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Native Title Alert

NSW GOVERNMENT | Crown Solicitor's Office

Worth the wait? Native title legislation reform package passed

The *Native Title Legislation Amendment Bill 2021* (Cth), passed on 3 February 2021, includes a range of adjustments and measures to improve native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes.[1] It has the potential to impact NSW Government policy and native title agreement-making under the new s. 47C. This section permits agreements to disregard extinguishment of native title over national or state park areas, including extinguishment by the public works within them. The Bill is awaiting assent.

KEY POINTS

The Bill:

- gives NSW Government agencies greater flexibility to recognise native title over national or state parks in both existing and future native title determinations (s. 47C)
- streamlines, and provides greater accountability in, native title holder decision-making and dispute resolution processes
- confirms the validity of mining and exploration-related (s. 31) native title agreements post *McGlade v Native Title Registrar & Ors.*

SUMMARY

The Bill amends the *Native Title Act 1993* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) with the stated aim of improving native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes.

The Bill makes a broad range of changes dealing with the role of the applicant, the role of registered native title bodies corporate (RNTBCs) in compensation claims and agreement making, agreement making over historical extinguishment in national and state parks and other procedural changes.

The Bill, once assented to, will commence in a staggered manner, with the latest commencing date scheduled for August 2021.

DISREGARDING EXTINGUISHMENT OVER PARK AREAS

Section 47C has the greatest potential to impact on NSW Government policy and native title agreement-making. This section permits governments and native title claimants to reach agreements that disregard prior extinguishment, and confirm recognition, of native title over "park areas".

Section 47C provides that park areas include national and state parks or any area set aside, granted or vested for purposes including preserving the natural environment.

The definition of "park areas" can encompass Crown land and freehold land held by the Crown, in any of its capacities (including a statutory authority of the Crown). Accordingly, in NSW there is potential for park areas to overlap with claimable Crown land under the *Aboriginal Land Rights Act 1983* (NSW). Any such overlapping Indigenous interests may need careful consideration in NSW Government agency land negotiations.

Section 47C can still apply where the area is subject to a lease or licence, or is covered by a dedication or similar. The extinguishing effect of any relevant public works can also be disregarded.

Agreements under s. 47C will be subject to public notification and a three-month comment period.

The Bill also provides that an agreement under s. 47C may be grounds for an application to

[1] *Revised Explanatory Memorandum, Native Title Legislation Amendment Bill 2020*, cl.1

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vary or revoke an existing native title determination under ss. 13(5). As such, the Bill allows existing determinations and agreements over park areas in NSW to be revisited.

These changes may avoid (and even cure) the complexities of past "similar but different" regimes implemented to deal with parks that have a patchwork of extinguished areas, by allowing parties to negotiate for consistent recognition of native title across the whole park.

VALIDATION OF S. 31 AGREEMENTS

A key original driver of the Bill was concern about the validity of mining- and exploration-related agreements (s. 31 agreements) following the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

McGlade held that another type of native title agreement, Indigenous Land Use Agreements (ILUAs), were invalid where not all members of the native title applicant were party to the agreement.

The risk to ILUAs was quickly addressed by validation with the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*, but uncertainty remained with respect to s. 31 agreements. Estimates suggested a significant number of s. 31 agreements around Australia were likely affected. The Bill addresses this problem at Schedule 9 by validating existing s. 31 agreements (where at least one member of the applicant group is a party) and at the new s. 31(1B) by requiring that only a majority of the native title applicant group are parties.

Other amendments include permitting a government body to opt out of negotiations with the consent of other parties, which reduces the risk that minimal participation by a government party may be regarded as a lack of good faith.

The amendments also require the Native Title Registrar to maintain a register of s. 31 agreements to allow the public to identify areas affected by a s. 31 agreement and find basic details, such as the term and parties involved, and whether there is a collateral agreement. Detailed terms will not be published.

INDIGENOUS LAND USE AGREEMENTS

The Bill makes various amendments in relation to ILUAs that enhance flexibility and fix technical concerns. Some key points are:

- Section 24BC will now permit RNTBCs to enter into body corporate ILUAs over areas within a determination area where native title has been extinguished. This will reduce the complexity of future ILUAs over determined areas.
- Section 24CH will remove the requirement that the Native Title Registrar notify an area ILUA even if it did not meet registration requirements.
- Section 24EBA and new subsection, 24EB(2A), make clear that the validity of a future act done in accordance with an ILUA is not affected if the ILUA is removed from the Register. This measure now clarifies legal uncertainty about the effect of such removal.
- A new section, 24ED, permits minor amendments to ILUAs, such as updated property descriptions or party details, without requiring a new registration process.

COMPENSATION CLAIMS BY RNTBCS

The role of RNTBCs in native title compensation claims has been clarified. The changes in Schedule 4 of the Bill confirm that an RNTBC can make a compensation claim over areas within the external boundary of their determination area where it has been determined that native title does not exist.

ROLE OF THE APPLICANT

The Bill provides a range of measures concerning the role and responsibilities of the person or persons authorised by a claimant group to make and manage a native title claim ("the applicant"), including:

- A new general rule at s. 62C provides, as a default, that the applicant can act as a majority.
- Section 251BA allows the claimant group to impose conditions on the applicant's authority. Many claimant groups have informally adopted this practice; with the changes, the authorisation conditions will be a formal part of the native title determination application and any change to them will require leave to amend the application itself.

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- Changes to s. 66B permit changes to the applicant without further authorisation, where a member is deceased or unable to act, including through pre-agreed succession planning when replacement applicants are authorised by s. 251B.

POST-DETERMINATION GOVERNANCE

Another key driver behind the Bill was facilitating improved post-determination governance of native title holding groups by their RNTBCs. Internal disputes have become a problem for some RNTBCs and their partners.

There has been a significant trend of post-determination litigation of membership and other disputes.

The Bill at Schedule 8 makes amendments to the CATSI Act to improve accountability, transparency and governance, and streamline dispute resolution.

The Bill also confers a new function on the National Native Title Tribunal allowing it to assist RNTBCs in dispute resolution, and the Federal Court of Australia is given exclusive jurisdiction in respect of CATSI Act matters relating to RNTBCs.

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