



Australian Government  
Attorney-General's Department

# Native Title Reforms

FACT SHEET # 1

OVERVIEW OF REFORMS

## INTRODUCTION

The Australian Government has released exposure draft legislation proposing reforms to the native title system for public consultation. The Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 would amend the *Native Title Act 1993*, and other related legislation and regulations. This will implement recommendations from a number of independent reviews and improve the native title system for all parties.

This fact sheet is a quick guide to key proposed changes. A more detailed public consultation paper outlining the draft amendments is available on the [Attorney-General's Department](#) website.

## ROLE OF THE APPLICANT

### What is changing?

The 'applicant' is the person or group of people authorised by a native title claim group to make and manage a claim on their behalf. The 'applicant' can also enter into native title agreements (such as Indigenous Land Use Agreements) on behalf of the group where authorised to do so.

The government proposes to amend the Native Title Act to give native title groups greater flexibility around setting their internal processes, including to:

- allow the claim group to place conditions on the authorisation of the applicant (for example, a condition to require the applicant to get approval from the claim group before agreeing to a consent determination or discontinuing a claim)
- allow a majority of the applicant to make decisions or sign native title agreements, rather than requiring all members of the applicant to act together, if this is something the claim group wants, and
- making it simpler for the claim group to replace individual members of the applicant if the member becomes too ill to perform their duties, or has passed away, including through pre-agreed succession-planning arrangements.

These amendments are contained in Schedule 1 of the Native Title Legislation Amendment Bill 2018, and would implement recommendations made by the Australian Law Reform Commission in its *Connection to Country: Review of the Native Title Act 1993 (Cth)* report.

These amendments would not take effect immediately – there would be a six month period for claim groups to decide if and how to make use of the changes, including whether to hold an authorisation meeting to place any conditions on the applicant's authority.

## What does this mean in practice?

**Example – allowing the claim group to place conditions on the authorisation of an applicant:** A native title claim group wants to ensure they have control over who their nominated legal representatives are for the claim. Under the current law, the applicant has the power to change legal representatives without having to go back to the group for approval. The proposed amendment would allow the group, when authorising the applicant to make the claim, to impose a condition that the applicant must have the claim group's agreement before the applicant can change representatives and advise the Federal Court of Australia (court) of the change.

**Example – allowing the applicant to act by majority:** The applicant for a particular native title claim is made up of seven people. The members of the applicant have negotiated a mining agreement (also known as a section 31 agreement) under the right to negotiate process over several months. The time has come to sign the agreement, but one member of the applicant is on remote country for an extended period.

The proposed amendments would allow the six other members of the applicant to validly enter into the agreement, unless the claim group had made it a condition, at the time it authorised the applicant for all members of the applicant to sign such agreements.

**Example – replacing a member of the applicant/succession-planning:** A particular native title claim group is made up of five family groups. The applicant comprises representatives from each family group. When authorising the applicant, the claim group decided to identify 'reserve' members for each family group. While the claim is progressing through the court, one of the members of the applicant passes away.

Instead of needing to go through a new authorisation process, the proposed amendments would allow the group to apply directly to the court for a change of applicant so the 'reserve' member could replace the deceased member. This would ensure that the applicant will continue to be representative of the five family groups without needing to go through an unnecessary authorisation process.

## SECTION 31 AGREEMENTS

### What is changing?

A 'section 31 agreement' is a particular type of agreement under the Native Title Act. Section 31 agreements primarily relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights.

Stakeholders have raised concerns that Full Federal Court of Australia's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 could also be applied to section 31 agreements. In *McGlade* the court had found that certain agreements made under the Native Title Act, called 'area Indigenous Land Use Agreements', are invalid if not all members of the applicant have signed the agreement.

To address this uncertainty, the government proposes to confirm the validity of existing section 31 agreements where at least one member of the applicant has signed the agreement (see Part 2, Schedule 6 of the Native Title Legislation Amendment Bill 2018). The changes to the role of the applicant **described above**

will also extend to section 31 agreements, so that in future only a majority of the applicant (rather than all) are required to sign these agreements (unless the claim group requires all members of the applicant to do so).

## CLAIMS RESOLUTION AND AGREEMENT-MAKING

### What is changing?

The government proposes to make a number of technical changes to improve the claims resolution and agreement-making processes under the Native Title Act. Most of these changes were recommended by the report to the Council of Australian Governments on the *Investigation into Indigenous Land Administration and Use*. Key changes include amendments to:

- allow extinguished native title to be revived in national and state parks, as long as all of the parties agree
- allow body corporate Indigenous Land Use Agreements to be made over areas where native title has been extinguished, and
- simplify and clarify the registration process for Indigenous Land Use Agreements

The amendments are primarily contained in Schedules 2 to 6 of the Native Title Legislation Amendment Bill 2018.

### What does this mean in practice?

**Example – Allowing parties to agree to revive extinguishment in national and state parks:** A native title claim group is able to establish connection over a large portion of a state park, although the creation of that park technically extinguished native title.

The proposed amendments would allow the claim group to enter into an agreement with the relevant state government to disregard the extinguishment of native title over the area, while preserving any third party interests. Once this agreement is made, native title would be able to be recognised over the area within the state park.

**Example – allowing body corporate Indigenous Land Use Agreements to be made over areas where native title has been fully extinguished:** A native title claim group has non-exclusive (i.e. partially extinguished) native title rights over 90% of their claim area. Native title over the remaining 10% of the claim area was fully extinguished because of a government housing development. It is uncontested that, but for the extinguishment, the native title holders' rights would have been recognised over the whole area. The group decides to enter into an Indigenous Land Use Agreement over the whole area with the relevant government to settle compensation for the extinguishment of their native title.

The proposed amendments would create a more efficient and less costly process by allowing the parties to enter into a body corporate Indigenous Land Use Agreement over the entire area, including those areas where native title has been fully extinguished.

## POST-DETERMINATION DISPUTE RESOLUTION AND ACCOUNTABILITY

### What is changing?

The government is proposing several changes which will impact stakeholders – in particular, prescribed bodies corporate (PBCs)<sup>1</sup> and native title holders – ‘post-determination’. Following a determination of native title, disputes can arise about how the PBC is managing the native title. The proposed changes aim to improve the way disputes are handled in future.

Some reforms will improve dispute resolution pathways, particularly where the dispute is about membership between PBCs and native title holders. Other reforms will increase the transparency and accountability of PBCs to the native title holders by clarifying the consultation and consent process to be used and requiring decisions made by the PBC to be documented in a certificate accessible to the native title holders.

For more information on these reforms – and the practical impact they will have on PBCs and native title holders – please see the **Fact Sheet # 2 – Prescribed bodies corporate**.

To further improve dispute resolution pathways the government also proposes to provide the National Native Title Tribunal (NNTT) with a new function to provide direct assistance to PBCs and native title holders. The aim of this reform is to promote agreement about native title issues. Under the current law, the NNTT can only assist when invited by native title representative body or service provider to do so.

It is proposed that the NNTT’s assistance would be flexible and might involve helping to establish governance processes, mediating disputes and facilitating collaboration between PBCs.

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<sup>1</sup> Prescribed Bodies Corporate are the entities charged with managing the native title rights of native title holders following a determination. They are also known as Registered Native Title Bodies Corporate or native title corporations.