UNDERMINING THE OBJECTS OF THE NATIVE TITLE ACT: THE DEBASING OF THE FUTURE ACT PROCESS BY THE FEDERAL COURT

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I INTRODUCTION

The object of the future act process of the Native Title Act is to provide equality before the law in the form of rights of protection for native title claimants and holders with respect to future acts. The protection can only be accomplished if future acts which do not comply with future act process are held to be invalid. The Federal Court has repeatedly refused to hold such acts invalid, most recently in the decision in *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)*.[1] The decision is strikingly flawed both as to its understanding of the objects of the Native Title Act and its attempt at a literal interpretation. The High Court needs to grant leave when the issue next arises and rectify the shockingly anomalous decision.

II EQUALITY BEFORE THE LAW

Compliance with the *Racial Discrimination Act 1975* (Cth) (RDA 1975) demands equality before the law in the provision of substantive and procedural rights of protection of and non-interference with native title.[2] The Federal Government in 1993 sought to give effect to equality before the law with respect to the future act process. To that end, s 7 of the *Native Title Act 1993* (Cth) (NTA 1993) originally declared that 'nothing in the Act affects the operation of the *Racial Discrimination Act 1975*'. Unlike the treatment of past acts, future acts were not excluded from the operation of the section: NTA 1993 s 7(2). A 'particularly important' objective of the NTA 1993, as declared in the preamble, was to 'ensure that native title holders are now able to enjoy fully their rights and interests', which 'rights and interests under the common law of Australia need to be significantly supplemented', in future'. The future act process put in place in NTA 1993 Pt 2 Div 3 was intended to provide equality to native title holders. The preamble to the NTA 1993 elaborated:

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[1] [2018] FCAFC 8

[2] The High Court affirmed in *Western Australia v Ward* (2002) 213 CLR 1; 191 ALR 1 at [122] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, citing *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1 and *Western Australia v Commonwealth* (1995) 183 CLR 373; 128 ALR 1, that 'the Court has rejected the argument that native title can be treated differently from other forms of title'. Those authorities clearly require equality before the law with respect to future acts.

> In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, wherever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.

On 2 March 1996, the Liberal−National Party Coalition was elected to Federal Government on a platform that included the amendment of the Native Title Act 1993 (Cth) (NTA 1993) to 'ensure its workability' while respecting the provisions of the *Racial Discrimination Act 1975* (Cth) (RDA 1975).Following the *Wik* decision, the Federal Government developed the Ten Point Plan.[3] The Ten Point Plan provided for the subordination of native title to a variety of other interests in the future act regime, just as the NTA 1993 had so provided for past acts. The Ten Point Plan was given effect in the *Native Title Amendment Act 1998* (Cth) (NTAA 1998).

In explaining the 1998 amendments to the NTA 1993, the Commonwealth Liberal−National Government asserted a commitment to the principles of the RDA 1975. The explanatory memorandum declared:

> The Government has been concerned to ensure that its amendments to the NTA [1993] are consistent with the principles of the Racial Discrimination Act 1975. This is not a legal requirement but flows from government policy.[4]

The government went on to explain that, in its view, the proposals met standards of formal and substantive equality. It asserted that in applying the standard of substantive equality and taking into account relevant differences between groups and their interests, the government enjoyed 'a discretion in fashioning appropriate measures'.[5]

III THE PROCEDURES REQUIRED BY THE FUTURE ACT PROCESS[6]

Part 2 (Native Title), Division 3 (Future act etc. and native title) provides for the future act process. It sets down the procedures that must be complied with in order for a future act to be valid. As the overview of NTA 1993 Pt 2 Div 3 explains, the Division provides 'that, to the extent that a future act affects native title, it will be valid if covered by certain provisions [ss24FA-24NA] of the Division and invalid if not': NTA 1993 s 24AA (2). Subdivision O — 'Future acts invalid unless otherwise provided' — confirms in s 24OA that 'unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title'. S

[3] See generally Explanatory Memorandum 1996−97−98, Native Title Amendment Bill 1997 (Cth).
[4] Explanatory Memorandum 1996–97–98, Native Title Amendment Bill 1997 (Cth), [18.23].
[5] Explanatory Memorandum 1996–97–98, Native Title Amendment Bill 1997 (Cth), [18.27].
[6] See generally: Richard H Bartlett: Native Title in Australia,4th Ed, to be published late.

24AA(6) is a provision that seeks to summarise the Division's operation; it declares the effect of valid future acts, and that it "also deals with procedural rights and compensation". Section 253 declares that 'procedural right' refers to 'procedures that are to be followed when it is proposed to do the act'.

There is a hierarchy of procedures corresponding with particular future acts. The higher-listed Subdivisions generally provide for procedural rights of notice, opportunity to comment and compensation. In general, the procedural rights increase the lower in the order the validating Subdivision is found. The structure entails a careful grading of rights:

> Depending upon who is to do the future act and depending on the impact the act will have on established native title rights or on native title rights that may possibly exist in the lands or waters affected by the act, persons with determined or possible native title interests in the land are to have carefully graded rights to be notified beforehand and also have carefully graded rights to have attention given by the decision-maker to their views about the doing of the act. These deliberately structured differences between the various entitlements to be notified of and to respond to proposals to future acts are … more than mere semantic differences.[7]

IV IF NON-COMPLIANCE, A FUTURE ACT SHOULD BE INVALID

It would seem almost incontestable that in the event of non-compliance with the future act process, a future act should be considered invalid[8] as dictated by NTA 1993 ss 24AA(2) , 24OA, 24AA(6) and the definition of 'procedural right' in s 253.

Such a conclusion is consistent with the operation of the RDA 1975, which the protection of the NTA 1993 displaced. If the NTA 1993 had not been enacted or did not apply, acts that affected native title would be invalid if they were not in compliance with the RDA 1975. The future act process put in place in NTA 1993 Pt 2 Div 3 was intended to provide equality to native title holders, as the preamble makes clear. The process was not intended to place native title holders in a significantly worse position than under the RDA 1975.

Surprisingly, the Federal Court has consistently reached a contrary conclusion and fundamentally undermined a primary objective of the NTA 1993, seemingly with the acquiescence of the High Court. The saga begins with the 2001 obiter dicta of the Full Federal Court in *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland,*[9] the reasoning of which has been recently affirmed in *BHP Billiton*

[7] *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60; 173 ALR 159 at [27].
[8] In *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483; [1998] FCA 1478, the court held, in construing the NTA 1993 as originally enacted, that a grant of an estate in fee simple without compliance with the future act process 'could have no effect on native title'.
[9] (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414,

Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2).[10] Leave to appeal BHP to the High Court was sought but was refused.[11]

V PRINCIPLES OF STATUTORY INTERPRETATION

The decisions of the Federal Court seems so shockingly in error that it is necessary to go back to first principles of statutory interpretation, beginning necessarily with the Commonwealth Acts Interpretation Act 1901. In that regard s15AA unsurprisingly but authoritatively declares that "the interpretation that would best achieve the purpose or object of the Act …is to be preferred to each other interpretation." Guidance in interpretation can be drawn from the long title, the preamble, and any headings, all being parts of an Act. s 13. Extrinsic to an Act and only to be considered to confirm the ordinary meaning or in the event of ambiguity or to avoid a manifestly absurd or unreasonable result are the explanatory memoranda, ministerial speeches on second reading and any relevant material in the debates in Parliament: s15 AB.

Application of the principles of interpretation declared in the Acts Interpretation Act dictate that in the event of non-compliance with the procedures mandated by the future act process set out in Division 3 a future act is invalid.

How has the Federal Court arrived at a different conclusion?

VI LARDIL 2001: A FLAWED LITERAL INTERPRETATION

In *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland,*[12] a Buoy Mooring Authority had been issued in waters subject to a native title claim. NTA1993 s 24HA (7) required that the claimants be notified and be given an opportunity to comment. No such notice had been given or opportunity provided. The Full Federal Court, composed of French J, Dowsett J (now President of the National Native Title Tribunal) and Merkel J concluded, obiter dicta that the Authority was not rendered invalid by the failure to comply with the procedural requirements. The reasoning is obiter dicta because the acts in question were not considered to be future acts because the claimants made no attempt to establish any effect on native title.[13]

The majority gave no consideration to the overriding guidance of NTA 1993 s 24AA (2) and almost none to s 24OA. Instead, the court pointed to the absence of

[10] [2018] FCAFC 8

[11] *KN (Deceased) on behalf of the Tjiwarl and Tjiwarl #2 Native Title Claim Groups v BHP Billiton Nickel West Pty Ltd* [2018] HCATrans 123 (21 June 2018).

[12] (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414.

[13] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 at [114] per Dowsett J

an express provision declaring invalidity in any of the particular Subdivisions of NTA 1993 Pt 2 Div 3 concerned (ss 24HA and 24NA in Subdivisions H and N respectively) which provided for validation, and compared this to the express declaration of invalidity in Subdivision P respecting the right to negotiate.[14] On such an examination, French J concluded that the:

> … validation [of future acts] by particular Subdivisions is conditioned upon their characterisation as a future act to which that Subdivision or a section within it applies. The Subdivisions which provide for prior notification to registered native title claimants and others do not appear to condition the validity of the future acts to which they apply upon compliance with that requirement. Absent some express provision, as in Subdivision P, it is not to be supposed, having regard to the statutory setting, that non-compliance with those procedural requirements goes to validity.[15]

The reasoning has little regard for the purpose of the NTA 1993, but is grounded in what is suggested to be flawed literal and per incuriam understanding of its language.[16] Because NTA 1993 ss 24AA and 24OA provide such an express general declaration of invalidity, it was not necessary for the particular Subdivisions to provide particular declarations of invalidity. In order for a future act to 'comply with' NTA 1993 Pt 2 Div 3, it must surely meet the limited procedural rights extended to native title holders and claimants.

Admittedly, the explanatory memoranda[17] were less than clear, perhaps not surprisingly in the context of the tortuous negotiated and belated amendments in

[14] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 at [48]−[58] per French J; at [115]−[121] per Dowsett J; compare [72] per Merkel J (not deciding). See *Holt v Manzie* [2000] FCA 1857 at [24] per Olney J as to the express declaration of invalidity in NTA 1993 s 28 in the event of non-compliance with the right to negotiate procedures.

[15] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 at [58] per French J; see also at [117] per Dowsett J. Justice Merkel did not consider that the issue arose for consideration: at [70].

[16] The explanation for the views of the majority in Lardil*, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 might have been grounded in a misunderstanding of the meaning of invalidity in the NTA 1993, which, of course, refers only to invalidity as it affects native title. Absent such misunderstanding, the remarks of Dowsett J at [120] are difficult to comprehend: 'It seems relatively unlikely that Parliament intended to invalidate such acts merely because no notice had been given to registered native title claimants, even in the event that the claim turns out to be entirely without merit. Such an interference with State government could hardly be justified constitutionally or politically, if there were no native title to protect' (emphasis added).

[17] The majority in Lardil*, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 placed some reliance on a reference in the explanatory memorandum to the Native Title Amendment Bill 1997 (Cth) relating to the new NTA 1993 s 24HA(7) (the notice requirement respecting management of water), which, after referring to the absence of a requirement to notify with respect to each and every act, observed that 'failure to notify will not affect the validity of the future act': Explanatory Memorandum 1996−97−98, *Native Title Amendment Bill 1997* (Cth), [10.20]. But in the context of the paragraph in the explanatory memorandum, it appears to be a reference to a failure to notify each act rather than a failure to notify at all: see *Harris v Great Barrier Reef Marine Park Authority*

the Senate. But significantly, the overview in the explanatory memorandum, with respect to the amendment of the future act regime by the introduction of all of the Subdivisions, explains that the regime 'establish[es] a much more comprehensive regime for the validity of acts occurring in the future which affect native title', and goes on to list all of the Subdivisions and future acts which it 'covers'.[18] The overview in the explanatory memorandum further declared:

> If an act will affect native title and complies with Division 3, it will be valid … If an act affects native title and does not comply with Division 3, it is invalid to that extent.[19] (Emphasis added)

But in any event as the Acts Interpretation Act makes clear explanatory memoranda are very much secondary material in the consideration of meaning, to the object and purpose of the Native Title Act and its preamble.

A *Object and Purpose: Subordinating the Protection of Native Title Rights*

It has already been stressed that the object and purpose of the Native Title Act is to provide equality before the law with respect to the future act process. In *Lardil* Justice Dowsett reaches the opposite conclusion. His Honour declared that conduct undertaken pursuant to government authority under the relevant subdivision 'will presumably have social value' and should not accordingly be invalidated merely on account of a lack of notice to, or opportunity to comment for, native title claimants.[20] Justice Dowsett clearly considered that it was good policy to subordinate the protection of native title rights to the interests of others under the

(2000) FCR 603; 173 ALR 159 at [45] per Heerey, Drummond and Emmett JJ. The reference might accordingly be regarded as ambiguous. The same observation was made with respect to the notice requirements found in the like formulated provisions NTA 1993 ss 24GB, 24GD, 24ID(3) and 24JB(6). Reliance upon the ambiguous references in the explanatory memorandum seems ill-founded, and certainly should not extend beyond the notice provisions. The procedural requirements were not confined to notice; they also included the more important requirement that an opportunity to comment be provided. The explanatory memorandum did not explicitly say whether or not a failure to provide such an opportunity will or will not affect the validity of the act. All of these notice requirements (NTA 1993 ss ss24GB, 24GD, 24HA(7), 24ID(3), 24JB(6)) were introduced by belated amendment in the Senate, which Dowsett J recognised was 'the subject of ongoing and robust parliamentary negotiation': *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 at [108]. And see Explanatory Memorandum 1996−97−98, *Native Title Amendment Bill* 1997 (Cth), [11.26], [12.17]; Supplementary Explanatory Memorandum 1996−97, Native Title Amendment Bill 1997 (Cth), pp 7, 9, 10 (Government amendments 22, 24B, 25, 26, 30). In contrast, the explanation with respect to NTA 1993 ss 24GE indicates, in a table, that the notice and opportunity to comment requirements must be met, in order for a future act to be valid: Explanatory Memorandum 1996−97−98, *Native Title Amendment Bill 1997* (Cth), [9.17], [9.22]. Moreover, the explanation with respect to NTA 1993 ss 24MD expressly asserts that 'compulsory acquisitions will need to comply with subsection 24MD(6A) procedures': Supplementary Explanatory Memorandum to Government Amendments Moved in July 1998 1996−97–98, *Native Title Amendment Bill 1997 [No 2]* (Cth), pp 16–17.

[18] Explanatory Memorandum 1996−97−98, Native Title Amendment Bill 1997 (Cth), [1.6]

[19] Explanatory Memorandum 1996−97−98, Native Title Amendment Bill 1997 (Cth), [6.5].

[20] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 at [120] per Dowsett J.

future act process. Justice Dowsett added to this view of the discounted worth of native title that as a matter of policy it was 'unlikely' and a 'surprising assertion that Parliament intended to invalidate acts because of failure to give notice to registered claimants'.[21]

B *Lardil was in Error*

It is suggested that, consistent with the objects of the NTA 1993 as declared in the preamble, and the overview of the future act process in NTA 1993 s 24AA and the general provision of s 24OA, the Federal Court dictum in *Lardil* was in error.[22] It renders much of the future act process meaningless, introduces considerable uncertainty as to the effect of future acts, and denies any pretensions of the NTA 1993 to the seeking of equality for native title holders with respect to future acts.

Paradoxically, having reached the conclusion that non-compliance with the mandated procedures would not invalidate a future act, French J declared in *Lardil* that 'consistently with that conclusion, non-compliance with procedural requirements may support injunctive relief restraining the doing of the act until the relevant procedures have been complied with'.[23] The comment is presumably intended to convey the understanding thateven though future acts are not declared invalid after they have taken place on account of non-compliance, injunctive relief should be made available to stop them before they do so!

Despite the weaknesses of the obiter dicta of the Full Federal Court in *Lardil*, the majority's reasoning was followed in *Daniel v Western Australia*— where Nicholson J observed that 'that there is no reason to depart from such persuasive authority which is not clearly incorrect'[24] — *Banjima People v Western Australia*[25] and *CG (Deceased) on behalf of the Badimia People v Western Australia*.[26]

VII BHP 2018: MORE FLAWED LITERAL INTERPRETATION AND PATENTLY WEAK POLICY UNDERSTANDING

It was not until 2016 that the obiter dicta reasoning in Lardil was challenged by another court. Justice Mortimer in the Federal Court gave primacy to NTA 1993

[21] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 at [117] and [120] per Dowsett J (emphasis added).
[22] In support of this conclusion is the reasoning of another Full Federal Court in *Harris v Great Barrier Reef Marine Park Authority* (2000) FCR 603; 173 ALR 159 at [22] per Heerey, Drummond and Emmett JJ; see also at [21], [33], [39]. In explaining the procedural entitlement of claimants, the court assumed that non-compliance led to invalidity, observing that the entitlements have the effect of providing for 'the involvement in the validation process of those with native title interests'.
[23] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513; [2001] FCA 414 at [58].
[24] *Daniel v Western Australia* [2004] FCA 1388 at [63].
[25] *Banjima People v Western Australia (No 2)* (2013) 305 ALR 1; [2013] FCA 868 at [986]−[990].
[26] *CG (Deceased) on behalf of the Badimia People v Western Australia* [2015] FCA 204 at [942].

s 24AA and 24OA and the fundamental objects of the NTA 1993 in *Narrier v Western Australia*.[27] Miscellaneous licences had been granted under the Mining Act 1978 (WA) in total non-compliance with NTA 1993 s 24MD, which all agreed was the provision applicable. The explanatory memorandum expressly asserted as to an analogous subsection that acts 'will need to comply with' the procedures.[28] Justice Mortimer emphasised the importance of the procedural requirements of objection, notice, consultation and hearing provided for in s 24MD(6B), observing that '[t]he concern is with fair decision-making processes that pay sufficient regard to interests affected', else 'native title interests can be affected by future acts without any effective or meaningful notice or consultation':

> That is particularly so in a legislative scheme which expressly seeks to 'protect' native title interests, and does so in large measure not by making those interests immune from the effects of future acts, but rather by requiring those who seek to undertake future acts to consult and take account of what those with native title say will be the impact of future acts on their proprietary interests.[29]

A *Equality is not the Starting Point*

But on appeal to the Full Federal Court, composed of Dowsett, North and Jagot JJ, in *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2),* [30] the obiter dicta reasoning of Lardil was affirmed and the reasoning of Mortimer J in Narrier rejected.

The Full Court dismissed the significance of NTA 1993 s 24OA by stating that 'it is a residual provision' and 'is not the starting point'.[31] The court sought to reduce the significance of s 24OA from a statement of a fundamental principle and a general presumption of invalidity declared in NTA 1993 Subdivision O to a lesser status. Of course, the true starting point should be the RDA 1975, which, unless displaced by the NTA, must render future acts invalid if appropriate procedures are not followed. The 'starting point' is the presumption that in the absence of such procedures, future acts will be invalid unless validated by the NTA 1993. And that of course is precisely what s 24OA declares. Section 24OA is a statement of fundamental principle and the conclusion of the future act structure, not its residuum.

[27] *Narrier v Western Australia* [2016] FCA 1519.
[28] Supplementary Explanatory Memorandum to Government Amendments Moved in July 1998 1996−97–98, Native Title Amendment Bill 1997 [No 2] (Cth), pp 16-17
[29] *Narrier v Western Australia* [2016] FCA 1519 at [1040]; and see at [1038].
[30] [2018] FCAFC 8.
[31] *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [29], [34], [35].

B *Bases for Validity do not include the Procedural Rights*

But in BHP the court re-worded, as it must to sustain its reasoning, the language of NTA 1993 s 24OA. The judgment declared: 'By stating that "[u]nless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title", s 24OA means that a future act will be invalid if it is not made valid by being covered' by another provision.[32] No longer is s 24OA considered to demand that any future act must be validated by a provision of the NTA 1993, consistent with the presumption of invalidity; rather, it merely need be 'covered' — a much more ambiguous term and one that is far more susceptible to interpretation.

It is the meaning of 'covered' that is the crux of the judgment. NTA 1993 s 24AA(2), in the 'Overview', declares that 'basically' the future act 'Division provides that, to the extent that the future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not'. Section 24AA(4) refers to the applicable provisions as 'bases for validity', declaring that a future act will 'be valid to the extent covered' thereby. The 'bases for validity', from s 24FA through to s 24NA, describe particular acts in particular contexts, and specify particular requirements as to procedures of notification, consultation, hearing and compensation. Any construction must surely conclude, given the explicit presumption of invalidity and purpose and object of the NTA 1993 in the protection of native title, that in order to be 'covered' by a validating Subdivision, the 'bases for validity' include the specified procedural requirements and must be met. But the Full Court rejected that conclusion, instead considering that 'as BHP submitted, to be "covered by" a provision means no more than that the particular act in question is an act of the class to which any of the listed sections in s 24 AA(4) apply'.[33]

C *More Flawed Literal Interpretation*

The court reasoned that the legislature should have used other 'alternative' language, such as the need to 'comply with' or 'satisfy' the procedural requirements.

Significantly, the court pointed to a subsection where such language was used to indicate textual support; namely NTA 1993 s 24AA (5), which states: 'for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P (which provides a "right to negotiate")'. But the court missed the most significant

[32] *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [29].
[33] *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [23].

part of the language there used — it is the reference to the adverb 'also'. That wording makes clear that the legislature assumed that the other procedural requirements referred to must also be satisfied for validity to be established.[34]

The court also sought support from the language of s 24AA (6), which declares that the 'Division also deals with procedural rights and compensation for the acts' (emphasis added). The court concluded that because the language of compliance or satisfaction is not used, the procedural requirements do not condition validity. But no reference was made to s 253 and the definition of procedural right as a reference to 'part of the procedures that are *to be followed* when it is proposed to do the act'. The conclusion was reached despite the frequent references to "procedural rights" throughout the subdivisions.[35] And of course, the conditioning of validity has already been boldly declared in s 24AA (2), is re-stated in s 24AO and assumed throughout.

But just as significantly, it is passing strange to suggest that the conferment of 'procedural rights' can be accomplished without making those rights a condition of validity. If they do not condition validity, they cannot be effectively enforced after the act has been carried out. On that interpretation, the future act regime 'does not "protect" native title; rather it facilitates its defeat'.[36] As the Attorney-General on the second reading of the Amendment Bill that introduced the provisions into the NTA 1993 declared: 'where these acts affect native title, significant compensation and procedural rights are given to native title holders'.[37] It was not intended that the procedural rights should be regarded as so trivial as to be unenforceable. Indeed, much jurisprudence would suggest that 'rights' cannot truly be rights in law if they are not enforceable.

There is a Subdivision, to which the court points,[38] which does provide that validity is made subject to satisfaction of the procedural rights within the Subdivision, namely NTA 1993 Pt 2 Div 3 Subdiv JA 'Public housing etc' (s 24JAA). But again. it is rather 'the exception which proves the rule'. Subdivision JA is the only Subdivision introduced after the *Lardil* decision, and, recognising the uncertainty created by that decision, reflects the determination of Parliament to

[34] The reason for the reference to satisfaction of the requirements of NTA 1993 Pt 2 Div 3 Subdiv P in s 24AA(5) is of course readily explicable — those requirements lie outside and are additional to the procedural rights otherwise imposed in each Subdivision and therefore separate reference must be made to Subdiv P. This also explains the separate reference in s 24 MD (1). Compare *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [25].

[35] Ss 24 ID (4), KA (7-9), MD (6A) (7-8), and NA (8– 10).

36 *Narrier v Western Australia* [2016] FCA 1519 at [1043]; and see at [1035] per Mortimer J.

37 D Williams (Attorney-General), Native Title Amendment Bill (No 2) 1997 (Cth), second reading speech, House of Representatives: Commonwealth of Australia, Parliamentary Debates, Cth Hansard, House of Representatives, 11 March 1998, p 970 (emphasis added).

38 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [26].

provide clarity to ensure that acts within the Subdivision could only be valid if the procedural requirements were met.

C *Gradations of Unenforceability*

The court in BHP sought to justify its conclusion by reference to the overall scheme of the future act process, and in doing so expressly adopted the outrageous submission of the appellant BHP that future acts in NTA 1993 Pt 2 Div 3 Subdivisions F–N can be classified 'on three levels' — from acts likely to have the 'least impact' to those likely to have the 'greatest impact', thereby evincing 'a legislative intention that future acts that do not involve rights to mine will not be invalidated by a failure to adhere to procedural requirements'.[39] The court thereby suggested that none of the procedural requirements in those Subdivisions condition validity.[40] The conclusion renders essentially unenforceable the procedural rights protecting native title rights and interests against, inter alia, compulsory acquisition. The court denied the main point of Subdivisions F–N. The result is inconsistent with the objects of the future act process. It is also, of course, inconsistent with the express provision made in the post-*Lardil* Subdivision JA.

D *Patently Weak Policy Understanding*

An attempt was made in BHP to further justify the result by offering patently weak policy excuses, such as suggesting that the difficulty of determining whether or not there has been compliance with the requirements, 'given their detailed nature', would lead to 'substantial uncertainty and inconvenience to those who have relied on the act as valid'.[41] The reasoning may remove uncertainty and inconvenience, but does so by removing almost all procedural rights of native title holders with respect to future acts upon their native title land.

Additionally, in the court's opinion it could not have been intended to 'invalidate future acts'[42] because of a failure to comply with the same procedural rights as others were entitled to under state or territory legislation, as required by NTA 1993 ss 24ID(4), 24KA(7), (8), (9), 24MD(2)(ba), (6A) and 24NA(3)(c), (8), 'over which the Commonwealth legislature has no control'.[43] The reasoning, of course, completely fails to appreciate that the point of conferring 'the same

39 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [24] (emphasis added).

40 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [31].

41 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [31].

42 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [32], where the court adopted BHP's submission.

43 *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [32].

procedural rights' is to establish equality before the law with respect to future acts, the theme which underlies the entire future act process.

The court seemed to recognise that the result is 'wholly unsatisfactory' but implies that it really does not matter because 'there is no reason to assume that the relevant government authority would not comply with these requirements in the ordinary course'![44]

The court claimed that 'the scope and objects in context of the NTA as a whole' support its conclusion, but this conclusion is at such variance with parliamentary explanations, the explanatory memoranda, the preamble to the NTA 1993, the object of the NTA 1993, and the principal provisions, object and purposes of the future act process, that the result seems startlingly wrong. It appears to be a construction of the NTA 1993 driven by a determination to adopt a narrow understanding of native title holders rights under the Act and to maintain the 20-year-old approach of *Lardil* reached in a different native title era when native title had yet to be accepted by many in the Australian polity.

VIII LEAVE TO APPEAL TO THE HIGH COURT REFUSED

Leave to appeal to the High Court was sought but was refused.[45] The appellants did not rely upon NTA 1993 s 24AA or s 24AO in their 20-minute oral argument. The argument proceeded on the basis of the language of the particular Subdivision: NTA 1993 Pt 2 Division 3 Subdivision M (ss 24MA–24MD). Section 24MD(6) in that Subdivision declares that the 'consequences in ss (6A) and (6B) apply'. Subsections (6A) and (6B) outline the procedural rights. Chief Justice Kiefel accordingly described the provisions as 'consequential' rather than conditional and opined that s 24MD was 'simply not expressed to be conditioned to procedural requirements'. That conclusion was reached despite the declaration in the explanatory memorandum with respect to NTA 1993 s 24MD that acts within its scope 'will need to comply with subsection 24MD (6A) procedures'.[46] The court did not even call upon the respondents.The conclusion is an incorrect construction of the NTA 1993 and the future act regime, reached in the leave to appeal hearing without regard to the pertinent provisions of the Act. Nowhere in the oral argument or questioning of counsel by the court was the object and purpose of the future act process of the Native Title Act considered.

[44] *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [37].
[45] *KN (Deceased) on behalf of the Tjiwarl and Tjiwarl #2 Native Title Claim Groups v BHP Billiton Nickel West Pty Ltd* [2018] HCATrans 123 (21 June 2018).
[46] Supplementary Explanatory Memorandum to Government Amendments Moved in July 1998, 1996−97–98, Native Title Amendment Bill 1997 [No 2] (Cth), pp 16–17.

IX UNDERMINING OF THE PROVISIONS OF THE NATIVE TITLE ACT

The current law manifested in *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* denies enforceability of the future act process, except for the right to negotiate, and entails a massive undermining of the objects and purpose of the NTA 1993. The decision is purportedly grounded in a literal approach but an approach that is hopelessly flawed. Moreover, the attempts at ascertaining the object and purpose of the Act are the antithesis of the manifest fundamental object of the future act process of the Native Title Act: equality before the law. It is not clear whether it is the complexity of the Native Title Act or the decades out of date prejudice against native title which obscured the object of the future act process from the court. The High Court needs to grant leave when the issue next arises and rectify the shockingly anomalous decision.

Sadly, it must be said that the enforceability of the right to negotiate itself had to weather a like saga more than 20 years earlier, with similar arguments as to statutory interpretation and policy made by the states and the National Native Title Tribunal (NNTT) before they were comprehensively dismissed in *Walley v Western Australia.*[47] Without that decision of Justice Carr, none of the future act process would have any meaning and be enforceable.

[47] [1996] FCA 490,137 ALR 561 (Carr J).