

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter discusses each of the four schedules of the Bill as follows:

- Schedule 1: minor and technical amendments;
- Schedule 2: Native Title Representative Bodies (NTRBs);
- Schedule 3: Prescribed Bodies Corporate (PBCs); and
- Schedule 4: technical amendments relating to legislative instruments.

Schedule 1: minor and technical amendments

2.2 Schedule 1 of the Bill would make a large number of minor and technical amendments to the Native Title Act. According to the Explanatory Memorandum, 'most of the amendments would clarify or improve existing provisions of the Native Title Act, although some would provide for new processes.'¹

2.3 Aspects of these technical amendments have been subject to a public consultation process. The Attorney-General's Department released an initial discussion paper on the technical amendments for public comment in November 2005, followed by a second discussion paper in November 2006.²

2.4 These amendments are discussed below in the following broad categories:

- future act and Indigenous Land Use Agreement (ILUA) processes;
- processes for making and resolving native title claims;
- obligations of the Registrar in relation to the registration of claims; and
- other amendments.

Future act and ILUA processes

2.5 Schedule 1 includes amendments to:

- improve the process for notifying ILUAs (see, for example, items 7, 9-13, 18-19, 27-28);

1 *Explanatory Memorandum* (EM), p. 6. The following discussion of Schedule 1 of the Bill draws heavily on pp 6-7 of the EM.

2 See also Attorney-General's Department and FaCSIA, *Submission 6*, p. 6 and attachments A-D. Further details of the consultation process, including copies of the discussion papers, are available on the Attorney-General's Department's website at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_TechnicalamendmentstotheNativeTitleAct (accessed 4 April 2007).

- ensure the National Native Title Tribunal (NNTT) provides a report after an inquiry into an objection to registering an alternative procedure ILUA (see especially item 95);
- include automatic weather stations as facilities for services to the public for the purposes of the future act regime (see especially item 34);
- enable the combination of two or more existing leases, licences, permits or authorities to be a 'permissible renewal' for the purposes of the future acts regime (see especially item 33); and
- enable assistance to be provided by the Native Title Registrar (Registrar) to parties seeking to register an ILUA (see especially items 6, 17 and 26).

Processes for making and resolving native title claims

2.6 Schedule 1 also includes provisions to:

- amend application provisions to require certain types of information to be provided (see, for example, items 71-73, 76);
- amend notification provisions to ensure appropriate parties are notified of new or amended claims (see, for example, items 80, 81 and 86);
- streamline the process for replacing the native title applicant in claims (see for example, items 79 and 82);
- give the Federal Court greater ability to deal with questions about the authorisation of claims which arise during proceedings and ensure claimants identify the basis of authorisation for claims (see especially item 88);³
- encourage access by parties to hearings (such as directions hearings) through teleconferences and other facilities (see especially item 85); and
- clarify the timeframe in which a respondent may simply withdraw from a proceeding (see especially item 87).

Obligations of the Registrar in relation to the registration of claims

2.7 Schedule 1 also contains amendments which would:

- require the timely application of the registration test, particularly where the exercise of procedural rights would flow from registration of a claim (see especially item 101);
- exempt amended claims from going through the registration test where the amendments would not affect the interests of other parties, such as where the area of the claim is being reduced or there is a change of name or address (see especially item 102);⁴ and

3 See also recommendation 13 of the Claims Resolution Review.

4 See also recommendation 12 of the Claims Resolution Review.

- provide for internal review of registration decisions by the Registrar (or his or her delegate) in addition to the existing provision for review by the Court (see especially item 107).

Other amendments

2.8 Other amendments made by this Schedule would:

- restrict the use of information obtained by the NNTT in exercising its assistance function (see items 5, 16, 20, 21, 25, 30, 57, 66, 68, 89 and 113);
- clarify the scope of alternative state regimes under section 43 (see for example items 61-63)
- make clear that a determination for an alternative state regime must be revoked where that regime ceases to have ongoing effect, thereby ensuring resumption of the right to negotiate provisions of the Native Title Act (see items 64 and 65);
- amend sections 87 and 87A in response to recommendation 9 of this committee's report on the Native Title Amendment Bill 2006, which recommended the government consider amending section 87A (items 90-91);
- change notification provisions to ensure that native title holders, who are yet to set up a PBC, are notified of future acts where the PBC would otherwise have been notified (see for example items 35-37 and 43-54);
- clarify that certification of a claim or ILUA by an NTRB is still valid if that NTRB is subsequently derecognised or ceases to exist (see item 106);
- establish a more flexible scheme for payments held under right to negotiate processes (in particular, replacing the existing trust regime with a bank guarantee regime - see items 55, 58-61 and 69); and
- clarify when information is added to, amended or removed from the registers setting out details of native title claims, determinations and ILUAs (see, for example, items 100, 108, 109 and 112).

2.9 Finally, Schedule 1 would also make amendments to adjust or remove misleading or ambiguous notes; provide for other notes to be included to assist navigation of the Native Title Act; and amend drafting errors.⁵

Schedule 2: Native Title Representative Bodies

Background

2.10 Section 203B of the Native Title Act sets out the functions of NTRBs. In summary, they include:

- to assist and facilitate the preparation of native title applications;

5 EM, p. 7. See, for example, items 1, 2, 41, 77, 115 and 116.

- to provide written certification of applications for determinations of native title, and related processes for land or waters in the NTRB's area;
- to promote dispute resolution between constituents about native title applications and related processes;
- to identify and notify, as far as possible, those who hold or may hold native title over lands in the NTRB's area which may be the subject of native title processes;
- to be a party to ILUAs;
- to undertake internal review of its decisions; and
- other functions authorised by the Act.

Proposed amendments

2.11 Schedule 2 of the Bill will amend provisions governing NTRBs. In particular, Schedule 2 of the Bill includes measures to:

- repeal inoperative provisions (see especially items 1-3);
- avoid duplication by ensuring that NTRBs are not subject to provisions of the *Commonwealth Authorities and Companies Act 1997* which reflect obligations already imposed by their incorporation statutes (item 4);⁶
- improve the process for reviewing decisions by NTRBs not to provide assistance to Aboriginal or Torres Strait Islander persons (item 5 – see further below); and
- simplify and clarify provisions dealing with the transfer of documents and records from a former NTRB to its replacement (item 6).⁷

2.12 One of the more substantive amendments in Schedule 2 is contained in item 5, which amends the process for reviewing decisions by NTRBs not to assist Aboriginal or Torres Strait Islander persons.⁸ Currently, section 203FB allows an Aboriginal or Torres Strait Islander person affected by an NTRB's decision not to assist him or her to apply to the Secretary of the Department of Families, Community Services and Indigenous Affairs for a review of the decision. Under existing subsection 203FB(2), the Secretary must appoint an external expert to conduct the review.

2.13 Proposed paragraph 203FB(2)(a) would allow the Secretary to review assistance decisions. The Secretary will retain the ability to appoint an external expert

6 See also discussion of this issue at: Senate Legal and Constitutional Affairs Committee, *Report on the Native Title Amendment Bill 2006 [Provisions]*, February 2007, pp 32-33.

7 EM, p. 67.

8 This item will repeal existing section 203FB and replace it with proposed sections 203FB, 203FBA and 203FBB.

where more complex issues arise.⁹ The Explanatory Memorandum states that the proposed amendments will 'ensure that the process for reviewing assistance decisions is more transparent, efficient and timely.'¹⁰

Schedule 3: Prescribed Bodies Corporate

2.14 Schedule 3 of the Bill proposes amendments relating to the functioning of Prescribed Bodies Corporate (PBCs). In particular, Schedule 3 of the Bill includes measures designed to:

- ensure that regulations can provide for the replacement of PBCs at the initiation of the native title holders under all possible circumstances (see items 1-6); and
- partially implement two recommendations made in the *Report on Structures and Processes of Prescribed Bodies Corporate* (the PBC Report).¹¹

Background¹²

2.15 Under section 55 of the Native Title Act, where the Federal Court determines that native title exists, the native title holders must establish a body corporate to administer their native title rights and interests. The native title holders must elect to establish one of two alternative kinds of PBC. The alternatives are:

- the native title is held in trust by the PBC (a trust PBC); or
- the native title is held by the common law holders of native title and the PBC acts as their agent (an agent PBC).

2.16 These alternatives have different legal consequences and, in particular, affect the sort of legal relationship that the native title holders have with the PBC. If the native title holders make no choice, the Court selects the second alternative.

2.17 When the Court approves the PBC, the PBC is placed on the National Native Title Register, which is maintained by the NNTT. Once registered, the PBC is the legal entity and contact for that group of native title holders. The PBC conducts business between the native title holders and other people with an interest in the area such as pastoralists, governments or developers.

9 Proposed paragraph 203FB(2)(b); see also EM, p. 70. Note that item 9 of Schedule 2 would also allow the Secretary to delegate the powers in proposed sections 203FBA and 203FBB.

10 EM, p. 70; see also Attorney-General's Department and FaCSIA, *Submission 6*, pp 7-8.

11 *Structures and Processes of Prescribed Bodies Corporate*, Commonwealth of Australia 2006, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(1E76C1D5D1A37992F0B0C1C4DB87942E\)~Structures+and+processes+of+PBC.pdf/\\$file/Structures+and+processes+of+PBC.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1D5D1A37992F0B0C1C4DB87942E)~Structures+and+processes+of+PBC.pdf/$file/Structures+and+processes+of+PBC.pdf) (accessed 4 April 2007).

12 Material for this section of the report was sourced from the National Native Title Tribunal, "What is a Prescribed Body Corporate?" *Fact Sheet No.2d*, Available at: http://www.nntt.gov.au/publications/1021859460_4854.html (accessed 4 April 2007).

2.18 In October 2006 the Attorney-General and the Minister for Families, Community Services and Indigenous Affairs released a report entitled *Structures and Processes of Prescribed Bodies Corporate* (the PBC Report).¹³ The PBC Report was part of the six-part plan for native title reform announced in September 2005. The PBC Report noted that the primary roles of PBCs are to:

- protect and manage determined native title in accordance with the wishes of the broader native title holding group; and
- ensure certainty for governments and other parties with an interest in accessing or regulating native title lands and waters by providing a legal entity through which to conduct business with the native title holders.¹⁴

2.19 The PBC report made 15 recommendations, many of which can be implemented administratively or through amendments to the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (the PBC Regulations). The Native Title Amendment Bill 2006 implemented two recommendations from the PBC Report. Schedule 3 of this Bill would implement two further recommendations: recommendations 11 and 15.

PBC amendments proposed by the Bill

Replacement of PBCs

2.20 The Native Title Act envisages that regulations may provide for the replacement of PBCs at the initiation of the common law holders. For example, existing subsection 56(4) would allow for the replacement of a trust PBC by another trust PBC, and section 60 would allow for the replacement of an agent PBC by another agent PBC. However, according to the Explanatory Memorandum, existing regulation-making powers may not allow an agent PBC to be replaced by a trust PBC, or a trust PBC to be replaced by an agent PBC. Further, they may not allow an agent PBC to become a trust PBC (that is, to change its functions from those of an agent PBC to those of a trust PBC), or a trust PBC to become an agent PBC. Items 1 – 6 will remedy these deficiencies.¹⁵

PBC Report recommendations

2.21 Recommendation 11 of the PBC Report proposed that the Native Title Act should be amended to authorise a PBC to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the Native Title Act or PBC Regulations at the request of the third party. It also

13 *Structures and Processes of Prescribed Bodies Corporate*, Commonwealth of Australia 2006, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(1E76C1D5D1A37992F0B0C1C4DB87942E\)~Structures+and+processes+of+PBC.pdf/\\$file/Structures+and+processes+of+PBC.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(1E76C1D5D1A37992F0B0C1C4DB87942E)~Structures+and+processes+of+PBC.pdf/$file/Structures+and+processes+of+PBC.pdf) (accessed 4 April 2007).

14 PBC Report, p. 6.

15 EM, p. 74.

recommended that the amendments provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred. Item 7 of Schedule 3 inserts proposed sections 60AB and 60AC which deal with fees for services provided by PBCs, and the giving of opinions about those fees by the Registrar of Aboriginal Corporations.¹⁶

2.22 Recommendation 15 of the PBC Report related to the development of a mechanism for the determination of a 'default' PBC in appropriate circumstances, such as where there is no functioning PBC nominated by the native title holders. Schedule 3 would permit regulations to be made under which a particular government funded body or bodies (a default PBC) could perform the functions of an agent PBC (but not those of a trust PBC) in relation to determined native title rights and interests in particular circumstances. These circumstances include:

- where the common law holders fail to nominate a PBC in conjunction with a native title determination (see proposed subsection 59(2));
- where a liquidator is appointed to a PBC (see proposed subparagraphs 56(4)(d)(ii) and 60(a)(ii)); and
- at the initiation of common law holders (see proposed subparagraph 56(4)(d)(i), proposed paragraph 56(7)(a) and proposed subparagraph 60(a)(i)).¹⁷

Schedule 4: technical amendments relating to legislative instruments

2.23 Schedule 4 will make technical amendments to the Native Title Act to reflect changes made by the *Legislative Instruments Act 2003*. Currently, the Native Title Act provides that a number of determinations, instruments and approvals are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. However, section 46A of the Acts Interpretation Act was repealed in 2003. Section 6 of the Legislative Instruments Act now provides that instruments that were disallowable instruments for the purposes of section 46A of the Acts Interpretation Act are legislative instruments. Schedule 4 therefore amends various provisions of the Native Title Act to refer to legislative instruments, rather than disallowable instruments.¹⁸

16 EM, p. 78; Attorney-General's Department and FaCSIA, *Submission 6*, pp 8-9.

17 EM, pp 75-76; Attorney-General's Department and FaCSIA, *Submission 6*, pp 9-10.

18 EM, p. 81; see also Attorney-General's Department and FaCSIA, *Submission 6*, p. 10.

