National Native Title Tribunal

Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector (December 2008)

Submission to Productivity Commission Draft Research Report

C J Sumner, Deputy President, 9 February 2009

Resolution of native title over land and waters.

NATIONAL NATIVE TITLE TRIBUNAL

Submission to the Productivity Commission Draft Research Report
"Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector"
(December 2008) – 9 February 2009

1. INTRODUCTION

In the draft Report, delays in project approvals are identified as a factor that can impose significant burdens through increased project costs, reduced flexibility in responding to market conditions, with such delays impeding the financing of projects and deferring production and revenues. It is suggested that cutting the time taken to gain approval for a project can have significant benefits (*Overview p XXIII)*.

Native title and land rights are identified as involving legislation which affect the upstream petroleum sector. The *Native Title Act 1993* (Cwlth) (NTA) is the legislation which sets up the National Native Title Tribunal (the Tribunal). This submission is confined to the matters arising under the NTA which are the subject of comments in the draft Report.

It is important to acknowledge that the general principle underlying the recognition of native title in the NTA is that native title holders should be treated in the same way as holders of ordinary (freehold) title. Overall the recognition of native title has, since 1994, added another regulatory process to gaining approval for upstream petroleum resources which has undoubtedly contributed to delay but this is an inevitable consequence of the non-discriminatory principle which underpins the NTA. The draft Report and the Tribunal's submission accept these policy parameters.

The Tribunal's submission does not comment on policy issues but confines its comments to factual matters and attempts to correct some statements in the draft Report.

2. DRAFT RECOMMENDATION 5.5

> ***Draft Recommendation 5.5***
> *There is evidence that in some circumstances Indigenous land use agreements can streamline the native title approval process and reduce the backlog of future act applications. State and Territory Governments should investigate whether such agreements could be used more frequently (including statewide, regional and conjunctive Indigenous land use agreements). (pps XLIII, 105)*

Whilst the Tribunal agrees with the thrust of Draft Recommendation 5.5, it believes that some of the information upon which the recommendation was based, particularly insofar as it relates to the Tribunal's role within the right to negotiate (RTN) process, has been misinterpreted and requires clarification. One key point we would like to make clear is that the Tribunal is only one element of the administration of the RTN process and can only become involved to assist with

agreement-making upon request or in an inquiry by way of a future act determination application (FADA) or an objection to the application of the expedited procedure to the grant of a tenement or title. The Tribunal does not have an initiating role in the RTN process.

Draft Recommendation 5.5 also refers to '*evidence* that in some circumstances Indigenous Land Use Agreements (ILUAs) can streamline the native title approval process and reduce the backlog of future act applications', but the report does not detail the evidence relied upon. In the Tribunal's view and experience it is certainly correct that in some circumstances ILUAs can streamline native title approval processes especially where the ILUA involves conjunctive agreements covering the grant of exploration and production titles and/or future grants in a particular area or in relation to a particular project. ILUAs may also enhance long term relationships with the native title parties However, it is impossible to say overall whether ILUAs are a better method to progress a proposed future act unless all of the circumstances of the project, including the native title environment (such as whether there are competing claims over the area) are known. In some circumstances the RTN might be a better option for parties. The Tribunal's views and experiences are expanded on below in response to particular sections of the draft report and we have included with this submission an updated version of the information sheet that the Tribunal produces that compares both the RTN and ILUAs (www.nntt.gov.au/Publications-And-Research/Publications/General/ILUA/ILUA or RTN process.pdf) (Attachment A - ILUA or right to negotiate process? *A comparison for mineral tenement applications)*. A 2005 version of the information sheets was referred to by the Commission in its preparation of the draft report.[1] In all cases, governments and proponents need to carefully consider all of the circumstances of a project before determining how they would like to progress the proposed future act/s.

Therefore, while the Tribunal fully supports the use of ILUAs in appropriate circumstances, it is the Tribunal's submission that the recommendation might be better worded to either:

- Remove reference to evidence, unless that evidence is provided in the final report in more detail than is currently the case in the draft report; or
- Recommend more broadly that state and territory governments and proponents in conjunction with native title representative bodies should consider which of the future act provisions of the NTA (right to negotiate or indigenous land use agreements) is likely to most effectively facilitate the processing of a proposed future act or related series of future acts while ensuring the rights of native title parties are properly recognised.

Rewording the recommendation so that it encompasses both the RTN and ILUAs would require inclusion in the final report of information about circumstances in which the RTN might be the more appropriate future act process to follow. Our submission contains information suggesting that whether the RTN or an ILUA is the

[1] Referred to in the draft report as NNTT 2005

most appropriate process will depend on the circumstances of particular matters. If the Commission requires additional information we would be happy to provide it.

We note that 80% of Australia's gas reserves and 95% of oil reserves are offshore.[2] The RTN does not apply to a future act to the extent that the act relates to areas below the mean high water mark. Therefore, the RTN is only available in relation to a small percentage of future acts relevant to the development of those resources and the Tribunal's role is correspondingly limited to those future acts.

Nevertheless, we consider it important to clarify statements in the draft report on provisions of the NTA and the role of the Tribunal in the RTN process and to provide information with respect to future acts and ILUAs that the Commission might find helpful in the finalisation of the report.

3. RIGHT TO NEGOTIATE AND THE TRIBUNAL'S ROLE WITHIN IT

Box 5.3 Right to negotiate procedures

Under the right to negotiate procedure, the State or Territory Government publishes a notice that it wants to grant a tenement for a proposed development (a future act).

The notice is given by placing an advertisement in major newspapers. It must also be given directly to any native title parties (includes registered native title claimants and registered native title bodies corporate). People who claim to hold native title in the area, but have not yet made a native title claimant application, have three months from the date given in the section 29 notice to file a claim if they want to have the right to negotiate about the proposed future act (Native Title Act 1993 (Cwlth) (NTA). To obtain that right, they must also be registered within four months of the date given in the notice.

If there are objections to the proposed future act at the end of the three month period, the government, the developer and the native title party must negotiate 'in good faith' for at least six months about the effect of the proposed development on the registered native title rights and interests. The right to negotiate is not a right to stop or veto projects from going ahead, but it does give native title parties a right to have a say about the project. The aim is to obtain the agreement of the native title parties to the future act being done.

The parties can ask the National Native Title Tribunal (NNTT) to mediate during the negotiations. If the negotiations do not result in an agreement (after the parties have negotiated for at least six months), then under section 35 of the NTA any party can ask the NNTT to make a determination under section 38 of the NTA as to whether or not the future act should go ahead, or under what conditions it should go ahead.

---

[2] Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector, Productivity Commission Draft Research Report, p.XXII.

The NNTT is required to make a determination as to whether the tenement can be granted, and under what conditions as soon as is practicable (NTA, s 36). Six months is allowed for the NNTT to make a determination. However, if a determination is not made within this time, then the NNTT must advise the Commonwealth Minister in writing of the reason for it not doing so, and include in that advice an estimate of when a determination is likely to be made (NTA, s 36).

The NTA also allows for an 'expedited procedure' if a 'future act' has a minimal impact on native title, in which case there is no need for negotiations (unless there is an objection by native title parties). (Source NNTT (2005))' (p 100)

Although the statements in this Box are, broadly speaking, correct when describing the RTN process they are not completely accurate. The NTA is specific about terminology, timeframes and processes in relation to future acts, which means that making generalisations or simplifying the process is difficult to do without providing some incorrect information about the process.

Immediately below is an overview of the process in general and the Tribunal's role within it followed by information which corrects a number of particular statements in Box 5.3 that the Tribunal considers are incorrect.

3.1 Overview of RTN process

As the draft Report says, the RTN process under the NTA is initiated when a state/territory government party gives notice (section 29 notice) of its intention to do a future act.

Expedited Procedure

If the government party giving the section 29 notice decides that the proposed future act meets the criteria necessary to attract the expedited procedure, the section 29 notice will include a statement to that effect. If the government party does assert that the expedited procedure applies, then the native title party may lodge an objection against that with the Tribunal. The Tribunal is then required to conduct an inquiry to determine whether the expedited procedure applies to the proposed future act or not. Section 237 NTA states that a future act is an act attracting the expedited procedure if it is not likely to:

a) interfere directly with the carrying on of the community or social activities of the native title holders in relation to the land or waters concerned; and

b) interfere with areas or sites of particular significance, in accordance with their traditions, to the native title holders in relation to the land or waters concerned; and

c) 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.

If the Tribunal determines that the expedited procedure does apply, the government party may do the act, i.e. the right to negotiate is not afforded to the native title parties.

However, nothing in the NTA prevents the parties from negotiating to reach agreement about the proposed future act while an objection application is before the Tribunal. Indeed, statistics from 2007-2008 indicate that the majority of objection applications are withdrawn prior to determination because the negotiation parties have reached agreement[3]. The Tribunal will usually defer making an expedited procedure determination for a period of time (if all parties agree) to allow the parties to pursue resolution by agreement. The negotiation parties can request the assistance of the Tribunal to progress those negotiations. In 2007-2008, 86% of objections resolved by agreement were resolved within nine months of the Tribunal's acceptance of the objection application. The Tribunal's performance standard is for 70% to be finalised within nine months of acceptance[4].

Statistically, there is not a significant difference in the time taken to resolve objections other than by agreement. Of the objections that were resolved other than by agreement, usually involving a decision of some sort by the Tribunal, 90% were finalised within nine months of the section 29 closing date. The Tribunal's performance standard is for 80% to be finalised within nine months of the s 29 closing date[5].

It is true that in cases where an inquiry and determination is necessary, applications usually take longer than nine months (from the section 29 closing date) to resolve. This is usually in circumstances where the Tribunal, at the request of the parties, has allowed a period of negotiation but parties have failed to reach agreement. In 2007-2008 only 23 objections out of 1,014 were disposed of by inquiry and determination[6].

In 1996, the Tribunal determined that the expedited procedure did not apply to three petroleum exploration permits applied for in Western Australia[7]. Since then, it seems that government parties generally do not include expedited procedure statements in section 29 notices that deal with petroleum title applications, although there has been at least one exception to this recently and that matter is currently the subject of an objection application before the Tribunal[8].

---

[3] National Native Title Tribunal Annual Report 2007-2008, Table 9, p 78

[4] National Native Title Tribunal Annual Report 2007-2008, p 78. An objection application must be valid in order for the Tribunal to have jurisdiction. An acceptance decision is usually made within 2 weeks of receipt of the objection application. Many objection applications are received on or close to the section 29 closing date.

[5] National Native Title Tribunal Annual Report 2007-2008, p 78

[6] National Native Title Tribunal Annual Report 2007-2008, Table 9, p 78

[7] *The Nyungah People/Western Australia/Empire Oil Company (WA) NL; Amity Oil NL; GeoPetro Co; Ensign Operating Co; Seven Seas Petroleum Inc*, [1996] NNTTA 18 (30 April 1996); Tribunal references WO95/29, WO95/32 and WO95/37

[8] EP/12/07-8 in Western Australia, NNTT-WO08/511

Right to negotiate - no expedited procedure

If the Government party does not assert that a proposed future act attracts the expedited procedure, or the Tribunal has determined that it does not, then the RTN under s 31(1) NTA applies.

Under the RTN, any negotiation party (i.e. government party, grantee party or native title party) can apply to the Tribunal for either mediation assistance (at any time during negotiations) or for a future act determination. As the draft Report notes, an application for a Tribunal determination in relation to a proposed future act can only be made if at least six months have passed since the s 29 notification day. The Tribunal must not make a determination if a negotiation party satisfies it that any other negotiation party (other than the native title party) did not negotiate in good faith.

As the draft Report says, once a future act determination application (FADA) has been made by one of the negotiation parties, the Tribunal is required to take all reasonable steps to make a determination as soon as practicable after the request has been made and report to the Commonwealth Minister if it does not.

The average timeframe for a Tribunal determination to date (specifically relating to petroleum matters) has been just under six months. Only three petroleum-related FADAs have taken longer than six months to determine (NNTT Nos. WF02/4, WF02/7 and WF02/8). The delays associated with these particular applications were at the request of the negotiation parties and are explained in more detail below under 4.1 Overview, *Land access*.

In the 2007-2008 reporting period, 99% of all future act determination applications (principally mining) were finalised within six months of being lodged in the Tribunal.[9] In 2006-2007, 95% of all future act determination applications were finalised within 6 months of being made[10]. The performance indicator in both reporting periods has been 80% of future act determination applications finalised within 6 months of the application being made.

It is also important to note that it is not usual for negotiation parties to lodge FADAs as soon as the six months from the notification date have expired. Statistics compiled in June 2007 (and covering all FADAs, not those relating only to petroleum matters) showed that of 213 applications made to the Tribunal between 1 January 1994 and 30 June 2007:

- 44 were lodged between 6-12 months
- 33 between 12-18 months, and
- 136 were lodged after 18 months from the notification date had expired.

[9] National Native Title Tribunal Annual Report 2007-2008, p 75

[10] National Native Title Tribunal Annual Report 2006-2007, p 66

Parties can be negotiating within a state government's RTN processes for several years before lodging such an application with the Tribunal. By way of example, in Western Australia a section 29 notice was given in September 1999 but an application under section 35 of the NTA for a future act determination was not made to the Tribunal until July 2006 (NNTT No. WF06/25, petroleum exploration permits). The Tribunal made the determination (by consent) within one month of receipt of the application.

There is a considerable difference in the time taken to resolve FADAs, depending on whether the determination is contested or made by consent of all parties. Where a FADA is contested, it is not uncommon for a native title party to challenge the Tribunal's jurisdiction on the basis that either the government or grantee party have not negotiated in good faith. When this occurs, there is greater pressure on the Tribunal to make a determination within six months and a good faith challenge adds to the cost of the process.

On the other hand, consent determinations can be a comparatively inexpensive and expeditious means of enabling tenement or title applications to be granted following the conclusion of negotiations. They are useful when agreement has been reached in relation to the doing of the future act but there is some impediment to the execution of that documentation, for example if formal execution would be a time consuming and expensive process. This can be the case where the native title party comprises a number of individuals who live in remote areas. The Tribunal must be satisfied that the native title party has reached agreement, has given its consent to a determination being made, and that it is appropriate to make the determination in all the circumstances. An example of a future act determination made by consent is NNTT No. SF05/1 discussed in more detail below.

The Tribunal hopes that the information provided above clarifies that the Tribunal is not involved in the resolution of tenement or title applications under the NTA until the relevant government issues a section 29 notice and either an objection against the application of the expedited procedure is made, mediation assistance is requested, or a FADA is made. The NTA does not empower the Tribunal to intervene in the RTN on its own initiative. It is correct that, when a FADA is made to the Tribunal, there will be time in addition to negotiation time already taken to determine the application and there will be costs associated with that. However, in most cases FADAs are resolved within six months of the making of the application. Where agreement has not been reached by the negotiation parties, FADAs are made in circumstances where granting of the tenement could not proceed without a determination and, as demonstrated by the large number of consent determinations in 2007-2008[11], they are also made in circumstances where the parties consider a determination by the Tribunal will take less time than formally executing an agreement that has been reached. As the draft Report points out (p 99), if a proponent proceeds by way of ILUA, rather than the RTN, and no agreement is reached, there is no statutory process available (i.e. arbitration) to resolve the matter.

[11] National Native Title Tribunal Annual Report 2007-2008, Table 8, p 76

Accordingly, the Tribunal submits that any impression that its involvement as an arbitrator significantly delays the processing of future act applications, over and above the time that might be taken for an ILUA to be negotiated and registered, is not correct in most cases.

3.2 Clarification of comments in Box 5.3 Right to Negotiate Procedures

The description of the RTN process in Box 5.3 is not completely accurate. The following information requires clarification:

> *If there are objections to the proposed future act at the end of the three month period, the government, the developer and the native title party must negotiate in good faith for at least six months about the effect of the proposed development on the registered native title rights and interests (paragraph 3).*

As already explained, the term 'objection' has a particular meaning in the NTA. Lodging an objection with the Tribunal is the means by which a native title party can object to the application of the expedited procedure to a proposed future act in circumstances where the government party has asserted that it applies. The draft Report correctly says the native title party has four months from the notification day specified in the section 29 notice to become a registered native title claimant, if they are not already a registered claimant or determined holder of native title, and four months within which to lodge an expedited procedure objection application.

In relation to the RTN (other than the expedited procedure process), there is no three-month waiting period before the negotiation parties can commence negotiations. Negotiations can commence at any time after the section 29 notice is given (and, in some cases, may have commenced before it is given). However, if a new native title party emerges (e.g., because they have filed a native title determination application within three months from the notification date, and that application is registered within four months), the developer and government party will need to negotiate with that party as well. The Tribunal notes that, as most claims have already been lodged, the emergence of new native title parties after section 29 notification is now a relatively rare occurrence.

Additionally, although s 31(1)(b) NTA does require negotiation parties to negotiate in good faith, and the Tribunal must not make a determination if a negotiation party satisfies it that any other negotiation party (other than the native title party) did not negotiate in good faith (s 36(2) NTA), there is no provision in the NTA which requires negotiation parties to "*negotiate in good faith for at least six months*". The negotiation parties cannot lodge a FADA with the Tribunal unless six months have elapsed from the notification day specified in the section 29 notice. However, ss 31(1)(b) and 36(2) do not impose a mandatory period for good faith negotiations.

This clarification is also relevant to paragraph 4 in Box 5.3 *'(after the parties have negotiated for at least six months)'* and the statement on page 102, paragraph 2 under the heading *Native Title* which is addressed in more detail below.

Six months is allowed for the NNTT to make a determination (paragraph 5)

Technically, the NTA does not specify a timeframe within which the Tribunal must make a determination under s 35. The only requirement is, as the Draft Report notes further on in that paragraph, that the Tribunal advise the Commonwealth Minister if a determination is not made within six months of the s 35 application having been made and provide an estimate of when a determination is expected.

The NTA also allows for an 'expedited procedure' if a 'future act' has minimal impact on native title, in which case there is no need for negotiations (unless there is an objection by native title parties) (paragraph 6).

The term 'minimal impact on native title' is a short hand way of referring to the expedited procedure. In fact, the NTA specifies in some detail when a future act is an act attracting the expedited procedure at s 237 (set out above under the heading 'Right to negotiate and the Tribunal's role within it').

There is no requirement in the NTA for negotiation with the native title party if the government party asserts in the section 29 notice that the expedited procedure applies to the future act and the native title party then makes an expedited procedure objection application to the Tribunal. Negotiation with the native title party is only required if the Tribunal makes a determination that a future act does not attract the expedited procedure. In these cases, the future act is then subject to the RTN. However, it is common practice for the parties to negotiate voluntarily in an attempt to reach agreement resulting in withdrawal of the objection and this is the most common way that objections to the application of the expedited procedure are disposed of (see above).

4. COMMENTS IN RELATION TO SPECIFIC SECTIONS OF THE DRAFT REPORT

4.1 Overview

Land access (p XXIX)

There is evidence of delays in the processing of future act applications through the RTN procedure and specifically when the National Native Title Tribunal is asked to arbitrate and determine the outcome of an application. There is also a backlog of future act applications for processing by the tribunal, exacerbating delays.

ILUAs provide a flexible alternative to negotiating land access approvals. They appear to have the potential to streamline the approval process, reduce the resources required for successive negotiations, take less time, and reduce costs in the long run for large, complex projects, or where there are likely to be many future act applications in one area. Such agreements have been used successfully in South Australia. Governments should investigate whether greater use of such agreements is feasible, particularly as reducing unnecessary process delays should lead to better outcomes for all parties.

Table 2 A Summary of the Commission's proposals (p XXXIX)

Land access		
Delays in processing future act applications for access to land subject to native title	• *Investigate whether Indigenous land use agreements could be used more frequently*	• *Streamlines approval process, reduces resources for successive negotiations and takes less time*

Although there might be backlogs within the relevant agency of a state or territory government of tenement applications waiting for section 29 notices to be given or subject to the RTN, there is no backlog of future act determination applications for processing by the Tribunal. There is currently only one petroleum related future act application before the Tribunal in its arbitral capacity and that is an expedited procedure objection application (i.e. the state government asserted that the expedited procedure applied and the native title party objected to this assertion). This application, NNTT No. WO08/511, was lodged with the Tribunal in July 2008. At the request of the parties, the inquiry has been adjourned to allow negotiations towards an agreement to continue.

As noted above, while it is correct that making a future act determination application (FADA) to the Tribunal can add anywhere between one to six months (and, in a few contested cases, longer) to the final resolution of an application for a mining tenement or petroleum title (based on the majority of determinations being made within six months), the context in which this time frame should be viewed is that, without a determination by the Tribunal, the application would possibly not have been resolved at all.

Between January 1994 and December 2008, 34 FADAs specifically relating to petroleum titles were processed by the Tribunal, with an average resolution time of just under six months from the date of making of the FADA. Three applications took between one and three years *from the date the application was lodged with the Tribunal* to resolve (NNTT Nos. WF02/4, WF02/7 and WF02/8). In each of these cases, the inquiry process was adjourned to accommodate requests by the parties for mediation assistance (section 150 conferences). Two of the three applications, WF02/7 and WF02/8, were finalised by consent determinations following the provision of that mediation assistance. WF02/4 involved three separate native title parties, two of which reached agreement and withdrew from the inquiry process. Mediation assistance involving the third native title party was unsuccessful, negotiations ceased and the inquiry process resumed. There was a challenge to whether or not the grantee had negotiated in good faith, which required the Tribunal to conduct an inquiry into whether or not it had power to continue with the substantive inquiry process.

> *Under the Native Title Act 1993 (Cwlth) there are two main avenues to deal with 'future act' (project) applications — the 'right to negotiate' procedure (RTN) or Indigenous land use agreements (ILUAs). (p XXIX)*

It should not be thought that these two processes are mutually exclusive. There is nothing to prevent ILUA and RTN agreements being negotiated in parallel. In the event that the ILUA negotiations take longer than desired with respect to the specific tenement/title applications, an application for a future act determination can be made (provided the RTN is applicable to the particular tenement/title, a section 29 notice has been given and the parties have negotiated in good faith) so that these applications can be resolved while the ILUA negotiations continue. The Tribunal notes that s 31 agreements under the RTN and future act determinations can also deal with sequential or related project acts. Subsection 26D(2) NTA specifically enables this. An example of a s 31 conjunctive agreement is that reached in relation to PEL86 in the Cooper Basin[12]. An example of a conjunctive determination made by consent by the Tribunal is NNTT No. SF05/1 which was made on 28 July 2005 in relation to a petroleum exploration licence, just over three weeks from when the FADA was made to the Tribunal. In total, a period of nine and a half months had expired from the date of the government notification (section 29 notice) to the date of determination.

As explained in the draft Report and confirmed elsewhere in this submission, the advantage of an ILUA is that it does not have to be tenement initiated or specific, unlike a s 31 agreement or a future act determination (see also Attachment A – ILUA or right to negotiate process? . *A comparison for mineral tenement applications*).

4.2 Chapter 4 Regulatory overview (p 43)
Chapter 4.3 Regulators and other relevant bodies (p 53)

Native title is dealt with by the National Native Title Tribunal (p 53)

This statement is not strictly accurate. As noted above under the heading 'Right to negotiate and the Tribunal's role within it', the Tribunal can only become involved in relation to future acts or ILUAs upon application by one of the negotiation parties either to mediate, arbitrate, provide assistance to negotiate an ILUA or assess an ILUA for registration. Native title, insofar as it relates to future acts, can be dealt with by the parties without any reference to the Tribunal until the s 31 agreement (in the case of the RTN) is lodged with it.

4.3 Chapter 5 – Resource management and land access (p 69)
Chapter 5.2 – Land access (p 92)

General observations on ILUAs

Before looking at particular statements within this section of the draft report, we make the following observations about ILUAs.

Parties need to consider carefully whether or not an ILUA is the best type of agreement for their needs, taking into account their particular circumstances. This is, in part, because the NTA sets out particular requirements for an agreement to be an ILUA and for it then to be a registrable ILUA. It is only once an ILUA is registered

[12] Agreement available at www.pir.sa.gov.au

(and then only one which specifically includes a statement that Subdivision P, which includes the RTN, is not intended to apply) that the RTN process does not apply. Whether or not the registered ILUA, in turn, results in a more streamlined procedure for dealing with future acts will depend upon the implementation of the ILUA, including whether or not there are any disputes arising from it.

Additionally, as with all negotiations, the timeframe for concluding an ILUA will depend upon the parties to it, the issues concerned and the resources devoted to it. While there might be longer term savings where a conjunctive agreement is negotiated as part of an ILUA, the costs and time associated with negotiating the ILUA in the first instance may (depending on the circumstances) be comparable to the costs associated with negotiating an agreement under the RTN. The Tribunal also notes that as more determinations of native title are made, the ILUAs negotiated will be body corporate ILUAs which may provide greater opportunities for resolving matters more quickly because the area has been subject to a determination recognising native title exists, dealings are with the registered native title body corporate, the notification period for the agreement is only one month and there is no capacity for objection to the registration of the ILUA.

As already noted, the advantage of the RTN is that a negotiation party may apply to the Tribunal for a determination if at least six months have passed since the notification day contained in the section 29 notice and, in most cases, have the determination made within a further six months. Examples of considerable time being taken to negotiate ILUAs are two Northern Territory petroleum ILUAs (the Sandover Petroleum ILUA and the Simpson Desert ILUA)[13] which were negotiated over a period of between 3-5 years (taken from the time the government published the section 29 notices to the date of registration of the ILUAs).

It is of course true that the attraction and advantage of ILUAs to proponents (as the draft Report notes) is that an ILUA that complies with s 24EB(1)(c) of the NTA precludes the RTN from applying to the relevant future acts from the time of registration. The Tribunal considers it important, however, that negotiating parties are aware that a registrable ILUA might not be the most appropriate mechanism to resolve future act issues in their particular circumstances; indeed it might not be achievable. For example, in circumstances where the agreement area encompasses multiple or competing native title claims or a native title claim group that is not unified with respect to development proposals, meeting the authorisation requirements of the NTA for the relevant type of ILUA (an area agreement) might not be possible. The draft report briefly touches on these potentially limiting circumstances on p 105.

The draft Report also refers to the South Australian government's preferred position of negotiating state-wide ILUAs. To date, there has been just the one petroleum ILUA registered in South Australia (Cooper Basin) involving one native title party (representing one claim group). The logistics involved in obtaining the signatures of

[13] NNTT-DI2006/002 and DI2005/007

all applicants to this ILUA meant that it took a further 12 months from when the State Minister executed the agreement in 2007 to when it was lodged for registration on 17 March 2008 (and registered on 22 August 2008). Prior to this ILUA, successful negotiations under the RTN had resulted in some 39 s 31 agreements for petroleum tenements in the Cooper Basin being lodged with the Tribunal.[14]

Key points (p 69)

- *There is evidence of delays in the processing of applications to explore for petroleum on land subject to native title.*
  - *In Australia, most State and Territory Governments process applications for petroleum exploration in accordance with the right to negotiate (RTN) procedures outlined in the Native Title Act 1993 (Cwlth). The exception is South Australia, where the preferred position of the Government is to negotiate through Indigenous land use agreements (ILUAs).*
  - *Applications processed through the RTN procedure, and more specifically when the National Native Title Tribunal is asked to arbitrate and determine the outcome of an application, have taken longer to negotiate than other cases that have been progressed through an ILUA.*

Key regulatory processes and requirements (p 99)

Native title

In Australia, most State and Territory Governments process future act applications for petroleum exploration in accordance with the RTN procedure specified in the NTA. However, at least two applications for petroleum exploration permits in the Northern Territory have been negotiated through an ILUA and registered with the NNTT (NNTT 2008a).

The exception is South Australia where the preferred position of the Government is to negotiate future acts through an ILUA. Instead of negotiating petroleum ILUAs on a case-by-case basis, as has occurred in the Northern Territory, the SA Government has developed a statewide framework. First initiated in 1999, the statewide ILUA process is designed to resolve native title matters in respect of all interests (represented by peak bodies) with the relevant native title bodies across the State.

Sources of unnecessary regulatory burden (p 101)

Native title (p 102)

There is evidence of a backlog of future act applications with native title implications, particularly in the resource rich states of Western Australia and Queensland (NNTT 2008b). Such backlogs can exacerbate delays in the processing of applications by the NNTT. (p 102)

[14] Agreements available at www.pir.sa.gov.au

As noted above under *4.1 Overview, Land Access,* there is no actual backlog of RTN applications before the Tribunal. Tribunal inquiries (in relation to FADAs and expedited procedure objections) are processed in as timely a manner as possible. Large numbers of matters within the expedited procedure objection process are, at the request of the parties, subject to a period of negotiation. If there are backlogs of tenement/title applications elsewhere in the system, they are not having an impact on the timeframe within which the Tribunal determines expedited procedure objection applications or FADAs. As far as the Tribunal is aware, there is no evidence to suggest overall that applications processed through the RTN take longer to negotiate than other cases that have been processed through an ILUA. The time taken in both cases depends on the particular circumstances, which can vary quite markedly.

As noted below, although the Tribunal supports the policy of placing emphasis on ILUAs, the situation in South Australia has had the practical result that to date there are no statewide or regional ILUAs that have been finalised in the petroleum sector.

> *Delays in the processing of applications can also occur if the NNTT is asked to arbitrate and determine the outcome of a future act application under the RTN procedure. For example in Western Australia, 25 future act applications for petroleum exploration permits have been determined by the NNTT from the commencement of the NTA until June 2008. Of these 18 took longer than 15 months to approve, with two of these applications taking seven years to approve (NNTT 2008c). (p 102)*

It would seem that the timeframes quoted in the examples referred to on page 102 have been calculated from the notification date contained in the section 29 notice through to the final resolution by Tribunal determination, rather than from the point in time at which the Tribunal could have any impact on the timeframe for resolution of the matter, i.e. the date of the making of a FADA to the Tribunal. Earlier in this submission, we have provided information in relation to the average timeframe taken to resolve petroleum related future act applications and some of the details of the circumstances surrounding the three applications that took longer than six months to resolve. We have also noted earlier in this submission that negotiation parties do not always make an application to the Tribunal immediately following the expiration of six months from the notification day specified in the section 29 notice.

> *The RTN process can also involve significant direct costs. The applicant must be prepared to meet their own costs of participating in the process such as any travel expenses, meeting costs, legal expenses and court fees. These costs will depend on the nature and length of the negotiations and whether the application is referred for determination. Where an agreement is not reached and the application is referred to the NNTT for determination, the applicant is required to pay any associated fees. The applicant may also be required to reimburse any costs incurred by government officers during the negotiation period, including but not limited to travel and accommodation expenses. (p 102)*

An applicant may need to pay an application fee when making a right to negotiate application to the Tribunal. The current fee is $682 and this fee applies to both future act determination and expedited procedure objection applications. While the *Native Title (Tribunal) Regulations 1993* allow for a number of circumstances in which fees are either not payable by an applicant or where the Native Title Registrar can exercise discretion to waive that fee, this is probably not applicable to petroleum companies. However, the regulations also provide that, where a Tribunal determination has been made, the person who paid the prescribed fee is, upon request, entitled to a refund if the Tribunal certifies that the proceedings terminated in that person's favour. This is a common practice.

In relation to reimbursement of costs incurred by government officers during the negotiation period, the Tribunal is not aware that this is the case and, as the draft report does not specify the source of this statement, it would be worthwhile checking the accuracy and source of the statement before including it in the final report.

It is true that the RTN may involve legal costs (especially if the matter is subject to arbitration) which has the potential to increase the costs to all parties in achieving a final resolution of the matter. However, whether those costs are greater than those incurred in negotiating an ILUA will depend on circumstances such as the complexity and time taken to reach an agreement. It is common for lawyers to also be involved in the negotiation of ILUAs.

> *An ILUA has the potential in certain circumstances to streamline the approval process because it can include multiple projects in a single agreement, and avoid the need to negotiate on each new project or future act application, as is the case under the RTN procedure. The ability to cover multiple projects in one agreement can reduce the resources required for successive negotiations and takes less time to negotiate than the RTN process. (p 104, paragraph 1)*

The Tribunal accepts that the circumstances set out in this paragraph are those where an ILUA is most likely to be considered the preferable way to proceed. An ILUA (or indeed a s 31 agreement) will also provide the capacity to meet the needs of all parties (including the native title parties) more comprehensively than a Tribunal determination under s 38 NTA, where there are limitations on the conditions the Tribunal can impose (for instance a condition requiring royalty type payment to be made by a grantee to a native title party cannot be made – s 38(2) NTA). However, the final sentence in this paragraph is unclear in relation to the time taken in an ILUA or RTN process. If it 'takes less time to negotiate' is a comparison of the time it takes to negotiate an ILUA compared with RTN, we submit that this is not necessarily the case. As previously noted, because negotiation timeframes are dependent upon the parties and the complexity of the issues being negotiated, an ILUA might take longer to negotiate than the future act applications might be resolved under the RTN. Negotiations under the RTN might take less time than those leading to an ILUA precisely because they are specific in nature. However, if the sentence refers to negotiations pursued under an already registered ILUA that covers the future act in question, then it is certainly possible that these will take less time than the RTN process.

The Tribunal also notes at this point its earlier observations about the possibility of conjunctive agreements being negotiated within the RTN and the conjunctive determination made by the Tribunal in SF05/1.

> *Further, an ILUA has the potential to be less costly in the long run than the RTN process for large, complex projects, or where there are many tenement applications in one area. (p 104)*

Again, the Tribunal agrees that these are the circumstances in which an ILUA is most likely to be considered. An ILUA can also cover multiple future acts which are covered by different parts of the future act regime[15] and not all of which are covered by the RTN provisions (Subdivision P). Infrastructure such as camps, accommodation villages or pipelines for instance are not covered by the RTN. There is also the potential for an ILUA to be less costly but whether this is in fact the case compared to proceeding under the RTN will depend on circumstances such as the length and complexity of negotiations, whether there is more than one native title party and whether agreement is ultimately reached.

> *They [ILUAs] also appear to be a faster way of resolving native title issues. On average it takes about two years longer to pursue a native title claim through the courts than it does to negotiate a settlement (NNTT 2008d). However, there is no provision for arbitration if the parties fail to reach agreement. (p 104)*

The document on which this paragraph was based, NNTT 2008d, is concerned with ILUAs used to resolve native title determination applications not future act matters. It is misleading to draw conclusions about the RTN as compared to future act related ILUAs based on a comparison of the resolution of native title claimant applications via litigation or ILUA. This is because the issues involved in the negotiation of each are significantly different. The Tribunal is also reviewing the helpfulness and accuracy of the statement made in that document that it takes, on average, about two years longer to pursue a native title claim through the courts than it does to negotiate a settlement. As the statement refers to determinations of native title, not future act ILUAs, it should not be relied upon.

> *Based on practical experience it appears that Indigenous land use agreements have the potential to streamline approval processes, reduce the resources required for successive negotiations, take less time and reduce costs in the long run for large, complex projects or where there are many future act applications in one area. (Draft Finding 5.9, p.104)*
>
> *The ability to negotiate conjunctive agreements, covering both exploration and production, can also streamline approval processes and avoid industry participants renegotiating the terms of development after the exploration phase. In February 2007, the SA Government initiated the first conjunctive petroleum ILUA in Australia. This agreement covers petroleum exploration and production in much of the Cooper Basin (Holloway 2007). (p 104)*

[15] *Native Title Act 1993* (Cwlth), Part 2, Division 3

We are unclear as to which practical experience the draft finding is based upon and submit that any final report should provide greater detail of this. As already pointed out, only one petroleum ILUA has been negotiated in South Australia and then only in relation to one native title party. Although the Tribunal agrees in general that ILUAs have the potential to streamline approval processes, it is also the case that, as noted earlier in the report, conjunctive agreements are possible under s 31 NTA and the Tribunal is able to make conjunctive determinations. One of the critically important aspects about ILUAs, in particular registered ILUAs, is that they might not be suitable or achievable in every set of circumstances. The draft report acknowledges this briefly at the top of p 105.

> *The use of statewide and regional Indigenous land use agreements appears to have the potential to address backlogs in future act applications. (Draft Finding 5.10, p.105)*

As far as the Tribunal is aware, there is no substantive evidence to support this finding. Any facts to support this finding should be clearly identified in the final report. Although statewide ILUAs have in the past been a focus for native title resolution in South Australia, there have been none to date and the focus is now on the resolution of individual native title determination applications by consent with sectoral related ILUAs, e.g. local government, parks, petroleum and other mineral activity being negotiated concurrently. While large scale or regional ILUAs might indeed have the potential to address a number of issues, including backlogs of future act applications, the individual and sometimes complex circumstances of a particular region, project area or state will determine the likelihood of a registered ILUA of this king being achievable. While the Tribunal supports the policy of attempting to resolve matters in this way, the evidence and practical experience to date suggests that they have not been a successful way of resolving matters more quickly or, indeed, at all.