

FOCUS

NATIVE TITLE



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NATIVE TITLE AMENDMENTS TO ENCOURAGE AGREEMENT OVER LITIGATION

The *Native Title Amendment Act 2007* (Cth) has come into effect to increase flexibility and certainty in the native title system. The amendments encourage the parties to resolve claims through agreement rather than litigation. Partner Tony Wassaf and Lawyer Lisa Ng look at the changes to native title legislation that will allow more efficient management and faster resolution of native title claims.

New amendments to native title legislation will encourage faster resolution to claims

HOW DOES IT AFFECT YOU?

- Native title claims and future act applications will have a greater focus on facilitating an agreement and have a less litigious approach.
- As a party to a native title claim, the claim will be resolved faster and more efficiently.
- There has been no change to the test for native title, so the amendments will have no impact on the areas over which a native title determination can be made.

INTRODUCTION

Our *Focus: Native Title*, December 2005, foreshadowed the reform package to native title legislation consisting of two Bills, the first of which the Federal Government has now implemented. The *Native Title Amendment Act 2007* (Cth) (the **Act**) was assented to on 15 April 2007 and most of the provisions are now in effect. This Act, which amends the *Native Title Act 1993* (Cth) (the **NTA**), provides the most significant native title legislative changes since the 1998 amendments¹. The provisions of the second Bill, which has not yet passed through Parliament, will make further technical amendments to the NTA.

1. See <http://www.comlaw.gov.au/comlaw/Legislation/Act1.nsf/>.



The Amendment Act will allow native title claims to be managed more efficiently by:

- implementing the Government's response to the Claims Resolution Review²;
- making Native Title Representative Bodies more effective;
- improving the flexibility of the prescribed bodies corporate governance regime; and
- broadening the scope of funding for non-claimant parties.

However, while the Act provides a framework that will undoubtedly make the processing of native title claims more workable, the amendments have not addressed all of the issues needed to achieve quick and fair outcomes.

CLAIMS RESOLUTION REVIEW

The Government's response to the Claims Resolution Review³ has clarified the roles of the Federal Court (the **court**) and the National Native Title Tribunal (**NNTT**) to:

- improve coordination and communication between the court and the NNTT;
- remove duplication of functions between the court and the NNTT;
- increase powers and functions of the NNTT, including the power to make directions; and
- increase the effectiveness of NNTT mediation.

MEDIATION

The Act encourages mediation rather than litigation to improve the resolution of claims. A new provision of the NTA requires parties to a native title claim to mediate the claim in good faith. The court will now not be able to conduct mediation of a claim until that claim has been mediated in the NNTT.

The NNTT will have additional powers to mediate claims more effectively, including the power to:

- compel parties to attend mediation and produce documents;
- collect evidence and make non-binding recommendations to the court; and
- report a party for not acting in good faith.

The court is required to consider admitting the evidence gathered by the NNTT and any reports prepared by the NNTT.

REVIEW AND INQUIRY

During a mediation, the NNTT may conduct a review into whether the claimant has native title rights and interests. Although the statements made during the review cannot be used in proceedings before the court without the consent of all of the parties, a report, which the NNTT must prepare at the conclusion of the review, may be provided to the court.

The amendments also address the circumstances in which the NNTT should exercise its power of inquiry under section 137 of the NTA. If the resolution of a matter or issue relevant to a native title determination is likely to lead to an agreement, amend the native title application or result in some other action being taken, the NNTT may hold an inquiry at its own initiative, at the request of the court or a party. The greater role the NNTT has in gathering evidence using this power will allow claims to be dealt with more effectively.

REGISTRATION TEST

Native title claims are required to meet a registration test before the applicants gain procedural rights, such as the right to negotiate over proposed developments on the area covered by their application.

The registration test for native title claims has not been amended, but the changes will allow the NNTT to dismiss a claim that does not contain all the supporting information. In response to the concern that applicants lodge claims to have the right to negotiate, the court has new power to dismiss a claim if the applicant fails to produce evidence in support of the application or progress the claim.

NATIVE TITLE REPRESENTATIVE BODIES

Under the NTA, Native Title Representative Bodies (**NTRBs**) are organisations that are recognised for the primary purpose of representing indigenous people in native title claims in a particular area.

2. See <http://www.ag.gov.au/www/agd/agd.nsf/>.

3. Ibid.

The amendments aim to improve the effectiveness of NTRBs by introducing a new regime for the recognition of NTRBs. New transitional arrangements will apply until 30 June 2007, requiring existing native title bodies to apply to, or accept invitations from, the Commonwealth Minister⁴, to be recognised for their areas by that time.

NTRBs were previously required to be incorporated under the *Aboriginal Corporations and Associations Act 1976* (Cth). The range of organisations that can be recognised as a NTRB also includes organisations incorporated under the *Corporations Act 2001* (Cth). A body that has not been formally recognised may now also act as a NTRB when it has been funded to perform some or all of the functions of a NTRB. Although these provisions will provide native title holders with better access to representation, it remains to be seen whether these organisations can adequately perform the functions without having the same structure and aims as NTRBs.

RECOGNITION

To ensure a focus on outcomes within a certain timeframe, the Act allows a NTRB to only be recognised for a fixed term between one and six years, as opposed to the previous system under which NTRBs were recognised indefinitely. However, a NTRB is unlikely to achieve results within the minimum period of one year. If a claim takes longer than expected, the intended result of resolving native title claims more quickly may not eventuate and may lead to additional uncertainty.

It will also be easier for the Commonwealth Minister⁵ to withdraw recognition of a NTRB that is not satisfactorily performing its functions, or has financial affairs with serious irregularities, and to appoint a replacement. The performance of NTRBs will be improved by making them more accountable; however, the replacement of a NTRB would be likely to cause delay to the native title claim.

4. While the Attorney-General has primary responsibility for administering native title, the Minister for Families, Community Services and Indigenous Affairs administers provisions dealing with NTRBs (Part 11 of the NTA). See <http://www.ag.gov.au/www/agd/agd.nsf/>.

5. Ibid.

FUNDING

For better strategic planning, funding grants will be made to NTRBs for multiple years, rather than for a single year. The amendments do not resolve the difficulties poorly resourced NTRBs have had in the past to maintain claims and participate in negotiations because of the inadequate amount of funding they receive.

The amendments allow the Commonwealth Minister⁶ to extend, reduce or vary the area of a NTRB. Although this may be appropriate in some circumstances and the Minister must be satisfied that the NTRB will satisfactorily perform its functions over a greater area, increasing the area for which a NTRB is responsible will burden under-resourced NTRBs.

PRESCRIBED BODIES CORPORATE

When a native title determination is made, the NTA requires the native title holders to establish a prescribed body corporate (**PBC**) to manage their rights and interests. It is critical that the PBC functions effectively, as it is the PBC that allows native title holders to exercise their rights, discharge any land management obligations and, increasingly, negotiate with others over the use of the determined areas of land.

The Act implements two of the recommendations from the Report on the Structures and Processes of Prescribed Bodies Corporate⁷. A PBC may hold the native title rights and interests in trust for the native title holders or it may act as an agent for the common law holders of native title.

Even if the PBC does not hold the interests on trust, it may enter into agreements that bind the native title holders without consultation. The PBC may also act in relation to the native title rights and interests of subsequent determination if the holders consent.

6. Ibid.

7. *Structures and Processes of Prescribed Bodies*, Commonwealth of Australia 2006, <http://www.ag.gov.au/www/agd/agd.nsf/>.

FUNDING OF NON-CLAIMANT PARTIES

The Act amends the scope of the respondent funding scheme in relation to future acts, which is an act or class of acts that may affect native title rights and interests in land and waters. Future acts may be consented to by interested parties in an agreement.

The increases in funding will cover the legal and other costs of respondents to future act applications associated with developing a standard form of agreement and participating in the right to negotiate process. Although native title respondents may continue to receive funding to litigate claims necessary to protect their interests, the changes to funding made to the Act emphasise agreement-making. These changes, together with new guidelines, will encourage parties to take a cooperative approach to native title.

FURTHER REFORM

The Native Title Amendment (Technical Amendments) Bill 2007 (the **Bill**) was introduced into the Federal Parliament on 29 March 2007 and is likely to implement additional legislative measures as part of the reform package. At the time of publishing, the provisions of the Bill were being reviewed by the Senate Legal and Constitutional Affairs Committee. These amendments will not change the nature of native title, but improve the procedures for making and resolving native title claims.

Some of the proposed provisions relate to future act and Indigenous Land Use Agreement (**ILUA**) processes. Parties will be able to register body corporate agreements on the Register of ILUAs. Framework agreements, which allow for the making of future agreements about native title matters, will be more widely available to parties. The amendments also establish a more flexible scheme for payments held under right to negotiate processes and replace the trust regime with a bank guarantee regime, to avoid funds being unnecessarily tied up for lengthy periods.

Other significant proposed changes will:

- clarify the scope of alternative state regimes under section 43 of the NTA, validating specific determinations previously made by the Commonwealth Minister⁸ in relation to state mining acts;

- stipulate certain information required to be submitted with claimant applications;
- amend the notification provisions requiring the NNTT to notify appropriate parties of new or amended claims;
- provide a mechanism to allow claimants to seek a review of the registration decisions by the Registrar of the NNTT and the court;
- restrict the NNTT's use of the information it obtains or that it otherwise has access to in the course of providing assistance;
- clarify that automatic weather stations are among the general public facilities that can provide services unimpeded by native title; and
- give access to parties to hearings through the use of teleconference and other facilities.

The Bill will also make a series of minor and technical amendments to clarify existing provisions of the NTA, including to amend previous drafting errors and inconsistencies. It is proposed that the above amendments commence several months later than the other provisions in the Bill to allow parties sufficient notice of the changes.

The provisions of the Bill make minor amendments applying to NTRBs to complement measures in the Act to:

- remove the corporate governance obligations imposed on NTRBs that are already imposed under their incorporation statutes;
- improve the process for reviewing decisions by NTRBs not to assist native title claimants and holders; and
- streamline the process for transferring documents to a replacement NTRB.

The Bill also implements two further recommendations from the Report on the Structures and Processes of PBCs⁹. PBCs will be able to recover costs reasonably incurred in performing specific functions at the request of third parties, including costs of negotiating agreements. Native title holders can initiate the replacement of a PBC and a government-funded body will be able to act as a default PBC in some circumstances.

We will keep you informed of any other significant developments in this area. In the meantime, if you would like further information, please contact one of our people below.

8. The determination made by the Special Minister of State on 18 October 1995 in relation to the *Mining Act 1971* (SA) and the determination made by the Minister for Aboriginal and Torres Strait Islander Affairs on 16 April 1997 in relation to the *Opal Mining Act 1995* (SA).

9. *Ibid.*



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