

NATIVE TITLE ACT REFORMS

27 February 2019 | Australia
Legal Briefings

On 21 February 2019 the Commonwealth government introduced the Native Title Legislation Amendment Bill 2019 (Cth) (**Bill**) to amend (amongst other legislation) the *Native Title Act 1993* (Cth) (**NTA**).

The proposed amendments to the NTA are the most substantive since the 'Wik' amendments in 1998. To assist project proponents in understanding the potential impact of the Bill, the table below sets out proposed key amendments with the likely implications for existing and future development.

No	Proposed amendment	Impact on existing development	Impact on future development
1	<p>Authorisation</p> <p>The Bill proposes amendments to the NTA to permit a claim group to define the scope of the authority of the applicant for native title claims.</p> <p>Moving forward, any conditions on the authority of the applicant will be included in the relevant claimant/compensation application and supporting affidavit.</p> <p>This will mean that the details of the conditions of the authority of the applicant would be publicly recorded and available on the Register of Native Title Claims maintained by the National Native Title Tribunal (NNTT).</p> <p>Whilst the amendments will generally operate prospectively (ie for future claims), native title claim groups will be able to amend existing claims to impose conditions on the authority of applicants.</p>	<p>Many existing native title agreements place contractual obligations on the persons comprising the applicant for native title claims.</p> <p>Changes to the scope of authority of an applicant may have the potential to impact the manner in which certain agreements operate.</p>	<p>Proponents will need to undertake due diligence prior to entering into negotiations with an applicant to ensure that the authority of an applicant, and any conditions imposed on that authority, are clearly understood.</p> <p>The timing of the commencement of the amendments will be important for ILUA negotiations presently on foot or planned to start in the near future.</p>
2	<p>Applicant decision making process</p> <p>The Bill proposes amendments to the NTA to codify how the persons comprising the applicant for native title claims are to make decisions.</p> <p>New section 62C provides that the default rule will be that the persons comprising the applicant act by majority. That is, a decision of the applicant will require a decision by the majority of the persons comprising the applicant.</p> <p>The default position can be modified by conditions imposed on the authority of the applicant by the claim group (see above).</p>	<p>Some native title and cultural heritage agreements contain decision making processes for the persons comprising the applicant.</p> <p>Changes to the decision making process of an applicant may have the potential to impact the manner in which certain agreements operate.</p>	<p>The drafting of native title and cultural heritage agreements will need to accommodate decision making processes of the applicant and drafters will need to give particular attention to how performance of obligations placed upon the applicant is articulated.</p>
3	<p>Indigenous land use agreements (ILUA)</p> <p>There is presently a level of uncertainty in relation to whether and to what extent an ILUA may be amended after registration. This has been amplified in the wake of the decision in <i>Conlon v QGC Pty Ltd (No 2)</i> (2017) 359 ALR 460.</p> <p>The Bill proposes amendments to allow amendments to registered ILUAs that update property descriptions and parties to the agreement, including where a party has assigned or otherwise transferred the rights or liabilities under the agreement. This is a significant and positive development.</p>	<p>The beneficiaries of assigned or novated ILUAs should consider having the Register of Indigenous Land Use Agreements (ILUA Register) maintained by the NNTT updated to reflect the current parties to the ILUA.</p>	<p>A rethink may be required in relation to the drafting of assignment clauses in ILUAs. Future assignment clauses in ILUAs might include appropriate drafting for updates to the ILUA Register.</p>
4	<p>Scope of body corporate ILUAs</p> <p>Presently, body corporate ILUAs can only be registered where there is a registered native title body corporate (RNTBC) in relation to all of the agreement area. This makes it difficult for a body corporate ILUA to cover land where native title is extinguished.</p> <p>The Bill proposes amendments to permit body corporate ILUAs to be registered over:</p> <ul style="list-style-type: none"> part of a determination area in which native title was determined not to exist; and an area expressly excluded from a determination because a claim could not be made over that area because it was subject to a 'previous exclusive possession act'. 	<p>This change will apply to applications for registration of body corporate ILUAs made after the amended section 24BC comes into effect, even if the agreement was made prior to commencement.</p> <p>This may remove potential hurdles to registration of current body corporate ILUAs and (potentially) encourage the use of body corporate ILUAs in anticipation of the commencement of the Bill.</p>	<p>Body corporate ILUAs have a number of advantages over area ILUAs. These amendments will likely mean that body corporate ILUAs will be more available to be used and they should therefore be considered as part of any ILUA strategy.</p>
5	<p>Historical extinguishment</p> <p>Under the Bill, it will be possible in the context of a native title claim to disregard historical extinguishment of native title over a 'park area'.</p> <p>A 'park area' means an area that has been set aside, granted or vested for purposes that include preserving the natural environment of the area (such as national, state or territory parks and reserves) for the purposes of a claimant application or revised native title determination application.</p> <p>The proposed amendments also allow for the varying or revoking of an existing determination of native title where an agreement to disregard historical extinguishment for a park area has been entered into.</p>	<p>The Bill protects existing interests in areas where historic extinguishment of native title has been disregarded.</p> <p>However it may be the case that the renewal of the existing interests may become a future act that will require NTA compliance.</p>	<p>We would advocate a process of assessing the extent to which current and future assets are in 'park areas'. This will assist in understanding the potential impact of this amendment.</p>
6	<p>Section 24MD(6B) objections</p> <p>Currently, a native title party's objection under section 24MD(6B) to infrastructure titles involving the creation of a right to mine and certain compulsory acquisitions of native title rights and interests (Section 24MD(6B) Acts) can only be referred to an independent person or body for determination by request of the native title party.</p> <p>The Bill proposes amendments requiring the Commonwealth, State or Territory, as relevant, to ensure that an objection that has not been withdrawn within 8 months of notice being given to the native title party is heard by the independent person or body.</p> <p>This change will affect:</p> <ul style="list-style-type: none"> objections lodged after the amendment to section 24MD(6B)(f) takes effect; and objections made before the amendment takes effect, unless the native title party previously requested the objection be heard by the independent person or body, or the objection was withdrawn. 	<p>Existing agreements should be reviewed to determine whether and how they deal with consents and objections in respect of Section 24MD(6B) Acts. Amendments may be required if those agreements do not operate effectively with the proposed 'new' procedural regime.</p> <p>The status of pending applications for infrastructure titles or compulsory acquisitions which could be Section 24MD(6B) Acts should be checked to determine whether the 'old' or the proposed 'new' procedural regime is likely to apply. Where the 'new' regime applies, the new process and timeframes should be considered in project planning and engagement with native title parties.</p>	<p>The new process and timeframes should be considered in project planning and engagement with native title parties.</p> <p>Essentially, it may take 8 months from the notice day, plus the period of time required for the hearing, for an outcome where an objection is not resolved by agreements or otherwise withdrawn. Future agreements should be drafted to accommodate the new procedural regime.</p> <p>Potentially, the new regime may lead to a greater number of objections being determined by an independent person or body. These determinations may provide parties with greater guidance about when objections may be upheld.</p>
7	<p>Register of section 31 agreements</p> <p>The Bill proposes amendments to introduce a requirement that the Registrar keeps a record in relation to section 31 agreements. The record would include the following information:</p> <ul style="list-style-type: none"> a description of the area of land or waters to which the agreement relates; the name and address of each party to the agreement; the period, if specified, during which the agreement will operate; and whether there are any ancillary agreements made between some or all of the parties. <p>The amendments require the arbitral body to give a copy of any agreement, or any advice it receives regarding an ancillary agreement, to the Registrar.</p>	<p>The changes will only apply to new section 31 agreements. Any existing section 31 agreements will not be recorded.</p>	<p>Section 31 agreements made after the commencement of the amendments will be recorded by the Registrar.</p> <p>While we consider that the record of section 31 agreements will assist with due diligence enquiries, its effectiveness will be limited as it only includes section 31 agreements made following the commencement of the amendments.</p>
8	<p>Validation of section 31 agreements</p> <p>The Bill proposes amendments to validate section 31 agreements potentially affected by the decision in <i>McGlade v Native Title Registrar & Ors</i> (2017) 340 ALR 419 made before the amendment took effect.</p> <p>Following that decision, concerns arose that the Court's reasoning when it found that an agreement was not a valid area ILUA because not all persons comprising the registered native title claimant signed the agreement could also apply to render section 31 agreements invalid for native title purposes.</p>	<p>This amendment will ensure that:</p> <ul style="list-style-type: none"> any existing section 31 agreements which were signed by at least one, but not all, of the persons comprising the registered native title claimant are valid for native title purposes; and the validity of future acts the subject of those agreements cannot be challenged on the basis that the section 31 agreement was not signed by all persons comprising the registered native title claimant. 	<p>This amendment only applies to section 31 agreements made before the amendment came into effect. The proposed amendments relating to applicant decision-making noted above enable future section 31 agreements to be signed by a majority of the persons comprising the registered native title claimant, subject to any conditions imposed on the registered native title claimant by the claim group.</p>

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



**MELANIE
DEBENHAM**
PARTNER, PERTH

+61 8 9211 7560
Melanie.Debenham@hsf.com



AMY CARSELDINE
SENIOR ASSOCIATE,
BRISBANE

+61 7 3258 6389
amy.carseldine@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2022

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2022