ABORIGINAL CULTURAL HERITAGE IN WESTERN AUSTRALIA: PRACTICAL ISSUES FOR MINERS

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1. INTRODUCTION

Aboriginal culture has many aspects which are culturally distinct from non-Aboriginal society, for example Dreamtime legends, languages and sacred and spiritual sites. As they form the very fabric of Aboriginal identity, they must be considered to require proper protection under Australian laws.

Long before the High Court's recognition of Aboriginal native title in *Mabo v Queensland (No. 2)*,[1] Western Australia had already enacted the *Aboriginal Heritage Act* 1972 ("the Act") to protect Aboriginal cultural heritage. By the time the *Native Title Act* 1993 (Cth) ("NTA") was passed, Aboriginal cultural heritage had already been under legislative protection in WA for over two decades. However, any legal analysis of Aboriginal cultural heritage would be amiss if it is not considered against the background of native title.

Shortly after common law recognition of native title, there was much debate on whether Aboriginal claimants should have an absolute right of veto over mining projects. It was settled, upon the subsequent enactment of the NTA, that claimants would have a right to negotiate with mining companies and the governments. The NTA was widely criticised by the resource industries as unworkable and as imposing significant barriers to the continued existence and success of the resources sector as Australia's prime earner of export revenue. Following the longest, vigorous and the most acrimonious debate in Australian parliamentary history, the NTA was amended in 1998. The right to negotiate was retained, but a number of amendments, notably the introduction of indigenous land use agreement ("ILUA"), were made.

Recent High Court decisions have given rise to the perception – and possibly to the reality – that proving native title would be extremely difficult. But Aboriginal cultural heritage legislation, whether Federal or State based, applies whether or not native title exists. Aboriginal groups whose claims for native title fail, or who cannot mount claims because their native title has been extinguished, will still have the right to protection of their Aboriginal cultural heritage set out in Aboriginal cultural heritage legislation.

Those involved in exploration or development of natural resources must be mindful of the impediments to exploration or development posed by those legislation. Although this paper does not attempt a comprehensive analysis, it notes some features of the WA legislation that are of ongoing importance for mining companies. As this paper shows, the protections afforded under the Act may impose significant barriers to mining exploration and development, giving Aboriginal groups in some cases considerable bargaining power in their dealings with mining and resource companies. The paper also points out the appropriate steps mining companies should take to ensure that their activities are not unlawful.

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[1] (1992) 175 CLR 1.

2. NATIVE TITLE

The High Court decided in *Mabo (No. 2)* that native title may be lost in two ways. The first is by the severance of the relationship between the original native title holders and the land, and it is in relation to the severance of that link that the decision in *Yorta Yorta*[2] is directed. The second is the extinguishing effect on native title of various valid acts of government and the decision in *Western Australia v Ward*[3] largely pertained to this.

In *Ward*, the High Court effectively ruled that the native title right to control access to and use of land may well have been extinguished by government action. However, since in that case the Court also confirmed that native title is essentially made up of a bundle of rights, the loss of the right to control entry onto and use of land may well have left intact some other native title rights which may well still be sufficient to found a claim for native title.

From the mining industry's perspective, the High Court's decision in *Yorta Yorta* is of greater practical significance. In that case the Court found that it was necessary, in order to be able to show the continued existence of native title rights, that not only did those rights have to be still the subject of contemporary recognition, but also that they have to be so recognised under a "normative system" which has been continuously recognised from the time when the British Crown acquired sovereignty over the lands of Australia in 1788 until the present time. Therefore, it is fatal to a native title claim if the claimants have not continuously since the acquisition of British sovereignty been recognised under their tribal laws, or "normative system", as the holders of the rights amounting to native title over the lands, or that the "normative system" involved has not been continuously recognised as affecting and effectively binding the native title claim group since that time.

The High Court with *Ward* and *Yorta Yorta* has erected what are undeniably difficult evidentiary barriers to the establishment of native title claims. Moreover, the 1998 amendments to the NTA had already raised the bar of proof of native title, by providing that the Native Title Registrar cannot register a claim for native title where, for example, the claimed area includes a claim over lands which have previously been the subject of a freehold grant, or where the native title rights and interests claimed include a right to subsurface minerals or petroleum.

3. A COMPARISON BETWEEN ABORIGINAL CULTURAL HERITAGE LEGISLATION AND THE NTA

The NTA is essentially non-prescriptive in operation. It does not prevent anything. Rather, from the perspective of the mining industry, its central operation is found in s 24OA, which provides that certain acts which adversely affect native title ("future acts") are invalid to the extent of native title. Thus, for example, the grant of a mining tenement in future will generally be invalid to the extent that it affects native title, unless the tenement has been issued in accordance with one of the relevant exceptions – for example, it may have been issued pursuant to a registered ILUA under Subdivision C of Division 3 of Part II NTA, or it may have been issued following compliance with the "right to negotiate" procedures under Subdivision P of Division 3 of Part II NTA.

The NTA does not provide that a "future act" is invalid in total. Rather, it is invalid only to the extent that it affects native title. It follows that any rights which are conferred by the grant of the

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2 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 558.

3 (2002) 191 ALR 1.

future act are effectively encumbered by the continuance of the unaffected native title. In a mining industry context, this means that if, for example, a government issues a mining tenement and neither the right to negotiate procedures have been complied with nor was the tenement issued in accordance with a registered ILUA, the tenement will be valid but the rights of the tenement holder will be encumbered by the superior native title rights. The difficulty, of course, is that it will not be until a determination of native title is made that the tenement holder will know the extent of the native title rights. The tenement will therefore be uncertain.

It is possible that those who claim to hold native title, and those in whose favour a determination of native title has been made, may seek the assistance of the courts to frustrate mining developments, by applying for injunctions and like remedies, on the grounds that the proposed developments interfere with the native title rights of the native title claimants or holders. These common law and equitable rights of native title claimants and holders do not, essentially, derive from the NTA – they derive from the native title rights themselves.

On the other hand, Aboriginal cultural heritage legislation does operate in a prescriptive manner. It operates to make disturbing protected sites or objects a criminal offence and imposes strict liability for breaches. Protection by imposition of criminal offences under this legislation can prevent, and have prevented, exploration and development of mining projects.

4. ABORIGINAL HERITAGE ACT 1972 (WA)

4.1 Background and Purposes of the Act

In WA, the main Aboriginal heritage legislation is the *Aboriginal Heritage Act* 1972. As with legislation in other States it was partly a response to the increasing likelihood that development would result in damage to Aboriginal sites. However, it goes beyond the primarily archaeological or relics approach of some States in that it refers to places and objects which are currently used by Aboriginal people. The purposes of the Act and its long title are "An Act to make provision for the preservation on behalf of the community of places and objects customarily used by or traditional to the original inhabitants of Australia or their descendants, or associated therewith, and for other purposes incidental thereto."

The history of the mining industry in Australia, particularly in the 1980's and 1990's, was punctuated by episodes of conflict between the interests of the industry on one hand and interests of Aboriginal people on the other. Several remote locations in Australia, such as Gove, Nookanbah, Coronation Hill, Yackabindie, MacArthur River and Rudall River, were the scenes of disagreement and misunderstanding. Industry publications carried complaints about being denied access for exploration and mining on Aboriginal land. Aboriginal people were concerned about the social, environmental and economic impact of mining on remote Aboriginal communities and about the destruction of sacred sites.

These disputes and complaints were given wide publicity in the mainstream media, leading to a perception in the public mind that Aboriginal interests and mining interests were irreconcilable. In 1980, following such conflicts, the Act was amended by the *Aboriginal Heritage Amendment Act (No. 2)* 1980 (WA).

The amendments brought about significant changes to the Act in key provisions, particularly ss 5 (places), 17 (offences), 18 (consent to certain uses) and 19 (protected areas) – some of which are discussed in more detail below.

4.2 Interaction between State and Commonwealth legislations

In 1984, the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) ("HPA") was enacted to provide a remedy of last resort, when State and Territory laws are not effective to protect a site from the threat of injury or desecration.[4] When the Commonwealth Bill was introduced into Parliament in 1984 it was explained that State laws would operate concurrently with the Commonwealth HPA wherever possible and the Commonwealth was not attempting to cover the legislative field in this area of heritage protection.[5]

In keeping with this objective, s13(2) of the HPA requires that the Minister consult the State or Territory Minister as to whether the laws of the relevant jurisdiction provide effective protection of the area or object in question before making a declaration under the HPA.[6] The basis of the HPA is that primary protection will be provided under State and Territory laws.

Despite the intention of the Commonwealth, however, s13(4) HPA provides that the Minister's failure to consult with State and Territory counterparts does not invalidate the making of a declaration (effectively negating the requirement in s13(2) to consult). By reason of s13(4), the HPA can effectively be used as a "first resort".[7] As such miners and their legal representatives must consider all issues under the HPA as well as those outlined in this paper for a comprehensive assessment of Aboriginal heritage laws.

4.3 What is protected

4.3.1 Places and sites

The Act covers a broad range of places and sites, including any sacred, ritual or ceremonial site which is of importance and special significance to persons of Aboriginal descent. Under s5, the Act applies to:

(a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present;

(b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent;

(c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State;

(d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.

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4 *Tickner v Bropho* (1993) 114 ALR 409 (see French J at 446-451).

5 As stated in the Second Reading Speech, "Where a State or Territory has no law capable of providing effective protection, or no action is being taken to give effect to that law, the Commonwealth will act in appropriate cases."

6 Section 13(2), (4) and (5). A declaration under the HPA is to be revoked if the State or Territory law makes effective provision for the protection of an area.

7 "*Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*", Report by Hon. Elizabeth Evatt AC, 21 June 1996, Chapter 5 – Effective Interaction with State and Territory Laws.

The Act covers all Aboriginal sites, whether or not they have been registered or recorded.

4.3.2 Sacred Sites

Land generally has spiritual significance for Aborigines but because of the form and content of myths relating to it, some land is more important than other land. So what constitutes a sacred site? While all landscape features have their origins in Dreamtime creation stories, there are some places of special significance to indigenous peoples, as Justice Woodward described in the Royal Commission report on land rights in 1974.[8]

Certain places are particularly important, usually because of their mythological significance and their use as a burial ground or important meeting place for ceremonies. These special places are often referred to as "sacred sites" – a generic term for different types of areas of land or sea. Sacred sites represent the cultural core of Aboriginal countries. Many sacred sites are places where particularly important events occurred during the Dreamtime. Others are places known as "increase centres" where special ceremonies are conducted to ensure the wellbeing of particular species; or places of great danger, sometimes called "poison grounds" or simply "danger places", where it is believed that inappropriate action (such as the killing of a forbidden species, or the entrance of a stranger) will cause severe storms, sickness or even death.

In order to avoid damage or trespass of Aboriginal sacred or archaeological sites, miners must examine the Registrar of Aboriginal Sites for sacred sites and it is prudent to undertake an ethnographic and archaeological survey before commencing activities on any parcel of land.

4.3.3 Objects

The Act also extends to objects under s6, "which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for . . . any purpose connected with the traditional cultural life of the Aboriginal people past or present."

5. OFFENCES RELATING TO SITES AND OBJECTS

The Act provides various offences in relation to sites and objects. Under s17, it is an offence for a person to:

- excavate, destroy, damage, conceal or in any way alter an Aboriginal site;
- in any way alter, damage, remove, destroy, conceal or deal with any object on or under an Aboriginal site in a manner not sanctioned by relevant custom; or
- assume the possession, custody, or control of any object on or under an Aboriginal site,

unless the act in question was done within authorisation given by the Registrar of Aboriginal Sites under s16 or the consent of the Minister under s18.

"Aboriginal site" under s17 need not be a site which has been specifically protected by the Minister or entered onto the Register under s38, which obliges the Registrar to maintain a register

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[8] Dr D Smith, "*Understanding Country - The Importance of Land and Sea in Aboriginal and Torres Strait Islander Societies*", Reconciliation and Social Justice Library, Council for Aboriginal Reconciliation available at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/car/kip1/BRM_KIP1.RTF>.

of all protected areas and known cultural material.[9] Accordingly, it is likely that s17 will be contravened by a mining company where any but the lowest-impact exploration work is undertaken on a place of importance or significance to Aboriginal people, whether or not it is known to the company.

There are further offences in relation to objects which have been declared as Aboriginal cultural material. The offences include selling, removing from the State or damaging the object without authority, s43(1). However, persons of Aboriginal descent may deal with objects in a manner sanctioned by Aboriginal custom. The penalties can be high. In the case of an individual, a penalty of up to $40,000 and 2 years imprisonment and $100,000 for a company for a second offence.

6. DEFENCE UNDER SECTION 62

Under s62 it is a defence to a contravention of s17 if the person committing the act did not know, and could not reasonably be expected to have known, that the place or object to which the charge relates was a place or object to which the Act applies. This provides some protection for miners or explorers who are unaware that any land that they propose to disturb is an “Aboriginal site”.

However, the element of constructive knowledge in the defence means that those intending to disturb any land cannot be wilfully blind to the possibility that the land may be an Aboriginal site. A defendant seeking to establish a s62 defence must show not only that he did not know that the place concerned was an Aboriginal site but that he could not reasonably be expected to have known that the site was an Aboriginal site. The burden on the defendant would be unlikely to be found to have been discharged by anything less than reasonable enquiry. Thus, the defendant will not be able to establish the defence unless at least he has made enquiries with the Registrar as to whether the land concerned contains an Aboriginal site.

Of course, if a miner or explorer has reason to suspect that land which its proposed activities will disturb may be an Aboriginal site, the burden of proving the requisite elements of the s62 defence will be harder to discharge. If, for example, an inspection of the area reveals Aboriginal tools or artefacts, cultural heritage significance might reasonably be expected. This is much more the case if there is also a registered native title claim over the area and rights claimed under it refer to sites of cultural heritage significance. Accordingly, despite the protection afforded by s62, it would be prudent to make enquiries with the Registrar or to undertake an assessment of any proposed site prior to commencing activities in these circumstances.

7. CONSENT OBTAINED UNDER SECTIONS 16 AND 18

Where areas of cultural significance are identified, an offence will not be committed under s17 of the Act if a miner has obtained consent under ss16 or 18. Consent is required, whether or not the site is registered under the Act and regardless of ownership of the land.

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[9] The Aboriginal Site Register held under s38 of the Act contains information on over 20,100 Aboriginal sites throughout WA. The electronic portion of the Register contains a brief description of the site, the site type, the site informants (usually the Traditional Owners) and a map showing the site boundaries and location. Where the informants have requested the site information be kept confidential, the location of the site is censored by placing one or more 2km square boxes over the extent of the site: Department of Indigenous Affairs’ Aboriginal Heritage Sites Register at <http://www.dia.wa.gov.au/Heritage/heritage_Sites_Register.aspx> as at 29 November 2004.

7.1 Consent under s 16

Under s16 (which is subject to s18), the right to permit excavation or removal of anything from an Aboriginal site is reserved to the Registrar. The Registrar, on advice of the Aboriginal Cultural Materials Committee ("ACMC"), has limited power to authorise the entry upon and excavation of an Aboriginal site and the examination or removal of anything on or under the site in such manner and subject to such conditions as the ACMC may advise.

7.2 Consent for certain uses under s 18 – Practice and procedure

Alternatively, an approval can be sought pursuant to s18 of the Act. Under s18, where an "owner of any land", which for this purpose includes a Crown lessee, the holder of any mining tenement or privilege, or a petroleum pipeline licensee, is likely to do an act that would result in a breach of s17, that person can give notice to the ACMC.

Under s18(8), where consent has been given under s18 to use the land for a particular purpose, nothing done by or on behalf of the person to whom consent has been given constitutes an offence under the Act.

In practice, applications for consent under s18 are first assessed by the Heritage Management Branch of the Department of Indigenous Affairs, which provides advice to the ACMC. The Department will inform the applicant whether there is a registered site. Even if there is no registered site, the developer applicant may be required to carry out an Aboriginal heritage survey. This may be done by direct consultation with relevant Aboriginal people, by making use of the professional staff of a Land Council (eg anthropologist and archaeologist), or by employing a consultant directly. The resulting report is assessed by the Department's archaeologist or anthropologist, and then submitted to the ACMC.

Upon forming an opinion as to the importance and significance of the site, the ACMC must give a notice to the Minister with a recommendation as to whether or not the Minister should consent to the use of the land for the purpose specified and any attached conditions.

In considering whether or not to consent to the use of the land for a purpose which would be likely to result in the alteration, damage or destruction of an Aboriginal site, the Minister must make his decision having "regard to the general interest of the community" (pursuant to s18(3)). In *Bropho v Tickner*,[10] Wilcox J was of the view that the Minister may give consent having regard to the general interest of the community, notwithstanding that the proposed action may have significant or even devastating consequences to a significant Aboriginal area.

The Minister may give his consent to the use of the land, or specify part of the land be subject to conditions, or decline the application. Pursuant to s18(5), the owner of any land (as defined in s18) may appeal the Minister's decision to the Supreme Court of WA. The Court may confirm or vary the decision or substitute a decision which will be effective as if made by the Minister. In practice, the Minister rarely refuses consent.

Concerned Aboriginal people have no statutory rights of appeal. In *Western Australia v Bropho*,[11] Anderson J held, among other things, that the provisions of the Act were passed for the benefit of

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[10] (1993) 40 FCR 165 at 171.

[11] (1991) 5 WAR 75.

the whole community with a view to preservation of objects and places that are significant to Aboriginal cultural.[12] As such, the Supreme Court of WA decided that an aggrieved Aboriginal heritage claimant lacks the legally recognised special status and standing to appeal the Minister's decision.

The special interest which attracts a right to be heard can be compared with the special status necessary for anyone to bring a case in court. Anderson J denied standing for Mr Bropho on the grounds that he did not claim any direct physical association with the site; and as his interests were spiritual, his concerns to protect the site from further desecration were only subjective.[13] However, Malcolm CJ,in dissent, following the decision of Gibbs CJ in *Onus & Anor v Alcoa of Australia Ltd*,[14] would have allowed Mr Bropho standing because of his special interest in the site[15] and stated that Mr Bropho "would be more particularly affected by the proposed development than ordinary members of the public".

A majority of the Supreme Court (2:1, Malcolm CJ dissenting) held that the Act did not confer on Mr Bropho a special interest. His right to a hearing was thus denied.

7.3 Consent attaches to owner and purposes of use

In *Minister for Indigenous Affairs v Catanach*[16] it was held by Pullin J that consent given by the Minister under s18 does not provide a blanket clearance in relation to all or any work on the site. Rather, the provisions operate so that consent applies only to the particular purpose which has been specified in the application for consent.

Pullin J held that where an owner of land obtains consent from the Minister, that consent attaches personally to the owner and does not "run with the land". This decision emphasises the direct nature of the prohibitory provisions found in Aboriginal heritage legislation and their possible impact on the mining industry. If a consent under s18(8) operates only in favour of a particular "owner" who has applied for it, it will be necessary to ensure that the applicant is the holder/s of the tenements concerned and not, for example, a joint venture manager which does not hold the tenements. Moreover, it will be necessary to consider carefully the position of mining contractors which are not "owners".

7.4 Expedited Procedure under the NTA

The fast-tracking process for future acts that may have minimal impact on native title is known as the "expedited procedure". The types of acts that may be expedited include the granting of some exploration and prospecting licences.

The State government since October 2003 has introduced a new policy whereby applicants for exploration and prospecting licences in WA are required to sign a Standard Heritage Agreement or prove they have an existing Alternative Heritage Agreement before the government will commence implementation of the expedited procedure under s32 of the NTA in relation to the

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12 *Western Australia v Bropho* (1991) 5 WAR 75 at 86.
13 *Western Australia v Bropho* (1991) 5 WAR 75 at 90.
14 (1981) 36 ALR 425.
15 *Western Australia v Bropho* (1991) 5 WAR 75 at 78–79.
16 [2001] WASC 268.

grant of mining licences. In the absence of such an agreement the applications will be processed under the NTA right to negotiate scheme.

In practice, when the relevant Mining Registrar returns a copy of the application to the applicant for advertising and service of notices the Department of Industry and Resources information package is provided to the applicant outlining the policy and process together with a copy of the Standard Heritage Agreement. To proceed under the expedited procedure, the applicant signs the Standard Heritage Agreement and forwards it to the relevant Native Title Representative Body or the native title claimant, who would then not lodge an objection to the application proceeding under the expedited procedure (pursuant to clause 3.3(a) of the Agreement).

The Standard Agreements include considerations such as the applicant agreeing to undertake heritage clearance surveys, if one is needed, prior to commencing work; the level of survey required and timeframe to commence and complete such survey. They also set out fixed rates for services by traditional owners who carry out such surveys.

If the expedited procedure applies, the State government can grant the tenement without the grantee party having to negotiate with native title claimants. If native title claimants do not agree that the grant should be fast-tracked and want to be involved in negotiations with the grantee and government parties, they can put in an objection application to the expedited procedure. Only native title claimants whose native title application has met the requirements of the registration test have the right to negotiate and can object by lodging an objection with the Tribunal within 4 months from the notification date. If the objection is successful, the development cannot go ahead without a negotiation process.

8. NEGOTIATIONS AND AGREEMENT

There are no provisions currently in the Act or the HPA (other than in Part IIA) providing for negotiation, mediation and the making of agreements between mining companies and Aboriginal groups. Many suggest that the Act should be repealed or amended and replaced by provisions that create an avenue for amicable resolution of heritage disputes between Aboriginal groups and other parties. Reform provisions could take into account the wishes of Aboriginal groups by allowing them to negotiate agreements, which fully recognise the significance of sacred sites and cultural heritage. Instead of consents under ss16 and 18, a more appropriate and effective result could be achieved by conferring upon Aboriginal groups the right to negotiate agreements themselves, without bureaucratic intervention.

But in reality negotiation is a common practice. Mining companies intending to carry out exploration and development works engage in discussions with Land Councils on a work clearance model. If an agreement is reached with the local Aboriginal community, the development would, in practice, proceed without seeking consent under the Act.

The introduction of the 1998 amendments to the NTA relating to ILUAs and the policy of the State government with respect to the expedited procedure has led to a growing number of negotiated outcomes in relation to the grants of mining and exploration tenements and the doing of other “future acts” required for mining development.

ILUAs almost invariably contain extensive provisions relating to the protection of Aboriginal cultural heritage. These provisions are commonly expressed to be without prejudice to the rights of the native title parties, and not to affect the obligations of the developer under the Act and the HPA

relating to Aboriginal cultural heritage. According to the “Agreements, Treaties & Negotiated Settlements Project",[17] which monitors agreements between indigenous people and other groups, as at June 2004 there were 179 agreements making provision for Aboriginal cultural heritage protection in Australia, and of these, 77 were ILUAs under the NTA.

There is a clear commercial imperative for mining companies to have a prearranged method of dealing with Aboriginal cultural heritage issues which arise during the life of the projects, from the commencement of exploration activities through to project development, construction, operation, maintenance and eventual decommissioning, demolition and site rehabilitation. By their very nature, items and places of Aboriginal cultural heritage significance cannot always be known in advance. Therefore, it is desirable to achieve a negotiated outcome at an early stage of a project.

9. CONCLUSION

Aboriginal cultural heritage legislation was in operation prior to the judicial and legislative recognition of native title. But since the enactment of the NTA, Aboriginal heritage legislation has received less attention because of the NTA and its provision for future acts and the making of ILUAs between Aboriginal native title claimants, mining companies and the governments .ILUA’s have captured much of the focus of the resources sector and their advisors in considering land access issues. As such the *Aboriginal Heritage Act* is neither the first nor the most important consideration for the mining industry in its dealings with Aboriginal groups before it commences its exploration or development projects. However, it would be prudent for any mining company or its advisors to contemplate and thoroughly examine the implications and hindrances that the Act may pose to their mining projects.

Mining companies should enter into dialogue with Aboriginal groups early in the life of their mining projects to negotiate and achieve an agreed outcome concerning Aboriginal cultural heritage issues since it is highly likely that such negotiation will in any event occur to address native title issues. Mining companies need to be mindful of the necessary steps to be taken to address Aboriginal heritage issues to ensure that their activities are not unlawful.

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[17] Available from Agreements, Treaties & Negotiated Settlements Database at <http://www.atns.net.au/database.html>.