

# **Technical amendments to the *Native Title Act 1993***

## **Discussion Paper**

### **Introduction**

On 7 September 2005 the Attorney-General announced a package of reforms to the native title system. One element of the package is a suite of minor and technical amendments to the *Native Title Act 1993* (the Act) to improve existing processes. The amendments are designed to enhance the operation of the Native Title Act and address issues which have emerged in practice. They are not designed to wind back native title rights.

Your comments are sought on the proposals set out in this paper. The Australian Government would also welcome your suggestions for other minor or technical amendments to the Act. In making suggestions for further amendments, you should include clear examples illustrating the nature of the problem and the way in which the proposed solution will address it.

The proposals in this paper do not reflect the final views of the Australian Government. An exposure draft of the technical amendments will be released early in 2006 for final comment before introduction into Federal Parliament.

If you would like to make a submission, please forward it no later than 31 January 2006 to:

The First Assistant Secretary  
Legal Services and Native Title Division  
Attorney-General's Department  
National Circuit  
BARTON ACT 2600

Submissions may also be e-mailed to [native.title@ag.gov.au](mailto:native.title@ag.gov.au), or sent by facsimile to (02) 6250 5553.

Please note that any suggestions may be forwarded to other relevant Australian Government agencies and Departments for their consideration. Unless you request otherwise, information you provide may also be used in consultations and any explanatory documentation prepared in relation to the Bill.

## **List of Acronyms**

ILUA	Indigenous Land Use Agreement
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993</i>
NTRB	Native Title Representative Body
PBC	Prescribed Body Corporate
RNTBC	Registered Native Title Body Corporate

## **Proposed amendments**

### **A: Amendments to the Future Act Regime**

#### **Subsection 24AA(3): amend the overview of ILUA provisions**

Section 24AA provides a general overview of future act provisions in the NTA, including an overview of future act validity under an ILUA (subsection 24AA(3)). Essentially, subsection 24AA(3) states that where parties to an ILUA consent to an act being done, that act will be valid.

However, even where the parties have consented, a future act is not valid until the ILUA has been registered (see sections 24EB and 24EBA). Whilst any conflict between the overview provision and operational provisions would likely be resolved in the latter's favour, it would be useful to amend the overview to align it with the substantive provisions. Accordingly, it has been proposed that subsection 24AA(3) be amended to make clear that a future act will be valid if the parties consent to the act being done *and* the agreement is registered.

#### **Sections 24BB and 24CB: enabling body corporate and area agreements to be framework agreements**

Currently an alternative procedure agreement can be about providing a framework for the making of other agreements about matters relating to native title rights and interests – these are known as ‘framework agreements’ (see paragraph 24DB(e)). However, there is no similar ability for a body corporate or area agreement to also be a framework agreement.

There is nothing in the nature of body corporate or area agreements prohibiting framework agreements. ILUAs are designed to be an adaptable and flexible mechanism, and given the limited availability of alternative procedure agreements, enabling all types of ILUAs to be framework agreements is desirable.

Accordingly, it has been proposed that sections 24BB and 24CB be amended to incorporate a provision similar to paragraph 24DB(e), enabling body corporate and area agreements to be framework agreements.

#### **Sections 24BF, 24CF and 24DG: clarify use by the NNTT of information provided or obtained when providing assistance to parties in the negotiation of an ILUA**

Sections 24BF, 24CF and 24DG provide that any party to negotiations for an ILUA may seek assistance from the NNTT in those negotiations. Concern has been expressed about what use the Registrar of the NNTT may make of information gained by or disclosed to the NNTT during the provision of that assistance, when he or she is later dealing with an application to register the ILUA.

These provisions can be contrasted with the provisions regarding mediation conferences (Part 6, Division 4A). The latter provisions prohibit the use of information obtained during mediation in court proceedings without the consent of parties, and also provide for the NNTT member who presides over or assists a

mediation not to take any further part in the proceeding without the consent of the parties (see subsection 136A(4)).

It is likely that concerns are not limited to use of information by the Registrar in the ILUA registration process, but may extend to the NNTT or the Registrar using information in other contexts, such as the mediation of a subsequent native title claim.

To ensure that information is not used inappropriately, and to provide comfort to parties who seek assistance from the NNTT in ILUA negotiations, it has been proposed that the NTA be amended to clarify that information provided by a person seeking assistance under sections 24BF, 24CF and 24DG is not to be used by the NNTT for any other purpose without the consent of the person.

References to the NNTT would include references to an alternative State or Territory body recognised under the NTA.

### **Section 24BI: provision for notification day for body corporate agreements**

When a party or parties apply to the NNTT Registrar to have an ILUA registered, the Registrar must give notice of that application to a range of persons or bodies who are not parties to the agreement.

Notice given in relation to area agreements and alternative procedure agreements must specify a notification day. Prior to the notification day, persons claiming to hold native title in the area the subject of the agreement may object to that agreement being lodged. Limited other applications and activities can also occur within this period.

However, there is no similar ‘notification day’ provision for body corporate agreements. This is most likely because the only persons or bodies able to object to the registration of the agreement are the parties to the agreement. In limited circumstances, non party NTRBs can also prevent registration. Section 24BI provides that the Registrar of the NNTT must register the agreement unless there is an objection, or advice from the NTRB, within one month from notice of the agreement being given.

As notices are sent to a range of bodies and can conceivably be sent on different dates, and public notification is generally done by advertisement in relevant newspapers (which may not be published daily), there has been some confusion about when the Registrar gives notice, and hence when the one month starts to run. This confusion may be exacerbated by the fact that parties to the agreement – who are the only bodies able to object to the registration – are not required to be notified.

In order to clarify these provisions, it has been proposed that section 24BH (which provides for the giving of notice) be amended to require the NNTT to write to parties at the same time notice is given, advising them of the notification period. The notification period of one month would be specified to run from the date the notification is sent or, if notice is to be given on different dates, from the latest date notification is to be given.

In addition, it has been proposed that the NTA be amended to provide that where notice is given to a non-party NTRB, that notice must set out the notification date to

ensure that body can provide any relevant advice to the Registrar with the one month period.

**Subsections 24CI(2) and 24DJ(2): clarify other use of information provided or obtained by the NNTT when providing assistance to parties in the negotiation of an objection to an ILUA**

Section 24CI enables persons claiming to hold native title in the relevant area to, in certain circumstances, object to the proposed registration of an area agreement ILUA. Objections must be made in writing to the Registrar of the NNTT (subsection 24CI(1)), and the parties to the ILUA may request assistance from the NNTT to negotiate with the person who made the objection, with a view to having the objection withdrawn (subsection 24CI(2)). Where an objection is not withdrawn, the Registrar will determine whether or not the objection will be upheld (see subsection 24CK(2)).

A similar procedure applies to registration of an alternative procedure agreement ILUA (see sections 24DJ and 24DL). However, where an objection to an alternative procedure agreement is not withdrawn it is the decision of the NNTT (not the Registrar) as to whether or not the objection should be upheld.

The involvement of the NNTT and Registrar in the objection process could give rise to concerns about the use of information gained through the objection negotiations in any later decision by the Registrar (area agreement) or inquiry by the NNTT (alternative procedure agreement) about that objection.

It has been suggested that information obtained or provided during objection negotiations should not be able to be used during a later decision by the Registrar or inquiry by the NNTT without the consent of the parties. Similarly, an NNTT member who attempts to negotiate the withdrawal of an objection to an alternative procedure agreement should be prohibited from being involved in a subsequent inquiry into the objection unless the parties consent is obtained.

Accordingly, it has been proposed that the NTA be amended to make clear that information provided and/or obtained in the course of providing assistance in objection negotiations cannot be used by the NNTT or Registrar in a subsequent inquiry or decision about that objection, without the consent of the parties to the negotiations.

In addition, it has been proposed that the NTA be amended to provide that an NNTT member who provides assistance in negotiations to withdraw an objection to an alternative procedure agreement is prohibited from participating in any subsequent inquiry, without the consent of the parties.

### **Subsection 24MD(6B): amend to allow non-native title parties to request an independent hearing**

Subsection 24MD(6B) of the NTA provides that, where certain types of acts are proposed over land or waters (namely, compulsory acquisitions by governments for the benefit of third parties, or the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility associated with mining) any native title claimant or PBC in relation to the relevant land or waters may object to the doing of that act to the extent that it affects their registered native title rights and interests. Paragraph 24MD(6B)(f) provides that where an objection is made, and the objector requests, the relevant Government party must ensure that the objection is heard by an independent person or body.

This provision has been interpreted to mean that the independent person or body can only hear the objection if the objector requests this. Where no such request is made, resolution of the objection, and therefore the proposed act, may be delayed.

Accordingly, to avoid the potential for extensive delays in resolving objections made pursuant to subsection 24MD(6B), it has been proposed that this subsection be amended to enable the relevant government party or the person who requested or applied for the doing of the act to request that the objection be heard by an independent person or body. The relevant government party or person who requested or applied for the doing of the particular act will only be able to request to have the objection heard by an independent person or body after two months from the date of the original objection by the native title claimant or PBC. This will allow time for the consultation required in paragraph (e) to progress, which may alleviate the need for the matter to be referred to an independent person or body.

### **B: Amendments to the Alternative State Regime provisions**

#### **Sections 43 and 43A: clarify resumption of right to negotiate when alternative state regimes cease**

Pursuant to sections 43 and 43A of the NTA the Commonwealth Minister may make a determination that alternative State or Territory right to negotiate provisions apply instead of the NTA provisions.

Currently, neither section outlines what happens in the event that an alternative state regime is revoked or otherwise no longer exists. It would be useful to clarify this. Accordingly, it has been proposed that the NTA be amended to provide that following the revocation of a section 43 or section 43A determination, or the repeal by a State or Territory of the laws providing for an alternative state regime, the relevant NTA right to negotiate provision will resume application. The resumption of NTA processes would take effect immediately following the revocation or repeal coming into effect.

## **C: Amendments to the Prescribed Bodies Corporate provisions**

### **Section 57: consent of agent PBCs to manage native title rights and interests**

Where the native title holders want a PBC to hold the native title rights and interests on trust, they must nominate that PBC and provide to the Federal Court the written consent of that PBC. However, where the native title holders want a PBC to manage the native title rights and interests as their ‘agent’, there is no requirement that they provide the Federal Court with the written consent of the PBC.

This appears to be an unintended discrepancy. It has been proposed that section 57 be amended to provide that an ‘agent’ PBC must consent to being nominated to manage the native title.

## **D: Amendments to the Application and Registration Test provisions**

### **Subsection 62(1): amend affidavit requirements about entries on the National Native Title Register**

The NTA requires an application seeking to have native title recognised to be accompanied by an affidavit sworn by the applicant which, amongst other things, includes a statement that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register (see subparagraph 62(1)(a)(ii)).

This provision is designed to ensure that a new native title claim does not cover an area where native title has already been finally determined. Entries in the National Native Title Register are governed by subsection 193(1) of the NTA, which in addition to requiring details of determinations by the High Court, Federal Court and any State or Territory court, also required details of any ‘other determinations of, or in relation to, native title in decisions of courts or tribunals’. This has the capacity to include a very wide range of native title related decisions which are not determinations of native title, and should not necessarily impede a native title claim being lodged over that area. For example, a State Supreme Court decision which may only have a lesser, *in personam* operation that a native title determination, would currently prevent an application being made over the area.

It has been proposed that the requirement in subsection 62(1) be modified to refer only to approved determinations of native title and not also those decisions entered under paragraph 193(1)(c). Such an amendment would not result in new claims being lodged where a determination of native title has already been made, as this is expressly prohibited by other parts of the NTA (subsection 61A(1) and 13(1)).

### **Paragraph 62(2)(c): searches carried out about non-native title rights and interests**

Paragraph 62(2)(c) forms part of the requirements which an application to have native title recognised must meet. The provision requires that the details of all searches carried out to establish certain things be included in the application. As currently drafted it is not clear whether it refers to searches carried out by the applicants, or searches carried out by anybody.

The clear policy of the provision is that it is limited to searches carried out by the native title claim group. It has been proposed that paragraph 62(2)(c) be amended accordingly.

**Subsections 62(2) and 62(3): amend information requirements for compensation application according to circumstances leading to application**

A compensation claim may be made either by a RNTBC or a compensation claim group (section 61). A claim by a RNTBC will follow a determination that native title exists. However, a claim by a compensation claim group could be made in two circumstances – where no determination of native title has been sought, or where a determination has been sought and native title has not been recognised. It is possible that native title might not have been recognised because it was extinguished by acts which may be compensable under the NTA.

Where a compensation application is made by a compensation claim group, some information required in applications for a determination of native title must also be included in that compensation application (paragraph 62(3)(b)). That information includes a description and map of the relevant area, details and results of searches about non-native title rights and interests, and a description of the native title rights and interests and the basis on which it is asserted they exist.

Provision of this information ensures that where necessary the Federal Court can make a determination of native title at the time it determines compensation. (Subsection 13(2) provides that if at the time the Federal Court is making a native title compensation determination, there is not an approved determination of native title in relation to the whole or part of the area to which a native title compensation application relates, then the Federal Court must also make a current determination of native title at that time.)

However, where the compensation group has already sought a determination of native title, and that determination has resulted in native title not being recognised, provision of material under paragraph 62(3)(b) could be unnecessary. Accordingly, it has been proposed that paragraph 62(3)(b) be amended to require the provision of additional information only in circumstances where there is a material difference between the nature of the group, the rights and interests claimed, or the land and waters covered by the compensation claim and the native title claim. Such compensation claimants would still need to meet the authorisation and other requirements in subsection 62(3). An additional provision in section 62(3) would require the applicants to also provide material identifying the previous claim.

Further, the note to subsection 13(2) states that where a claim for compensation is made, and there has previously been no application for a determination of native title, the compensation claimants must include certain information in their claim pursuant to subsection 62(3). However, as noted above, a compensation claim may be made following an unsuccessful native title claim. It has been proposed that the note also be amended to reflect the amendments to paragraph 62(3)(b).

## **Sections 64 and 87: enabling an application to be split to facilitate resolution**

Under the NTA an application can be split, to facilitate a consent determination over part of an area, for example where most parties consent to a determination and the parties who do not consent do not have an interest in the proposed determination area. However, this requires going through the registration test again which discourages applicants from taking up this option.

Accordingly, it has been proposed that the NTA be amended to enable applicants to apply to the Federal Court for a consent determination over part of a claim area and authorise the Federal Court to make such a determination. The application could only be made where the Federal Court is satisfied that all parties whose interest in the claim falls (either partly or solely) within the area proposed to be split off for the purposes of the partial determination would consent to a determination of native title.

It has also been proposed that this change be accompanied by consequential amendments requiring the Registrar of the Federal Court to review the party list after the split part of the claim has been resolved with a view to identifying parties who no longer have an interest in the claim. The Federal Court would be provided with the discretion to remove parties so identified by the Registrar from the remainder of the claim.

## **Sections 64 and 190A: amendments to applications and the registration test**

Subsection 64(4) requires the Registrar of the Federal Court to provide a copy of all amended applications to the Native Title Registrar, who is required to consider the application and apply the registration test (section 190A). There are no exceptions to this process.

Registration of a claim is important as it confers procedural rights under the further acts regime, such as the right to negotiate. However, it has been the experience of many stakeholders that many claimants with registered claims do not, or are reluctant to, amend their claim to take into account changes in the law or to improve the quality of the claim, in case their claim loses its registered status. This is not conducive to timely mediation or litigation of claims.

The ability to amend the claim to remove particular areas without going through the registration test may also provide incentive for claimants and respondents to agree on some areas being excluded – and therefore some respondents being able to withdraw from the proceedings.

This could be resolved in part by providing that some amendments to applications no longer trigger the registration test. It has been proposed that section 190A be amended to provide that amendments to claims to reduce the area covered by the claim, to remove the name(s) of deceased claimants from the application, or to make purely procedural changes such as changing the address for service, will not trigger the registration test.

Under this proposal section 190 would also be amended, to provide that the details on the Register of Native Title Claims of applications which are amended but are not

required to go through the registration test again are updated, to ensure all parties are aware of any changes.

**Subsection 190A(2) and section 24MD: extend the NNTT Registrar’s obligation to consider claim within appropriate timeframes**

Section 190A prescribes how the NNTT Registrar is to consider native title determination claims. Subsection 190A(2) provides that if notice is given under section 29 about a proposed future act which would affect land or waters within the claim area, the Registrar must endeavour to finish considering that claim within four months. That timeframe reflects paragraph 30(1)(a), which provides that a person who four months after notice is given under section 29 is a *registered* native title claimant over relevant land or waters will be a party to negotiations about the proposed future act.

Section 29 forms part of the right to negotiate provisions. Currently, the obligation in section 190A(2) does not extend to acts covered by State or Territory alternative right to negotiate regimes, or to other acts where procedural rights can arise.

*Alternative state regimes*

It has been proposed that section 190A(2) be amended to extend the Registrar’s obligation to also cover where he or she is given notice of a future act under a relevant State or Territory alternative right to negotiate regime. The timeframe within which the Registrar would need to endeavour to finish considering the claim will reflect the time within which an objection to a future acts can be made under the State or Territory’s alternative regime.

*Section 24MD*

It has been proposed that section 190A(2) be amended to also extend the Registrar’s obligation to cover where notice is given by the Commonwealth, State or Territory under subsection 24MD(6B) about a proposed future act.

Section 24MD sets out how certain acts, which could be done in relation to land or waters whether there is native title or ordinary title over that land or waters, can be done. For example, section 24MD covers compulsory acquisition where both native title and non-native title interests are acquired and the native title holders are not caused any greater disadvantage than the non-native title holders.

Some types of acts covered by section 24MD – compulsory acquisitions which confer rights on persons other than the Commonwealth, State or Territory, and the creation or variation of a right to mine solely to enable construction of a mining related infrastructure facility – will give rise to procedural rights. Notice of such an act must be given by the Commonwealth, State or Territory to any registered native title claimant, native title body corporate, and relevant NTRB (paragraph 24MD(6B)(c)). A claimant or body corporate may then object to the act being done within two months of the notification.

It has been proposed that where notice is given by the Commonwealth, State or Territory about the proposed future act, the Registrar be obliged to use his or her best

endeavours to finish considering any native title claim within two months of that notice. The two month period reflects the time in which a claimant may currently object to the doing of an act which affects their *registered* native title rights and interests.

A consequential amendment to paragraph 24MD(6B)(c) would also be required to ensure that the Registrar is given notice of the proposed future act, as currently notice is only given to claimants, PBCs and any NTRB.

## **E: Miscellaneous Amendments**

### **Section 78: clarify the scope of the Registrar’s ability to provide assistance pursuant to this provision**

Section 78 provides that the Registrar may give assistance to people in the preparation of applications, and may assist people (at any stage of a proceeding) in matters related to the proceeding. Section 78 is located in Part 3 of the NTA, which is about applications to both the Federal Court and the Registrar.

Whilst the Registrar can clearly provide assistance to people for some parts of the future act process – for example, in preparing an expedited procedure application – it is not clear whether assistance could be provided to a person applying to register an ILUA. It would improve the efficiency and effectiveness of the native title system if it were clarified that the Registrar can assist a person applying to register an ILUA. Accordingly, it has been proposed that section 78 be amended to enable the Registrar to give assistance to persons applying to register an ILUA.

### **Paragraph 139(d): provide for the NNTT to make a determination following an inquiry under paragraph 139(d)**

Where a person claiming to hold native title in relation to land or waters covered by an alternative procedure agreement objects to the registration of that agreement, and that objection is not withdrawn, the NNTT must determine whether or not the objection should be upheld and registration prevented (see sections 24DJ and 24DL). The NNTT decides this matter through an inquiry, pursuant to paragraph 139(d).

Section 139 also provides for inquiries to be held in relation to right to negotiate applications and ‘special matters’. Where the NNTT holds an inquiry into a right to negotiate application, section 162 prescribes that the NNTT must make a determination about the matters covered by the inquiry, and must state any findings of fact upon which the determination is based. When the NNTT holds an inquiry into a special matter, section 163 provides that the NNTT must make a report about the matters covered by the inquiry and report any findings of fact upon which it is based. Section 164 provides that determinations and reports referred to in section 162 and 163 respectively must be in writing and published by the Tribunal.

To ensure consistency, the requirements that apply to an inquiry to a right to negotiate application and a special matter should also apply to an inquiry under paragraph 139(d). Accordingly, it has been proposed that the NTA be amended to provide that where the NNTT holds an inquiry into a matter referred to in paragraph 139(d) they

must make a report about the matters covered by the inquiry. The report would include any findings of fact upon which it is based, be in writing and, be given to all parties.