

# LEGISLATIVE NOTES

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## RECENT AMENDMENTS TO THE NATIVE TITLE ACT 1993 (Cth): AN OVERVIEW

Clare Lawrence\* and Gavin Scott\*\*

On 7 September 2005, the Attorney-General, the Hon Philip Ruddock MP announced a plan for native title reform, aimed at improving the performance of native title processes both through amendments to the *Native Title Act 1993* (Cth) (NTA) and administrative measures. The reforms target the efficiency and effectiveness of the current system in achieving outcomes.<sup>1</sup> Nearly two years later, the reforms are close to implementation, having been introduced through two separate pieces of legislation.

The *Native Title Amendment Bill 2006* (Cth) was introduced into Parliament on 7 December 2006. Following a review conducted and recommendations made by the Senate's Standing Committee on Legal and Constitutional Affairs (Senate Committee), the *Native Title Amendment Act 2007* (2007 Act) received Royal Assent on 15 April 2007.

The second reform Bill, the *Native Title Amendment (Technical Amendments) Bill 2007* (Cth) was introduced into Parliament on 29 March 2007. Once again the Senate Committee reviewed the Bill, and some of their recommendations were adopted. The House agreed to the Senate's amendments on 20 June 2007, and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) (Technical Amendments Act)<sup>2</sup> received Royal Assent on 20 July 2007.

The Commonwealth's legislative reforms have focused on four areas: native title representative bodies (NTRBs); the claim resolution system; the prescribed bodies corporate which represent the native title-holders post-determination; and technical amendments to the NTA. The key changes to the NTA introduced by the 2007 Act and the Technical Amendments Act are outlined below.

### 1. NATIVE TITLE REPRESENTATIVE BODIES

The amendments relating to NTRBs are the most controversial aspect of the 2007 Act. The role of the NTRB is to assist native title-holders and claimants, within a designated area, with the various NTA processes. There is broad agreement that NTRBs could perform more effectively, but the Commonwealth Government is unconvinced the problems stem from funding levels, as is commonly asserted. The structural changes introduced in the 2007 Act will give the Commonwealth Government the capacity to make significant changes to the identity of NTRBs and the regions for which they are responsible.

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\* BA (Hons), LLB, Blake Dawson Waldron.

\*\* BBus, LLB, LLM, Blake Dawson Waldron.

<sup>1</sup> 'Native Title Reform' <<http://www.ag.gov.au/nativetitlesystemreform>>.

<sup>2</sup> The Technical Amendments Act can be found at [www.ag.gov.au/nativetitlesystemreform](http://www.ag.gov.au/nativetitlesystemreform).

### 1.1 Recognition of NTRBs

Essentially, the 2007 Act seeks to create a more competitive field for the role of an NTRB. NTRBs will be recognised for a fixed term of one to six years, where previously recognition was indefinite. In response to the Senate Committee's recommendation, the minimum recognition period was generally extended from one to two years. However, the Minister retains the ability to impose a one-year term where he or she considers that it would promote efficiency.

New recognition periods set by the Minister will be available for all current NTRBs from 1 July 2007. At the expiry of that term, the Minister may invite the incumbent NTRB or other 'eligible bodies' to apply for the role. NTRBs were previously required to be incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth). Eligibility is now extended to corporations incorporated under the *Corporations Act 2001* (Cth).

### 1.2 Variation of NTRB Areas and Withdrawal of Recognition

The 2007 Act amendments will allow the Minister to unilaterally vary the area of an NTRB, on 60 days notice. It will also become easier for the Minister to withdraw recognition of an NTRB. The grounds for withdrawal of recognition are expanded and the decision to do so will no longer be susceptible to judicial review.

## 2. CLAIM RESOLUTION

With approximately 540 unresolved native title claims in the system, and an average length of six years for resolution, reforming the claim resolution system has been a major priority for Government. The 2007 Act reforms several different aspects of the system, with further measures included in the Technical Amendments Act.

### 2.1 Becoming a Party

Previously, parties could join a native title claim within a three-month notification period if they had an interest that may be affected by a determination of native title. The threshold for joining a claim is raised by the 2007 Act. Now to become a party as of right, a person is required to have an *interest in relation to land or waters* that may be affected by a determination in the proceedings. This is defined broadly in the NTA and is not limited to a proprietary interest. To be joined as a party outside of the notification period, a person must have an interest that may be affected by a determination (although not necessarily an *interest in relation to land or waters*) and the court must be satisfied that joinder is *in the interests of justice*.

### 2.2 Partial Settlement of Claims

The 2007 Act amends the NTA to allow for partial settlement of claims with the agreement of specified parties only. A party who does not have a 'proprietary interest' that is recorded on a public register of interests, is currently limited to a right of objection. However, following a recommendation from the Senate Committee, and lobbying by certain stakeholders, the Technical Amendments Act further amends the NTA, such that a partial settlement will require the consent of each party who holds an *interest in relation to land and waters* in the area to be subject to the consent determination.

### 2.3 Expansion of National Native Title Tribunal (NNTT) Functions

The 2007 Act expands the functions of NNTT. It will have a new inquiry function, allowing it to review applicants' connection material and report its findings. Priority is also given to NNTT mediation over that conducted by the Federal Court, so there can no longer be a duplicate process.

This is notwithstanding criticism of the effectiveness of mediation by the NNTT reflected in the Senate Committee report. Further, the NNTT will be able to direct parties to attend mediation conferences and compel the production of documents, supported by a court order if necessary.

#### **2.4 Good Faith Obligation**

A further measure to improve the effectiveness of NNTT mediation is the imposition of an obligation on parties to act in good faith in the mediation of a claim. Responding to a recommendation made by the Senate Committee, the Attorney General's Department is presently preparing a Code of Conduct for parties to a native title claim.

### **3. IMPROVING 'CLAIM QUALITY'**

The Explanatory Memorandum to the 2007 Act comments that 'poor quality claims are a burden on the native title system'. To address this, the reforms include measures aimed at ensuring that claims are properly authorised, meet the merit standards of the registration test, and are able to be dismissed more readily if they are not actively pursued.

#### **3.1 Claim Authorisation**

The effect of the Technical Amendments Act is that applicants will be required to provide a greater level of proof that they have actually been authorised to make the claim on behalf of the claim group. However, the amendments also confirm that a technical defect in the authorisation of a claim will not prevent the Federal Court from making a decision about its merits.

#### **3.2 Replacing and Removing Applicants**

The Technical Amendments Act introduces amendments to make it easier to replace or remove an applicant in a native title claim. The grounds on which a native title claim group can seek to replace or remove an applicant have been expanded. The new grounds include where a current applicant consents, or has died or become incapacitated.

#### **3.3 Registration of Claims**

Under the NTA, only where a claim is registered do claimants have procedural rights in relation to a future land use approval. To become registered, a claim has to meet certain merit standards. The 2007 Act seeks to ensure that all claims progressing through the system meet those standards. All unregistered claims will now be required to undergo the registration test. The Registrar of the NNTT is required to use his best endeavours to complete this process within 12 months, that is, by April 2008. The Technical Amendments Act introduces a system allowing for internal review of the NNTT's decision not to register a claim. This is in addition to the existing right to judicial review.

#### **3.4 Dismissal of Claims**

The 2007 Act introduces several new circumstances where the Federal Court has the power to dismiss claims. An unregistered claim can now be dismissed once the claimant has exhausted all avenues of review of an adverse registration test decision, and has not sought to amend the claim. A claim made in response to a future act proposal can also be dismissed once matters associated with the future act have been finalised and the claimant has not sought to progress the claim.

Complementing the Federal Court's new powers of dismissal are new reporting functions given to the Registrar of the NNTT. The Registrar may report on the finalisation of future acts and must notify the court of claims which fail the registration test.

#### **4. POST-DETERMINATION REPRESENTATION**

With nearly 70 determinations recognising native title, the effectiveness of the 'prescribed bodies corporate' (PBCs) responsible for managing the recognised native title rights and interests is of increasing importance.

The 2007 Act introduces changes to make PBCs more flexible. One notable change is that an existing PBC will be able to be determined as a PBC for native title-holders in a subsequent determination. The Explanatory Memorandum states that this measure may encourage economies of scale by allowing PBC infrastructure and resources to be used by more than one group of native title holders. The Technical Amendments Act also covers PBCs and has several provisions directed at structural flexibility. In addition, the Act deals with access to resources.

A PBC will be authorised to charge certain third parties for costs incurred in performing its functions at the request of the third party. This formalises the current practice where project proponents often cover the costs of PBCs with whom they are negotiating. It is proposed that the Registrar of Aboriginal Corporations will oversee the system, providing opinions on whether charges are appropriately levied. These amendments are not scheduled to commence until 1 July 2008.

#### **5. FURTHER TECHNICAL AMENDMENTS**

The Technical Amendments Act introduces several hundred other minor amendments to the NTA, correcting drafting errors, updating references and ensuring consistency across classes of similar concepts.

#### **6. CONCLUSION**

The current reforms do not fundamentally alter the NTA, in the manner of the Wik amendments in 1998. They are largely directed at issues at the margins: the administration of some NTRBs, the behaviours of some respondents to claims and certain claims that seem to be going nowhere. However, the amendments are thorough, addressing numerous perceived flaws and bottlenecks in the system. They also give the key gatekeepers – the NNTT, the Commonwealth Minister and the Federal Court – a range of new powers to give them greater control over their areas of responsibility.

Collectively, the reforms represent a series of potentially significant changes to the native title system that are intended to make it more efficient. However, efficiency cannot be achieved by the legislative changes alone. The willingness of those invested with new powers to exercise them, and the capacity of native title parties and their representatives, in particular, to respond to the greater demands that they will face, will be critical.