

The Native Title Amendment Bill 2006

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On 7 September 2005 the Attorney-General announced a suite of reviews and native title reforms.¹ The findings from this review program formed the basis of a series of discussion papers released by the Federal government with proposed technical amendments to *The Native Title Act 1993*. Following feedback from these papers the Government tabled the *Native Title Amendment Bill 2006* in Parliament on the 7 December 2006. The Bill is currently before the Senate Standing Committee on Legal and Constitutional Affairs, which will report to Parliament on 23 February 2006.

The schedules of the Bill reflect the different limbs of the native title system under review. Schedule 1 refers to accountability and reporting provisions for NTRBs. The theme of Schedule 1 is expanding Ministerial discretion and simplification of some reporting obligations of representative bodies. It also provides different recognition approval procedures for NTRBs and Native Title Service Providers (NTSPs) including broadening the definition of NTRBs to include bodies incorporated under the *Corporations Act 2001*. Ministerial discretion over the performance and accountability of NTRBs is substantially changed in the Bill. The new 'satisfactory' benchmark for Ministerial recognition, previously two criteria, is condensed into one and an extra financial test is added.

The two limbed test for recognition now reads:

- That a representative body is not satisfactorily performing its functions (an existing ground), or
- That there are serious or repeated irregularities in the body's financial affairs (a new ground) (Subsection 203AH(2)).


The proposed changes would also place reporting and performance related conditions on the renewals of NTRB recognition, including information relating to the

expenditure of their funding (ss203BD(a)). The effect of this amendment removes the obligation for NTRBs to publish financial information in Annual Reports tabled in Parliament, but instead attaches conditions to funding agreements. Further amendments proposed in Schedule 1 allow the Minister to alter NTRB designated areas. Under proposed subsection 203AE(1) (repealing section 203AE) the Minister is able to a) extend representative body areas if satisfied the NTRB would satisfactorily perform its functions in the new areas, b) remove recognition (section 203AD(1) as listed above) and c) review applications to vary recognised areas under section 203AD(1A). The notice period for any such changes is reduced from 90 days to 60 days (subsection 203AG(3) amended).

The cumulative effect of the NTRB amendments is a greater emphasis on financial management and Ministerial discretion where reviews do occur, or where government performance expectations exceed delivery. There also appears to be less emphasis on making the recognition of an NTRB contingent on building relationships with traditional owners. Instead, the focus is on financial reporting and the structural issues of representative Bodies.

There are other amendments related to the progress of native title claims. Schedule 2 of the Bill is reflective of the Federal government's acceptance of most of the recommendations made by the Hiley-Levy review of the claims resolution processes. The effect of the amendments would prevent a single matter being mediated by the NNTT and the Court simultaneously, even in regard to different questions. The NNTT would be granted powers of inquiry, reporting and rights of appearance at the Federal Court level to assist the Court to make determinations with respect to discreet issues. Mindful of 'streamlining' the claims procedures by taking out duplicating or complicating factors, the Bill also provides the Court with powers to dismiss an application relating to a future act in some cases, and details conditions where the NNTT can refer a matter to the Court for dismissal. There is also a focus on using dispute-resolution options wherever possible, and for parties to act in good faith around the negotiating table (s136GA). This includes new powers of compulsion for the NNTT to direct a party to mediation or produce documents or reports from the mediation to improve the effectiveness of outcomes.

¹ The reviews would focus on the accountability of Native Title Representative Bodies (NTRBs), the claims resolution process in the National Native Title Tribunal (NNTT) and the Federal Court, the functioning of Prescribed Bodies Corporate (PBCs) and Federal government assistance to respondents to native title claims. The reviews were the last substantial overhaul of the operation of the native title framework since the 1998 amendments and the Government conducted a combination of broad departmental consultations and independent reviews.



The amendments also affect the operation of PBCs. The regime developed for PBCs is still very complex and is often vague in terms of which parties PBCs need to consult about agreements and decisions affecting native title or the nature of assistance available from other agencies, including State and Territory Government Departments and NTRBs. Amending section 58(e) narrows the circumstances where PBCs must consult common law holders on matters affecting native title to those where the decision is to surrender native title rights and interest in land or waters. Amendments to section 59 implement Recommendation 7 of the recent Attorney General's PBC report which recommends that an existing PBC can be regarded as a PBC for subsequent determinations for adjoining native title areas with the agreement of both claimant groups. It is thought this would encourage economies of scale for PBCs in instances such as the Miriuwung Gajerrong claim. There are also amendments of the technical definitions affecting PBCs. Schedule 3 redefines an 'agent prescribed body corporate' under section 253, to a new definition inserted by Schedule 1 of the *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other measures Act 2006* (CATSI Consequential Act) commencing on 1 July 2007. This corrects an unintended omission of Recognised Native Title Bodies Corporate as PBCs.

Other amendments affect non-claimant parties. Schedule 4 affects the Attorney-General's powers to grant financial assistance to non-claimant parties (respondents) in proceedings (including mediation) related to native title and the negotiation of Indigenous Land Use Agreements. The brief amendments (becoming section 183(2A)) allows the Attorney-General to receive applications for the provision of assistance in relation to the development of a standard form agreement or review of an existing standard form agreement in order to facilitate negotiation. The Attorney-General's Department have produced draft guidelines for applicants seeking such assistance including eligibility criteria, selection criteria, the types of assistance available, conditions placed on assistance approved and a right of review by the applicant if their application is refused, varied, terminated or made subject to additional special conditions. The Guidelines are still in draft form but are likely to narrow the grounds for respondent funding in order to ensure that non-claimant groups do not benefit financially from the scheme. Amendments in this Schedule will also limit the number of possible parties to a claim. In particular, the amendments prescribe how people affected by a possible determination can seek leave of the Court to become

a party to a matter. Section 84(e)(a)(iii) requires such parties to have an *interest in relation to land or waters* which is narrower than a mere interest in a claim.

These changes have significant implications. The Attorney-General outlined the scope of the review process as being 'technical' in nature and with no intention of reassessing the balance of rights. Many of the amendments correct unintentional errors or enshrine conventional practice in statutory form (in particular, many of the mediation provisions). However these amendments will also alter the claims management practices for NTRBs. It is still unclear as to whether the proposed changes will make NTRBs more efficient or whether they will impose unnecessary burdens on them. Much will depend on how the discretion is exercised by the Minister and whether the old criteria for 'satisfactory performance' will still implicitly be applied.

[Native Title Amendment Bill 2006](#)

The full text of the *Native Title Amendment Bill 2006* is now available online. For full details see the [explanatory memorandum](#) and [second reading](#).

Attorney General's Department

[Technical Amendments To The Native Title Act. Second Discussion Paper](#)

Technical amendments to the Native Title Act was released for public comment on 22 November 2006. Comments on the amendment proposals are requested by 22 December 2006.

The second discussion paper follows the release of an [initial discussion paper](#).

Stakeholder comments on those proposals and further suggestions for amendment were requested by 31 January 2006.

The second discussion paper incorporates:

- amendment proposals from the first discussion paper that were modified or discontinued as a result of consultation, and
- a large number of additional amendment proposals suggested by stakeholders.

Click on technical amendments to the Native Title Act from <http://www.ag.gov.au/nativetitlesystemreform>

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