NATIVE TITLE AMENDMENT ACT 2009

INFORMATION SHEET

Introduction

The *Native Title Amendment Act 2009* (the Act) was passed by the Australian Parliament on 14 September 2009 and received the Royal Assent on 17 September 2009. The majority of the provisions in the Act came into force on 18 September 2009.

The Act amends the *Native Title Act 1993* to implement institutional reform by giving the Federal Court (the Court) the central role in managing native title claims. It also implements other measures that will assist in achieving quicker, more flexible settlements of native title claims.

Objectives

The key objectives of the reforms set out in the Act are to improve both the operation of the native title system and the outcomes that parties can achieve in the system.

Mediation

The reforms allow the Court to determine whether the Court, the National Native Title Tribunal (the Tribunal), or another individual or body, should mediate a claim.

The legislation aims to encourage mediation by making it more effective, through allowing the Court to manage the process more closely. Having the Court control the direction of each native title case in a proactive and efficient manner also means that opportunities for resolution can be more easily identified and pursued, and the efforts of parties better focussed. Subsection 86B(1) now allows the Court to refer a native title matter to an appropriate body or person for mediation.

The change means that, rather than automatically referring every case to the Tribunal for mediation, the Court will decide which individual or body should mediate each matter. Mediation will still be mandatory, unless the Court considers there is no reasonable prospect of resolution and makes an order under subsection 86B(3) of the Act.

The Act empowers the Court to:

- consider the training, qualifications and experience of potential mediators (subsections 86B(2) and 86B(5A))
- cease a mediation and refer it to another mediator (subsection 86C), and
- make other orders in relation to mediation (subsection 86B(5C).

Other reforms contained in the Act aim to make the native title system work more efficiently and to encourage agreement-making.

Agreed statement of facts

One amendment enables the Court to rely on an agreed statement of facts between the key parties, which is designed to simplify connection processes in consent determinations. This measure is provided for in sections 87 and 87A. At a minimum, the statement must be agreed by the party the Court considers to be the principal government respondent and the applicant. The principal government respondent in most cases will be the State or Territory Government. The amendment is designed to clarify that the Court is able to accept a statement of facts agreed by the parties, without necessarily requiring such evidence to be brought before the Court and without the Court needing to make independent inquiries to be satisfied as to the basis of the agreed statement of facts. The amendment will also allow other parties to agree to the statement of facts, or to make objections. The Court has a discretion about whether to accept the statement or not.

Matters beyond native title

The amendments to sections 87 and 87A also give the Court the ability to make orders about matters beyond native title, which recognises the broad nature of agreements currently being negotiated and entered into by some parties. These broader settlements can deliver real economic and other benefits for claimants, and resolution and certainty for all parties. Native title claims often raise issues other than native title, and the effect of this change means that parties should be able to resolve a range of native title and related issues through native title agreements, and thereby encouraging comprehensive claim resolution within the one process.

Evidence amendments

Further reforms apply the amendments introduced by the *Evidence Amendment Act 2008* to the Commonwealth *Evidence Act 1995* to native title claims that commenced prior to 1 January 2009. They include amendments which recognise the manner in which Indigenous communities record traditional laws and customs, and have the potential to greatly assist Aboriginal and Torres Strait Islander people to give evidence in native title matters. New exceptions to the hearsay and opinion rules have been enacted so that oral evidence of the traditional laws and customs of an Aboriginal or Torres Strait Islander group is no longer treated as prima facie inadmissible when this is the very form by which these laws and customs are maintained. This change makes it easier for the Court to hear evidence of traditional laws and customs, where relevant and appropriate, and is of particular relevance to native title proceedings.

The *Evidence Amendment Act 2008* commenced on 1 January 2009 and applies to all proceedings the hearing of which commenced after this date. However, given the significant amount of native title claims that commenced prior to this date, combined with strong stakeholder support to extend the coverage of the amendments, the effect of the change to the Native Title Act under section 214 is that the amended evidence rules can now apply to any native title case where evidence has been heard and either the parties agree the rules should apply, or the Court has considered the views of the parties and considers it is in the interests of justice for the rules to apply.

Changes to Native Title Representative Body provisions

The legislation also makes a number of amendments to Part 11 of the Native Title Act, which deals with representative Aboriginal and Torres Strait Islander bodies. The amendments are designed to reduce administrative time and cost while maintaining a fair and open system of recognition for representative bodies and their clients.

In summary, the changes:

- repeal all spent provisions relating to the former transition period that ended on 30 June 2007 (amendments to sections 201A, 201C, 203A, 203AB, 203AC, 203AD and repeal of section 203AA)

- provide for the Commonwealth Minister to make written invitations that are individually tailored to a specific eligible body's circumstances by removing the need for a one size fits all Ministerial determination (amendments to section 203A)

- allow for applications for recognition to be made in any form that is convenient for the applicant (amendment to section 203AB)

- reduce the time periods in which the Commonwealth Minister must make decisions while allowing for extensions of time to these periods in appropriate cases (amendments to section 203AH)

- simplify the procedures for recognition of representative bodies and withdrawal of recognition (new sections 203AA and 203AAA, and amendments to sections 203AD and 203AH)

- reduce the number of processes for varying a representative body's area from three to a single process that retains the requirement to give notice to bodies and Aboriginal and Torres Strait Islander people who would be directly affected by any variation to an area; the process provides that submissions may be made to the Commonwealth Minister before a decision is made (repeal and replacement of sections 203AE, 203AF and 203AG), and

- remove overlapping requirements for assessing matters against fairness criteria (amendments to sections 203AI and 203BA).

Other minor amendments

The Act also makes minor and technical amendments to improve or clarify the operation of existing provisions in the *Native Title Act 1993.*

Further information

More information about the amendments can be found on the Attorney-General Department's website <www.ag.gov.au>