understand and flatter the bureaucratic personality.'[58] In the Future Act Unit's case, this involves forcing native title objectors to disclose a degree of particularity not required by the legislation.[59]

The burdens placed on native title objectors would be less problematic if there was parity of funding to the participants in the expedited procedure system, but this is not the case. In the 2001 Federal budget, native title received an $86 million increase, payable over four years.[60] However, notwith-

standing their chronic underfunding,[61] only a small proportion of this sum went to native title groups and none of that was for regular operational funding. The Tribunal on the other hand, received a rise of almost $36 million. It has been suggested that this fiscal unbalancing was deeply ideological. That is, if the Tribunal and the Federal Court are funded to go more quickly, to have more hearings and decide more matters, but native title parties are not funded to keep up, the consequences are obvious: 'extinguishment by stealth.'[62] As one prominent Aboriginal leader pointed out, the massive disparity has created a 'real concern that native title claimants will be denied their rights simply because... [they] ... do not have the resources to represent their cases properly.'[63] Notwithstanding these profound resource inequalities, the Future Act Unit's position is that native title parties' 'lack of resources to comply with the requirements of the Act and regulations ... is not ... an issue for the Tribunal in applying the Expedited Procedure provisions of the Act.'[64]

The struggle over politics and legitimacy

Aboriginal people overwhelmingly see the application of the expedited procedure in political and historical terms.[65] This is not surprising, as 'Aborigines have been at the mercy of officials since the arrival of the First Fleet'.[66] However, it is contrary to the Future Act Unit's depiction of the expedited procedure system as an impartial statutory process. One Member of the Tribunal for instance, when writing on its behalf described the logic of the system as one of balancing 'the protection (and supplementation) of native title rights and the need for a fair system for future acts to occur', a 'balancing of interests' that he saw to be 'evident in the future act provisions.'[67] Such a formalistic analysis though, ignores the reality that delimiting objections to the narrow conduit of s 237 criteria has a subduing effect, foreclosing on the possibility of Indigenous political reaction by confining (legitimate) complaint to the nature of a pleading within a quasi-judicial process.[68]

Thus, the 'rational' logic of the expedited procedure system is a legitimating story that seeks 'to explain and defend' the Tribunal by 'demonstrating that bureaucratic power is constrained by some kind of objectivity' that purports 'to ensure that the interests of constituents are not threatened by the consolidated power exercised by the bureaucracy itself.'[69] In other words the narrative of the NTA provides a justification for the actions of the Tribunal, which therefore must be reasonable because they are grounded in the statute. The crucial transfer here is from the decision about whether or not a particular act attracts the right to negotiate from being seen to be a political decision (which it is) to being a technical question devoid of politics. The expedited procedure system 'subverts politics' through 'the conversion of practical questions ... into technical questions purportedly solvable only by experts.'[70] This veneer of objectivity conceals the fact that the Tribunal 'continues to make political decisions, though these are now handily removed from public participation.'[71] What is determinative in the process is not the native title party objecting, but the Tribunal's 'rational' application of s 237 to the objection. If the initial injustices of colonisation can in part be traced to the imposition of colonial truth, in the guise of objectivity, upon the Indigenous populace, the Future Act Unit is clearly an heir to that dynamic.[72]

Outputs

It has been commented aphoristically that bureaus tend to 'get to their main objectives, not yours.' [73] This pattern of 'emphasis on performance indicators' has long been observed in Aboriginal affairs where the concern of 'head office' 'with throughput rather than long term results' can severely reduce the delivery of the latter.[74] This is again a kind of goal displacement, where records come to have 'more importance to the government officials than the activities and performance that these records were designed to measure, control, and improve.'[75] This apparent conflict between performance indicators and real results has a resonance when considering the activities of the Future Act Unit in relation to the expedited procedure. The more objections to the application of the expedited procedure that the Tribunal can deal with in a year, the more productive it considers itself to be.[76] The ease with which outputs can be measured and achieved under the expedited procedure system may have contributed to goal displacement. The elusiveness of mediating claims to resolution has seen a 'displacement' of Tribunal emphasis toward the more obtainable goal of decisions under the expedited procedure system: an instance of conflict between ultimate and proximate goals.[77] These tensions are disclosed on the face of the Tribunal's Annual Report.[78]

The Annual Report records that 'Output 1.3.2' relates to the expedited procedure system. This 'output group' satisfies 'goals' 1 and 3 of the Tribunal's 'Corporate goals'. These are 'to promote practical and innovative resolution of

applications under the Native Title Act' and 'to address the cultural and customary concerns of Aboriginal and Torres Strait Islander people'. In assessing the Tribunal's performance under Output 1.3.2, the speed with which it makes decisions and the number of decisions that it makes in a financial year are deemed by the Tribunal to be measures of its productivity. This is, on the face of it, problematic. If the goal of the expedited procedure system is the protection of native title, then speed of decision-making cannot logically be seen as a measure of productivity because in an instant case, so long as a tenement remains ungranted, native title in the area remains undisturbed. A swift decision under the expedited procedure system cannot provide protection — it merely gives rise to a right to negotiate or to the grant of the tenement. Speed of decision making under the expedited procedure system can only benefit government and grantee parties, never native title objectors. The Future Act Unit has continually (and inaccurately) depicted its administration of inquiries in to the application of the expedited procedure as itself being an 'expedited process' — a characterisation that is plainly wrong and that was expressly rejected as such in obiter dicta by the Federal Court of Australia.[79]

The President of the National Native Title Tribunal has, with respect, implicitly acknowledged the disjunction between the requirements of the NTA and the approach of the Tribunal:

> The time taken by the Tribunal to conduct an inquiry and make a determination in relation to a future act matter is influenced by various factors, including timeframes contained in the Native Title Act and the preparedness of parties to put their evidence and submissions. If the Tribunal is required to hold an inquiry into an objection to the expedited procedure there is no set statutory timeframe within which the inquiry must be completed. Negotiations may take place between the native title party and the grantee within the arbitral process being run by the Tribunal. Some allowance of time is made to provide parties an opportunity to reach agreement and thereby terminate the inquiry. *Because the inquiry is about a 'fast tracking' procedure, the Tribunal attempts to deal with objections promptly* (emphasis added).[80]

The Future Act Unit has an ideological fixation with speed.[81]

Evidence that the Tribunal regards its role in the expedited procedure system as enabling the expeditious grant of tenements is found throughout its own documentation. In the Tribunal's promotional fact sheet entitled 'Fast-tracking exploration and prospecting tenements',[82] the graphic figure of the expedited procedure system leads to three possible conclusions: 'No objection, State or Territory body grants tenement' and 'Tribunal determines that fast-tracking applies' are each illustrated with a large tick. 'Tribunal determines that fast-tracking does not apply' is illustrated with a cross. These simple graphics represent a straight ideological choice: the grant of tenements is depicted as success, Aboriginal people obtaining a right to negotiate is depicted as failure.[83] Ironically in this light, the Tribunal has claimed 'confusion about the Tribunal's role, coupled with the misconception that it is in place to serve Indigenous interests alone, demanded that the Tribunal was vigilant about maintaining its impartiality in order to establish relationships of trust with all parties'.[84]

Conclusion: The expedited procedure applies

Rather than a rupture with the colonial past, the Future Act Unit of the Tribunal operates in a manner that is redolent of colonial continuities. Overwhelmingly then the expedited procedure system is implemented and interpreted by the Future Act Unit in a manner that disadvantages native title parties and is more likely to lead to the deprivation of the right to negotiate from Aboriginal people. The Future Act Unit's administration of the expedited procedure actively disadvantages Aboriginal people. Its claims to be 'protecting native title' are ironically hollow. As Richard Bartlett wrote in 1995, the

> Tribunal was supposed to be a just and informal body that would facilitate the determination of native title and ensure that, whatever the sorry past, future grants would be made in a context that afforded equality to Aboriginal people. The administration by the NNTT of the future act process and the right to negotiate is critical to ensuring such equality. But ... [it] has failed dismally in its role.[85]

It may yet be that this effective engine of dispossession will yet reverse its practices.[86] Sadly though it is more likely that the bureaucracy of the Future Act Unit will simply continue to churn through applications, improving its productivity rates, placing Aboriginal people and their representatives under ever greater pressure, diminishing native title throughout Western Australia and ensuring that over vast tracts of Australia, Aboriginal people continue to have no say in what occurs on their traditional lands. ●

Endnotes

* Many thanks to my colleagues Cedric Davies and Adrian Murphy, whose understanding of the processes described herein is simply magnificent. Many thanks also to the various former staff and Members of the NNTT (who must remain anonymous) who agreed to review this paper for me prior to its publication. Any mistakes are of my own making. This article is written in my personal capacity and nothing herein is necessarily the view of the Yamatji Land and Sea Council. David Ritter is Principal Legal Officer of the Yamatji Land and Sea Council, native title representative body for the Pilbara, Murchison and Gascoyne regions of Western Australia.

1 *Native Title Act 1993* (Cth) (NTA) s 3.

2 Section 109 (1) of the NTA.

3 Two exceptions are Bartlett R 'Dispossession by the National Native Title Tribunal' *Western Australian Law Review* (26) July 1996 108 at 108, and McIntyre G Ritter D and Sheiner P 'Administrative Avalanche: The Application of the Registration test under the NTA 1993 (Cth)' *Indigenous Law Bulletin* 4 (20) April/May 1999 8.

4 It is not, though, an ethnography of the Tribunal. See Czarniawsk B *Narrating the Organisation*, University of Chicago Press Chicago 1997 particularly p 202-3. Neither is this article written from an 'indigenous perspective' as I am not Indigenous.

5 Hummel R P *The Bureaucratic Experience* St Martin's Press New York 1977 p 25.

6 Interestingly, the two anonymous referees of this paper appointed by the AILR took opposing views on this matter. One intimated that it would not be appropriate if this paper was perceived 'as a complaint about the conduct of the Tribunal and its individual members' while the other urged me to add a critique of the 'control and nature of appointments made to the Tribunal'. This is an argument I do not want to have. I openly acknowledge the assistance, professionalism and commitment of many past and present Members and staff of the NNTT. The point is though, that good staff cannot, without more, remedy unjust and ineffective institutions: see Bennett S *White Politics and Black Australians* Allen & Unwin Sydney 1999 p 130-153. See also Hummel R P *The Bureaucratic Experience* St Martin's Press New York 1977 p 22-23.

7 In making this distinction, though, it is not suggested that there is a rigid separation of the administration of the process and the decisions that are made: but what this paper *is not* is a doctrinal critique of the case law.

8 See for example comments in Hutchinson A C *Critical Legal Studies* Rowman & Littlefield Totowa (NJ) 1989 at p 3.

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

10 Section 233 of the NTA.

11 Subdiv P, Div 3 of the NTA

12 Section 237 of the NTA.

13 Within the Australian federal balance, the power to issue land tenure is held by the States.

14 Section 32(3) of the NTA.

15 The vast majority of future act activity under the NTA has occurred in Western Australia.

16 Although this is not mandated by the NTA.

17 Sections 75 and 139 of the NTA.

18 Although, again, this is not mandated by the NTA.

19 See *Re Irruntyju-Papulankutja Community's Objection to the Application of the Expedited Procedure*, WO95/7, 6 October 1995.

20 Decisions of the Tribunal, as a Federal arbitral body are appealed to the Federal Court: s 169 of the NTA.

21 See *Dann v WA* (1997) 74 FCR 391; 144 ALR 1. Tellingly, on no occasion has a superior court ever overruled the NNTT for being too generous towards Indigenous interests.

22 For a description of the amendments to the future act system, see for instance Garnett M J and Ritter D L 'The Application and Operation of the Right to Negotiate', *Australian Mining and Petroleum Law Journal* 17(3) Oct 1996 p 284. Online, see 'Detailed Analysis of the Native Title Amendment Act 1998 (OCT98)' at <www.atsic.gov.au>.

23 Section 237 of the NTA; whereas, the section had previously stated:

> 237. A future act is an 'act attracting the expedited procedure' if:
>
> (a) the act does not directly interfere with the community life of the persons who are the holders ... of native title in relation to the land or waters concerned; and
>
> (b) the act does not interfere with areas or sites of particular significance, in accordance with their traditions, to the persons who are the holders ... of the native title in relation to the land or waters concerned; and
>
> (c) the act does not involve major disturbance to any land or waters concerned or create rights whose exercise will involve major disturbance to any land or waters

concerned.

24 See *Smith on behalf of the Gnaala Karla Booja People v State of Western Australia* [2001] FCA 19 (19 January 2001). It is notable though, how few appeals there have been from the NNTT to the Federal Court since the amendments to the NTA and that where appeals have occurred there has been no further appeal to the Full Court. It might be speculated that this is because of the reduced funding (in real terms) and increased statutory responsibilities for native title representative bodies since the 1998 amendments.

25 *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 235-236.

26 *Fejo v Northern Territory* (1998) 156 ALR 721 at 735.

27 As an aside, it also widens the gap in effectiveness that exists between native title and statutory land rights: Sexton S 'Law, Empowerment and Economic Rationalism', *Aboriginal Law Bulletin*, 3(81) June 1996 12 at 13.

28 See Antonios Z Acting Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 1998* 102-3.

29 See also Jonas W *Native Title Report 2001* Human Rights and Equal Opportunities Commission Sydney January 2002 at 23.

30 This is also indicated to some extent by the sheer proportion of all native title litigation in Australia that concerns the application (or not) of the expedited procedure. For an easy indication of this, see Butterworths' *Native Title Service*.

31 Section 203B(4) of the NTA. This is a statutory direction that, it seems, is often overlooked.

32 I make this comment based on personal observation.

33 This is widely recognised within government: see Seaman P *The Aboriginal Land Inquiry* September 1984 chapter 8; see also Rumley H 'South Australian Aboriginal heritage Legislation: Summary, Comparisons and Interaction with Native Title' in Meyers G and Field A *Identity, Land and Culture in the Era of Native Title* National Native Title Tribunal November 1998 at 23-4. Also personal comments from two ex-Registrars of Sites, Michael Robinson and Nicholas Green. See for instance Clarke K *Environmental Management in Western Australia: Aboriginal Heritage* University of Western Australia 1983 at 57-8. My own views are contained in 'Trashing Heritage: Dilemmas of Rights and Power in the Operation of Western Australia's Aboriginal Heritage Legislation' publication pending in Choo C (ed) *Studies in Western Australian History: History and Native Title.*

34 This is now trite law. See for example *Mabo v Queensland (No 2)* (1992) 175 CLR 1 per Deane and Gaudron JJ at 110 and Toohey J at 192.

35 Downs A *Inside Bureaucracy* Little Brown and Company Boston 1967 p 237

36 Above note 35 p 245-6.

37 The spirit of the times is evinced (for example) by French R S 'Native Title: New History for Australia' *The Australian* 30 December 1995.

38 Preamble to the NTA.

39 Bartlett R 'Dispossession by the National Native Title Tribunal' *Western Australian Law Review* (26) July 1996 108 p 137.

40 The critical distinction was that between the native title claims process and the future acts process, both administered by the Tribunal. See s 108 of the NTA.

41 There are other units within the Tribunal: research, human resources, and so on.

42 *Explanation of Guidelines on Acceptance of Expedited Procedure Objection Applications* issued 16 October 2001 para 2.

43 Smith BC *Bureaucracy and Political Power* Wheatsheaf Books Brighton 1988 p 139.

44 Above note 43 p 229.

45 That purported to be consistent with recent dicta comments of Deputy President Franklyn QC in *Roy Dixon and Ors/Ashton Mining Limited/Northern Territory of Australia and six other matters*, DO00/1 - DO00/7. The Guidelines were effective immediately and applied to Applications already lodged with the Tribunal and not yet accepted. There was no consultation process with any native title party prior to their promulgation.

46 Copies of the opinion are available (with Counsel's permission) from the author.

47 Like the Guidelines, the new Guidelines were not exposed in draft form prior to their public release. As an aside, the manner in which para 1 of the Explanation records events in relation to the issue of the New Guidelines issued on 16 October 2001 is strongly disputed. The Tribunal did not invite interested parties to make written submissions in relation to the Old Guidelines of its own motion as is strongly implied by paragraph 1.

48 For instance, there is no reference to any requirement that an objection must contain an identification of

activities, sites or areas in the statute or regulations, yet this is required by the Guidelines.

49 Letter from Dr William Jonas AM Aboriginal and Torres Strait Islander Social Justice Commissioner to Hon Mr Christopher Sumner 'NNTT revised Guidelines on Acceptance of Expedited Procedure Objection Applications – issued 16 October 2001' 5 November 2001.

50 Jonas W *Native Title Report 2001* Human Rights and Equal Opportunities Commission Sydney January 2002 p 21.

51 *Procedures under the Right to Negotiate Scheme* originally issued 7 June 1995.

52 Hogwood B W and Peters B G *The Pathology of Public Policy* Clarendon Press Oxford 1989 p 55.

53 Above note 52 p 52.

54 See *Procedures under the Right to Negotiate Scheme* originally issued 7 June 1995; *Explanation of Guidelines on Acceptance of Expedited Procedure Objection Applications* issued 16 October 2001; and *Guidelines on Acceptance of Expedited Procedure Applications* issued 16 October 2001.

55 See ss 139 and 151. I am grateful to the anonymous reviewer for emphasising this point.

56 See Jonas W *Native Title Report 2001* Human Rights and Equal Opportunities Commission Sydney January 2002 p 21-23.

57 This has been echoed in a recent inquiry decision in which the Member expressed the following concern about the uncontested evidence of the objectors. 'It is possible to have some reservations about the native title party's evidence. Firstly, the affidavits are almost identically worded suggesting they have been prepared to a formula': *Inquiry into an expedited procedure objection application by Gilla and Others on behalf of Yugunga-Nya v State of Western Australia* WO01/174 27 March 2002 at para 14. One is tempted to ask, in what civil litigation are affidavits *not* formularised at least to the extent that they recite the facts that are relevant to making out, or defeating, a cause of action?

58 Hummel R P *The Bureaucratic Experience* St Martin's Press New York 1977 p 17.

59 Jonas W *Native Title Report 2001* Human Rights and Equal Opportunities Commission Sydney January 2002 p 23.

60 Above note 59 at Chapter Two and sources cited therein.

61 Members of the NNTT themselves admit this. See for instance the comments of Sosso J 'The Role of the Tribunal and the Federal Court' paper delivered to *Negotiating Country* a forum held by the National Native Title Tribunal at Customs House Brisbane 3 August 2001 available online at <www.nntt.gov.au>.

62 Peter Yu quoted in Western Australian Native Title Working Group press release 31 May 2001.

63 Above note 62.

64 *Explanation of Guidelines on Acceptance of Expedited Procedure Objection Applications* issued 16 October 2001 para 9.

65 I make this comment from my own experience of acting for native title claimant groups rather than from anything I have been able to find in the literature.

66 Bennett S *White Politics and Black Australians* Allen & Unwin Sydney 1999 p 130. See also Wood M 'Nineteenth Century Bureaucratic Constructions of Indigenous Identities in New South Wales' in Peterson N and Sanders W *Citizenship and Indigenous Australians* Cambridge 1998.

67 Letter from Hon Mr Christopher Sumner to Dr William Jonas AM Aboriginal and Torres Strait Islander Social Justice Commissioner 'NNTT revised Guidelines on Acceptance of Expedited Procedure Objection Applications – issued 16 October 2001' 18 December 2001 p 6.

68 It is also symptomatic of the broader failure of Government to tackle Indigenous issues in a holistic way. See Pearson N *Our Right to take Responsibility* Noel Pearson and Associates Cairns 2000 p 40.

69 Frug E 'The Ideology of Bureaucracy in American Law' in Hutchinson A C *Critical Legal Studies*, Rowman & Littlefield Totowa (NJ) 1989 p 184-5.

70 Hummel R P *The Bureaucratic Experience* St Martin's Press New York 1977 p 166.

71 Above note 70 p 166.

72 The problem of describing place neatly illustrates this dynamic. Spatial description is culturally conditioned and tensions have been evident in remarks by Members to the effect that, if sites of spiritual significance exist, Aboriginal people should frequent them and be able to point to them on a map with some precision. This rationalism reached a peak in one matter, where an objecting native title party seeking an adjournment because the occasion of cultural law business made it impossible to provide evidence during a particular period of time was directed to provide a detailed submission supporting its application for an extension of time setting out (among other things) the nature of

Indigenous law business.

73 Hummel R P *The Bureaucratic Experience* St Martin's Press New York 1977 p 24.

74 Bennett S *White Politics and Black Australians* Allen & Unwin Sydney 1999 p 142.

75 Cohen H *The Demonics of Bureaucracy* Iowa State University Press Ames 1965 p 161.

76 On the basis of this productivity measure (and others), the Tribunal makes its annual case to the Commonwealth Government for increasing its resources made available to it. It is possible then that there is an institutional tendency for the Tribunal to attempt to dispose of expedited procedure matters more quickly in order to justify its budget.

77 Hogwood B W and Peters B G *The Pathology of Public Policy* Clarendon Press Oxford 1989 p 49. See Edmunds M 'Comment' *AIATSIS Native Title Research Unit Native Title Newsletter* (6) Nov/Dec 2001 p 3.

78 *National Native Title Tribunal Annual Report 2000-2001.*

79 *Little v State of Western Australia* [2001] FCA 1706 (6 December 2001) para 85.

80 Neate G *Native Title and Mining Industries in Australia: Meeting the challenges and pursuing the possibilities* paper delivered at Australian Mining Seminar Australia House London 7 February 2001 available online at <www.nntt.gov.au>. The text is not paginated or paragraphed, but see text at n 128-9. See also the cases cited therein, particularly *Western Australia v Ward* (1996) 70 FCR 265.

81 Described by the Aboriginal and Torres Strait Islander Social Justice Commissioner as 'over-emphasis on promptness at the expense of other considerations.' Jonas W *Native Title Report 2001* Human Rights and Equal Opportunities Commission Sydney January 2002 p 22.

82 Curiously, this fact sheet contains an illustrative photograph depicting the use of large-scale mining that would not be permissible under the terms of a prospecting or exploration tenement.

83 'Fast-tracking exploration and prospecting tenements' National Native Title Tribunal January 2001.

84 National Native Title Tribunal *Native Title: A Five Year Retrospective 1994-1998. Report on the Operations of the Native Title Act 1993 and the effectiveness of the National Native Title Tribunal* February 1999 11.

85 Bartlett R 'Dispossession by the National Native Title Tribunal' *Western Australian Law Review* (26) July 1996 108 p 108.

86 Bureaus can change and will usually do so in response to some external stimulus. In the past, reform of the Tribunal has come after decisions of the Federal and High Courts of Australia, both of which have been required to restrain the Tribunal's excessive actions. Other stimulus may come from the Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, currently conducting an inquiry in to the effectiveness of the National Native Title Tribunal. I am not aware of any reform embarked upon by the Tribunal in response to the indictments contained in Jonas W *Native Title Report 2001* Human Rights and Equal Opportunities Commission Sydney January 2002.