

1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIVE TITLE BILL 1993

EXPLANATORY MEMORANDUM

PART A

(Circulated by authority of the Prime Minister the Honourable Paul Keating MP)



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## OVERVIEW OF THE NATIVE TITLE BILL 1993

This document provides a broad overview of the major features of the Native Title Bill 1993. The overview does not deal with all matters covered by the legislation but is intended to be a guide to the major features and how they will work. This legislation is part of the Commonwealth's overall response to the High Court's historic decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.

### COMMONWEALTH APPROACH TO NATIVE TITLE

The Commonwealth's major purpose in enacting this legislation is to recognise and protect native title (see clauses 3 and 9). Native title is defined as the rights and interests that are possessed under the traditional laws and customs of Aboriginal peoples and Torres Strait Islanders in land and waters and that are recognised by the common law (clause 208). The Commonwealth has sought to adopt the common law definition.

To facilitate certainty, the Commonwealth has provided a straightforward mechanism to determine whether or not native title exists and what the rights and interests are that comprise that native title (see clause 12). That mechanism also recognises that native title rights, as with Aboriginal and Torres Strait Islander traditions, change with time. There is a mechanism provided to allow for variations of determinations where circumstances have changed.

The Commonwealth recognises that, in some cases, governments and those holding relevant interests will wish to be certain whether native title exists in relation to land, where it has not clearly been extinguished. The Bill provides for governments and the holders of interests to apply for a determination as to the existence or otherwise of native title (clauses 55 and 60). The Bill also provides for the establishment of two public registers - one for claims (the Register of Native Title Claims), and the other for determinations (the National Native Title Register).

Recognition of native title is one thing, protection is another. The Bill aims to protect native title to the maximum extent practicable. Under the Commonwealth's scheme for validation, native title is extinguished only in limited circumstances, as described in the section dealing with validation. For the future, the non-extinguishment principle will apply (clause 223). In essence that principle states that grants made in the future will not extinguish native title. Where there is conflict between the rights and interests under native title and those granted by government, the grants will prevail. But once those interests expire, native title will again have full effect. The actual mechanism for making future grants is dealt with in the section on the future regime.

The Bill also recognises that native title rights are primarily group rights and that it is likely that a number of people will be able to show that they possess native title rights to a particular piece of land. Further, membership of the title holding group will change over time. To take this into account, this Bill provides that

native title will be held by bodies corporate controlled by those who are the native title holders from time to time (see clause 53). This mechanism will also provide a practical and legal point of contact for those who wish to deal with native title holders.

The Bill makes it clear that native title will be subject to the general law of Australia, including State and Territory laws which are consistent with this Bill (clause 7).

*Special Measure  
under Racial  
Discrimination  
Convention*

The Bill complies with Australia's international obligations, in particular under the International Convention on the Elimination of All Forms of Racial Discrimination. Its approach is non-discriminatory. At the same time it provides significant benefits for Aboriginal peoples and Torres Strait Islanders and constitutes a special measure for their benefit under Article 1(4) of the Convention and section 8 of the *Racial Discrimination Act 1975*.

The Bill provides for the designation of Aboriginal and Torres Strait Islander organisations to assist native title claimants to make applications for the determination of native title and to assist in negotiations and proceedings (clause 193).

*Land Acquisition  
Fund to be  
established*

Recognising that many Aboriginal and Torres Strait Islander people will be unable to secure native title and to benefit directly from the High Court decision, the Bill establishes a National Aboriginal and Torres Strait Islander Land Fund (clause 192). This will be principally devoted to the acquisition of land.

*Existing rights*

The Bill does not affect rights under Commonwealth land rights legislation (clause 196). The Bill also provides in clause 197 that governments may confirm existing ownership of natural resources and access to beaches and public places

## VALIDATION OF PAST GRANTS

*Validation by  
Commonwealth,  
States and  
Territories*

The Bill provides in clause 13 for the validation of past Commonwealth acts. In clause 18 the Bill enables States and Territories to validate their past acts on the same terms. The Bill does not prevent States and Territories from attempting to validate on their own terms, but they would do so at their own risk in terms of the legality of such an approach.

This is not to indicate that the Commonwealth is of the view that past acts by the Commonwealth, States or Territories are invalid. The Mabo decision clearly indicated that governments are able to affect and indeed extinguish native title. However, significant concerns have been expressed to the Commonwealth in relation to the validity of some past acts, and in particular past grants to third parties. The Commonwealth has examined these concerns and regards the invalidity of some past acts as a legal possibility.

*Purpose is to  
remove  
uncertainty*

Because of the possibility that past acts and grants which affect native title may have been rendered invalid, in particular by the operation of the Racial Discrimination Act and also potentially by other laws, the Commonwealth has therefore decided to include in its legislation provisions for the validation of such past acts, in order to remove any doubt. The Government has, since the Mabo decision, consistently stated that interests in land granted by governments

should not be placed at risk as a result of the recognition of native title. The Commonwealth has sought to achieve validation in a way which is non-discriminatory and indeed gives special rights to the native title holders affected.

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title by  
n of  
s* The validation of past acts and grants will only extinguish native title where there has been what the Bill terms a Category A past act (clause 14(a) and (b)), that is, a grant of freehold or the grant of a commercial, agricultural, pastoral or residential lease (defined in clauses 231, 232, 233 and 234) or the construction of a public work (defined in clause 238).

Where there has been a grant of other leasehold interests, other than a mining lease (a Category B past act), the validation will only extinguish native title to the extent of any inconsistency between the two sets of rights and interests (clause 14(c)).

Extinguishment will not take place where the freehold or leasehold grant has ceased to have effect before 1 January 1994. Nor will it take place where the grant is made under legislation for the benefit of Aboriginal peoples or Torres Strait Islanders.

The validation of all other past grants and acts by the Commonwealth, called Categories C and D (clauses 14, 216 and 217), will not extinguish any native title, but rather native title will be subject to the non-extinguishment principle (defined in clause 223). In particular mining leases validated by the Commonwealth Bill and those validated by States and Territories pursuant to the Commonwealth Bill will not extinguish any native title.

Legislation passed before 1 July 1993 and acts and grants made before 1 January 1994 will be able to be validated. The Bill will also validate, and enable validation, of some acts which will take place in the future, where these acts are linked to acts done in the past. This will include the exercise of options and legally enforceable rights or the extension or renewal of grants made in the past (see the definition in clause 213).

*of  
is* Further, the validation will not affect any reservations or conditions for the benefit of Aboriginal peoples or Torres Strait Islanders in any past grant or legislation. Nor will it affect any other right or interest they may hold arising under legislation, common law, equity or by usage (clause 15).

*t to  
on for* Native title holders are entitled to compensation for the effect of the validation of past acts on their rights.

Where native title has been extinguished (for example by validation of a freehold grant) that compensation will be on just terms (clauses 16 and 49).

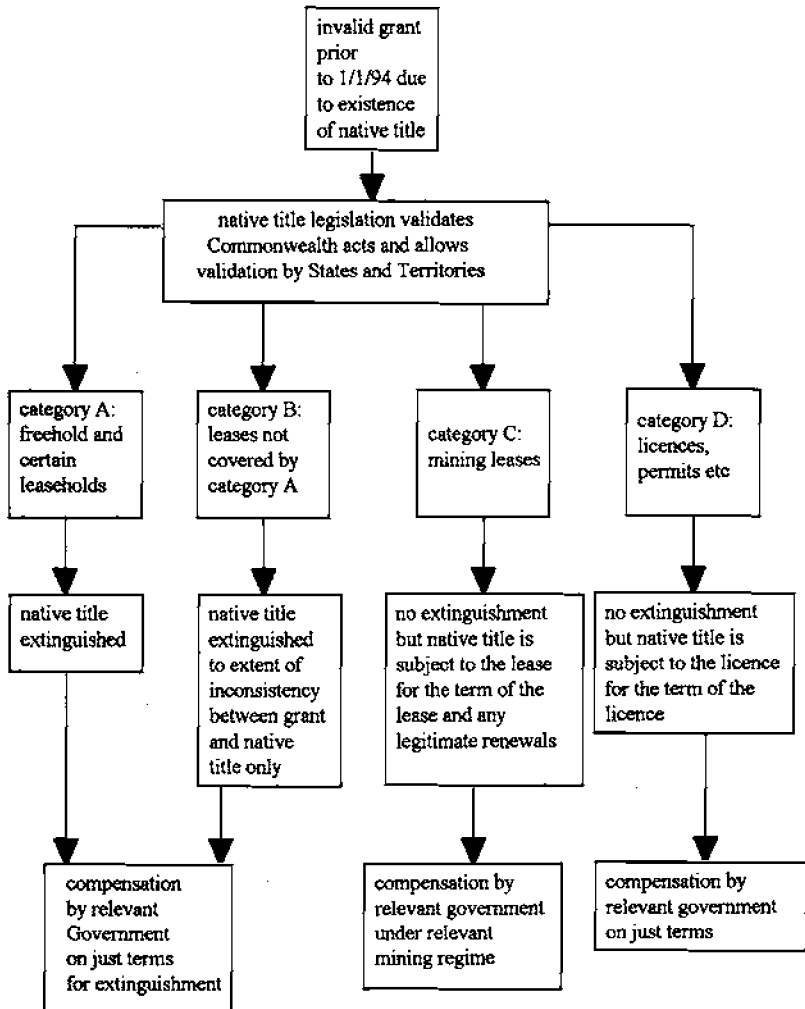
Where the native title is impaired but not extinguished (for example by the validation of a mining lease) compensation will be paid to native title holders where freeholders would have received it and will be assessed under the same regime as freeholders (clauses 16 and 49).

- Where the native title is impaired and the grant or act could not have been done over freehold land, native title holders will receive just terms compensation and, again, the native title is not extinguished (clauses 16 and 49).

*Non-monetary compensation*

In claiming this compensation native title holders will have a right to seek to negotiate non-monetary compensation, including other property or the provision of goods or services (clauses 49 and 72). In special circumstances the Commonwealth Minister may direct the National Native Title Tribunal to inquire into the effect on Aboriginal peoples and Torres Strait Islanders of the validation of particular past acts and alternative forms of compensation (clause 130).

**Validation of past grants affecting native title**



## THE FUTURE REGIME

It is crucial that there be a process to allow for grants and actions over native title land and land that could be native title land to continue in the future. To provide for such a process it is necessary for native title to be accommodated into the national land management system.

The Bill provides for future acts to take place providing that they are 'permissible future acts', which is defined in clause 220. In essence, the Bill provides that where an act can be done over ordinary title land then that act will be permitted over native title land. 'Ordinary title land' is defined to mean either freehold or, in the case of the ACT and Jervis Bay, leasehold (clause 238). Legislation is 'permissible' only if it affects native title holders in the same way that it affects ordinary title holders or if it puts native title holders in the same position as ordinary title holders (clause 220).

An example of a permissible future act is the grant of a mining interest. Such grants can be made over freehold land so they can also be made over native title land. Other future permissible acts are those carried out under general Compulsory Acquisition Acts.

In the future native title will only be able to be extinguished by agreement with the native title holders (clause 20) or under Compulsory Acquisition Acts (clause 22).

Native title holders will be entitled to just terms compensation for any future extinguishment and, in other cases, compensation under the same regimes as are applicable to ordinary title holders (clauses 22 and 49).

Registered native title holders and registered claimants will receive special rights of negotiation for some permissible future acts, as described below. Otherwise native title holders will be entitled to the same procedural rights as holders of ordinary title, such as the right to be notified and to object (clauses 22 (6) and 238).

In recognition of the special attachment that Aboriginal peoples and Torres Strait Islanders have to their land, the Bill provides that for certain permissible future acts registered native title holders and registered native title claimants will have a right to negotiate before those acts take place.

Subdivision B of Division 3 of Part 2 sets out the detailed provisions relating to the right to negotiate. Clause 25 sets out the acts to which the right to negotiate will apply. They are essentially acts relating to mining, the compulsory acquisition of native title for the purpose of making a grant to a third party, and any other acts approved by the Commonwealth Minister.

The right to negotiate does not apply if there are no registered native title holders or registered native title claimants within two months of notification of the proposed act (clauses 27 and 29) and in this case the act can proceed in the normal way.

*Expedited process*

Certain grants or classes of grants which have minimal effect on native title can be excluded from this right to negotiate by the Commonwealth Minister (clause 25). Further, an act which does not directly interfere with the community life of native title holders or involve major disturbance to their land can proceed through an expedited process (clauses 31 and 222 )

The right to negotiate is not a veto. If the parties cannot reach agreement even after mediation then any party can apply to the NNTT or the recognised State or Territory body, called the 'arbitral body' (clause 26), for a determination of whether the act may go ahead and if so on what conditions (clause 33).

In making its determination, the arbitral body has to take account of a number of factors including the impact of the proposed act on the way of life, culture and traditions of the native title holders and the economic significance of the proposed act to Australia and the State or Territory (clause 37). Finally, the relevant Minister has the power to overrule the determinations of the arbitral body where this is in the State, Territory or national interest (clause 40).

*State and Territory bodies and processes*

Where a State or Territory body complies with the relevant criteria and the Commonwealth Minister has recognised it, that body will be the arbitral body for the State or Territory (clause 26). There are also provisions to allow for the recognition of State or Territory systems which give an equivalent right to negotiate (clause 41). Where there is such a State or Territory system to deal with grants then the Commonwealth system will not operate.

*Low impact future act*

Certain future acts are defined as 'low impact future acts' (clause 219). These are acts such as minor licences and permits (such as for beekeeping). These can simply proceed in a period before native title has been determined, do not extinguish native title and do not require the payment of compensation - but they may not continue once native title is determined (clauses 22 and subclause 220 (7)).

*Surrender of native title*

Given that traditionally held land could not be bought and sold, native title will not be able to be alienated by the native title holders. To facilitate commercial dealings, native title holders will be able to surrender their title to the relevant government in exchange for a statutory title. Native title holders can also agree to acts taking place over their land (clause 20). The Bill does not prevent negotiation of agreements on a local or regional basis (subclause 20(4)).

*Pastoral leases held by native title holders*

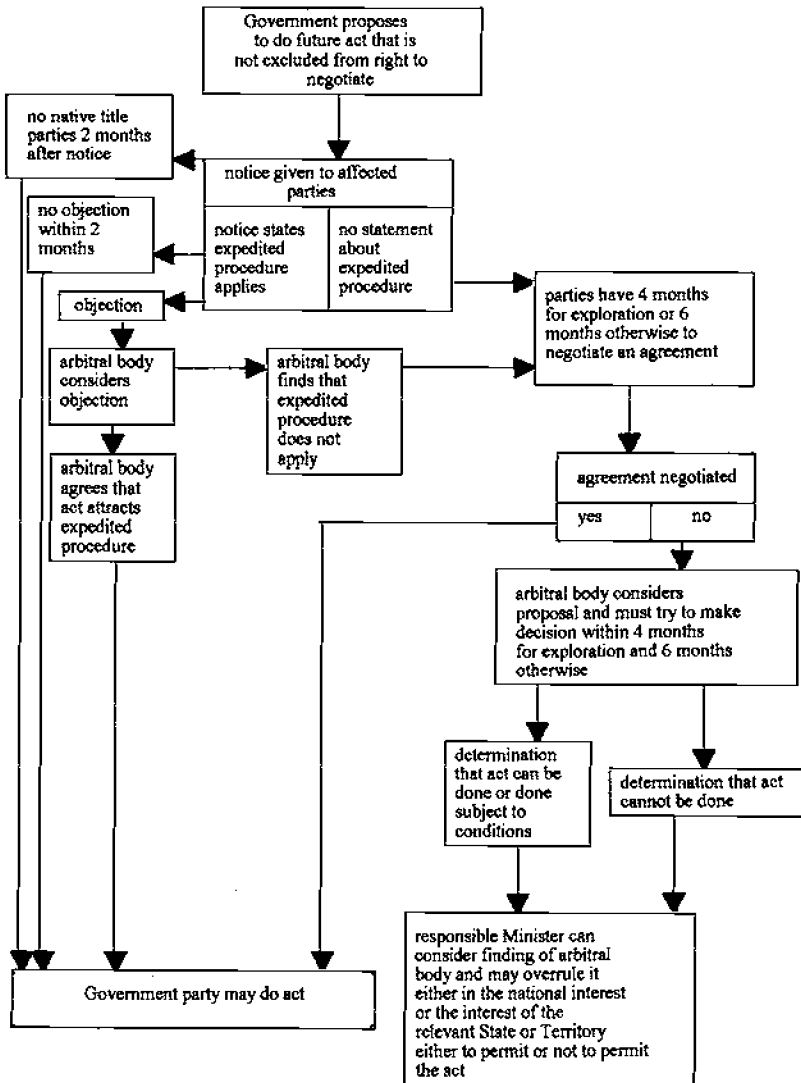
The Bill provides that where Aboriginal peoples or Torres Strait Islanders hold a pastoral lease over an area, the effect of that pastoral lease and the creation of any earlier interest in the land can be disregarded in relation to an application for determination of native title. Any determination that native title exists is on the basis that the pastoral lease remains valid and operative but the native title holders receive the benefit of the protections given by this Bill (clause 45).

*Acts where native title not known*

Where a government has applied to the NNTT for a determination of whether native title exists in a particular area and no claims to native title are lodged within a specified period, the government can proceed to do any act in relation to the relevant area (clauses 23 and 60). If native title is later found to exist the act is not thereby invalidated but compensation is payable. The Bill will

ensure the validity of legislative regimes governing economic activities offshore - those relating to commercial fisheries and petroleum extraction operations being of particular note. However, recognising the different circumstances applying offshore, while any future grants or interests will have to be issued in a non-discriminatory manner, they will not be subject to the freehold test or to the associated negotiation and arbitration procedures applying onshore.

**Future acts and native title - right to negotiate where native title known**



## THE TRIBUNAL AND COURT PROCESS

To provide the most effective means of dealing with issues of native title, the Bill provides for the establishment of a new body, the National Native Title Tribunal, and for the Federal Court to have jurisdiction in these matters.

### *Role and functions of NNTT*

The NNTT will be established as a separate body (see Part 6 of the Bill) to deal with uncontested claims to native title and uncontested claims for compensation.

The NNTT will also be able to inquire into any issue in relation to native title referred to it by the Commonwealth Minister (clause 130).

Where there is not a recognised State or Territory body, the NNTT will be the relevant arbitral body (see the future regime above) to determine whether certain grants can proceed over native title land if negotiations have not been successful.

The NNTT will be composed of a President, and other presidential members (who must be judges of the Federal Court or former judges of any Commonwealth court or of a State or Territory Supreme Court) and other members. The Bill requires that non-presidential members have special knowledge, particularly in relation to Aboriginal or Torres Strait Islander societies, land management or dispute resolution (clause 103).

### *Role of Federal Court*

The Federal Court will hear contested claims for a determination of native title or for compensation. That Court will also hear appeals on questions of law from the NNTT and from a decision of a presidential member under clause 57 not to accept an application for determination of native title.

The Court will be assisted by assessors who may take evidence and hold conferences (clause 76 and Division 2 of Part 4).

The Court and the NNTT will provide a determination mechanism that is fair, just, economical, informal, prompt and which takes account of the cultural concerns of Aboriginal peoples and Torres Strait Islanders (clauses 75 and 102).

There will be a Native Title Registrar to whom all applications to the Commonwealth system must be made. The Registrar will also be responsible for the establishment and maintenance of the Register of Native Title Claims and the National Native Title Register. The Registrar may delegate his or her powers and duties in relation to these Registers to a recognised State or Territory body (see Parts 7 and 8).

States and Territories may set up their own bodies to hear native title claims and compensation claims. Where those bodies comply with the criteria and standards set out in this Bill at clause 236 then the responsible Commonwealth Minister will be able to recognise those bodies. Where there is a recognised State or Territory body, native title claims may be initiated in either that body or the Commonwealth system.

This flow chart indicates the way that the Federal Tribunal and Court system is intended to operate, using the example of a claim for determination of native title.

### Claim for determination of native title by NNTT

