

NATIVE TITLE (QUEENSLAND) AMENDMENT BILL 1994

EXPLANATORY NOTE

GENERAL OUTLINE

Objectives of the Legislation

There are five objectives for this Bill. The first objective amends the *Native Title (Queensland) Act 1993* to reflect amendments made by the Senate to the Commonwealth *Native Title Bill 1993*. The second objective facilitates Commonwealth recognition of the Queensland Native Title Tribunal and so allows participation by Queensland in the national scheme established by the Commonwealth *Native Title Act 1993*. The third objective clarifies the meaning of certain provisions of the *Native Title (Queensland) Act 1993* and corrects certain definitions and drafting errors. The fourth objective amends the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* to simplify the operation of those Acts and to provide the most efficient means possible for the grant or transfer of land under these Acts to Aboriginal or Torres Strait Islander people. The last objective amends the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* to simplify the operation or clarify the meaning of certain provisions under these Acts and to correct certain minor drafting errors.

Reasons for the Bill

The Commonwealth *Native Title Act 1993* received the Royal Assent on 24 December 1993. All but Part 10 of the Commonwealth *Native Title Act 1993* commenced on 1 January 1994. Part 10 commenced on 1 July 1994. The *Native Title (Queensland) Act 1993*, which was drafted with reference to the form of the Commonwealth *Native Title Bill 1993* as introduced into the House of Representatives, was enacted to enable Queensland to

participate in the national scheme proposed by the Commonwealth *Native Title Act 1993*.

As a result of amendments to the Commonwealth *Native Title Bill 1993* in the Senate, there are now discrepancies between the Commonwealth *Native Title Act 1993* and the *Native Title (Queensland) Act 1993*. Given the importance of consistency between the Commonwealth *Native Title Act 1993* and the *Native Title (Queensland) Act 1993*, the *Native Title (Queensland) Act 1993* must be amended before it is to commence.

In particular, one of the purposes of the *Native Title (Queensland) Act 1993* is that the Queensland Native Title Tribunal be a 'recognised State/Territory body' under section 251 of the Commonwealth *Native Title Act 1993*. To properly address the criteria of section 251(2) of the Commonwealth *Native Title Act 1993*, and ensure that the Queensland Native Title Tribunal will be a 'recognised State/Territory body', certain amendments to the *Native Title (Queensland) Act 1993* must be made.

While the decision of *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1 is clear on the matter, there is considerable concern in the community about the effect of valid leases, including pastoral leases, upon native title. An amendment stating the position will address these uncertainties.

Estimated Cost for Government Implementation

It is estimated that there will be no cost additional to that required to implement the *Native Title (Queensland) Act 1993*.

Consultation

The Litigation Reform Commission has been consulted in respect of those matters contemplated by section 75 of the *Supreme Court Act 1991*.

NOTES ON PROVISIONS

Clause 1 sets out the short title of the Bill.

Clause 2 provides for the *Native Title (Queensland) Act 1993* to be amended by the Bill as set out in the Schedules.

Clause 3 provides that valid acts attributable to the State that took place before 1 January 1994 extinguished native title over land or waters where the act was inconsistent with the continued existence, enjoyment or exercise of those native title rights or interests. This statement of law reflects the majority opinion of the High Court of Australia in *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1 at 69, where His Honour Justice Brennan said:

Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency.

The clause provides that the issue of valid pastoral leases is an example of the extinguishment of native title rights and interests. This example is consistent with the statements of His Honour Justice Brennan in *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1 at 69, where His Honour said:

Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (e.g, authorities to prospect for minerals).

Schedule 1 contains amendments that are consequent upon the amendments made in the Senate to the *Commonwealth Native Title Bill 1993*.

Amendments 1 and 2 correct certain definitions.

Amendments 3-5 correct references to the *Commonwealth Native Title Act 1993*.

Amendment 6 inserts a provision to bring the effect of extinguishment under the *Native Title (Queensland) Act 1993* into line with the *Commonwealth Native Title Act 1993*.

Amendment 7 corrects a reference to the *Commonwealth Native Title Act 1993*.

Amendment 8 clarifies the *Native Title (Queensland) Act 1993*. It provides that compensation is determined by reference to the same criteria as the Commonwealth *Native Title Act 1993*.

Amendment 9 corrects a reference to the Commonwealth *Native Title Act 1993*.

Amendment 10 amends section 18 in light of *Amendment 11*.

Amendment 11 provides that the confirmation of certain rights in Part 3 of the *Native Title (Queensland) Act 1993* does not operate to extinguish or impair native title rights or affect land or waters, or interests in land or waters, conferred under a law for the benefit of Aboriginal people or Torres Strait Islanders.

Amendment 12 clarifies section 28 of the *Native Title (Queensland) Act 1993* by providing that Part 2, Division 6 of the Commonwealth *Native Title Act 1993* applies to the Queensland Native Title Tribunal as if it were the National Native Title Tribunal proposing to make an approved determination that native title exists at the time the determination is made.

Amendment 13 corrects a reference to a defined term.

Amendment 14 amends section 32 of the *Native Title (Queensland) Act 1993* to bring that section into line with the Commonwealth *Native Title Act 1993*.

Amendment 15 amends section 33 of the *Native Title (Queensland) Act 1993* and inserts a new section, section 33A, to ensure that the application procedures of the *Native Title (Queensland) Act 1993* conform with those of the Commonwealth *Native Title Act 1993*.

Amendment 16 corrects a reference to a defined term.

Amendment 17 amends section 36 of the *Native Title (Queensland) Act 1993* to ensure that the procedure for non-claimant applications under the *Native Title (Queensland) Act 1993* conforms with the Commonwealth *Native Title Act 1993*.

Amendments 18-20 ensure that the procedure of the Queensland Native Title Tribunal conforms with the procedure of the National Native Title Tribunal under the Commonwealth *Native Title Act 1993*.

Amendments 21 and 22 correct references to the Commonwealth *Native Title Act 1993*.

Amendments 23 and 24 clarify what evidence the Queensland Native Title Tribunal may receive in an inquiry; identifies those bodies from whom that evidence may be received; and adds reports and recommendations to the various matters that may be adopted by that Tribunal in an inquiry.

Amendment 25 provides that the Queensland Native Title Tribunal may dismiss an application when requested by the applicant if the Tribunal considers it appropriate to do so.

Amendment 26 amends section 73 of the *Native Title (Queensland) Act 1993* to ensure that the provision conforms with the Commonwealth *Native Title Act 1993*.

Amendments 27 and 28 correct references to the Commonwealth *Native Title Act 1993*.

Amendment 29 amends section 109 of the *Native Title (Queensland) Act 1993* consistently with the amendments made to the procedure for dealing with applications in *Amendment 15*.

Amendment 30 alters the information that the Queensland Native Title Register must contain for each approved determination of native title. This is to take account of Part 2, Division 6 of the Commonwealth *Native Title Act 1993*.

Amendment 31 amends section 148 of the *Native Title (Queensland) Act 1993* to provide that a regulation which alters the application of a State Compulsory Acquisition Act to native title ensures that the agents and representatives of native title holders, as well as the native title holders, have the same procedural rights as holders of ordinary title.

Amendments 32 and 33 correct references to the Commonwealth *Native Title Act 1993*.

Amendment 34 provides that the compulsory acquisition of native title rights and interests is subject to the non-extinguishment principle and that it is the use of native title land pursuant to the compulsory acquisition which may extinguish the native title.

Amendment 35 clarifies the *Native Title (Queensland) Act 1993*. It provides that compensation for the compulsory acquisition of native title rights and interests is determined by reference to the same criteria as the Commonwealth *Native Title Act 1993*.

Amendments 36-39 correct references to the Commonwealth *Native Title Act 1993*.

Amendment 40 amends section 178 of the *Native Title (Queensland) Act 1993* (which operates to amend s.13 of the *Acts Interpretation Act 1954*) to clarify the effect of future legislation on native title. This makes it consistent with the Commonwealth *Native Title Act 1993*.

Schedule 2 contains other minor amendments.

Amendments 1 to 36 operate to amend the *Native Title (Queensland) Act 1993*.

Amendment 1 amends the preamble in a manner consistent with the Commonwealth *Native Title Act 1993*. Particularly, the preamble provides that the High Court of Australia has held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests. This statement of law reflects the majority opinion of the High Court of Australia in *Mabo v State of Queensland [No. 2]* (1992) 175 CLR 1 at 69.

Amendment 2 omits a redundant definition.

Amendment 3 provides a definition of registered native title claimant.

Amendments 4 and 5 correct minor drafting errors.

Amendment 6 amends section 22(1) of the *Native Title (Queensland) Act 1993* to allow the adjournment of a proceeding to enable a native title determination application to be made to the National Native Title Tribunal as well as the Queensland Native Title Tribunal.

Amendment 7 provides that the purpose of Part 5 of the *Native Title (Queensland) Act 1993* is for the Queensland Native Title Tribunal and the Wardens Courts to be recognised State/Territory bodies and for the Queensland Native Title Tribunal to be an arbitral body.

Amendment 8 clarifies the operation of section 26 of the *Native Title (Queensland) Act 1993* by providing the types of application the Queensland Native Title Tribunal may deal with after the Commonwealth Minister has made a determination under section 251(1) of the Commonwealth *Native Title Act 1993* that the Tribunal is a recognised State/Territory body. Amendment 7 also provides for the types of application the Wardens Courts may deal with after the Commonwealth Minister has made a determination under section 251(1) of the

Commonwealth *Native Title Act 1993* that the Wardens Courts are recognised State/Territory bodies.

Amendment 9 amends section 27 of the *Native Title (Queensland) Act 1993* so that only the Queensland Native Title Tribunal may be an arbitral body for Queensland. However, the Queensland Native Title Tribunal may not be an arbitral body for matters arising under or in relation to a State Mining Act.

Amendment 10 provides that compensation applications for matters arising under a State Mining Act, including compensation for past acts under Part 2, may not be made to the Queensland Native Title Registrar under section 29 of the *Native Title (Queensland) Act 1993*.

Amendment 11 qualifies the nature of the interest required before a person is entitled to notice under section 35 of the *Native Title (Queensland) Act 1993*.

Amendment 12 amends section 35 of the *Native Title (Queensland) Act 1993* to ensure that non-claimant applications will include a notice that the application will be taken to be unopposed unless a claimant application is made to the Queensland Native Title Registrar or the National Native Title Registrar within two months of giving notice of the non-claimant application.

Amendment 13 amends section 37 of the *Native Title (Queensland) Act 1993* to account for the fact that the Queensland Native Title Registrar may give notice of an application under section 35(1) in a manner other than that provided for by section 35(2).

Amendments 14 and 15 clarify section 43 of the *Native Title (Queensland) Act 1993* in respect of its duty to hear and determine certain applications.

Amendment 16 amends section 44 of the *Native Title (Queensland) Act 1993* in order that applications for future act determinations (under section 33 of the *Commonwealth Native Title Act 1993*) and objections to the inclusion of a statement that an act attracts the expedited procedure (under section 31 of the *Commonwealth Native Title Act 1993*) may be made to the Queensland Native Title Registrar.

Amendment 17 provides for compensation held in trust (where the Queensland Native Title Tribunal operates as an arbitral body under Part 2, Division 3, Subdivision B of the *Commonwealth Native Title Act 1993*) to

be dealt with in the same way as the National Native Title Tribunal deals with such monies under section 52 of the Commonwealth *Native Title Act 1993*.

Amendments 18-20 correct minor drafting errors.

Amendment 21 inserts a provision to allow the Queensland Native Title Tribunal to make a determination during a proceeding if the parties reach agreement at any stage.

Amendment 22 amends section 74 of the *Native Title (Queensland) Act 1993* so it is subject to section 37 of the Commonwealth *Native Title Act 1993*.

Amendment 23 amends section 77 of the *Native Title (Queensland) Act 1993* so that a decision or determination of the Queensland Native Title Tribunal is final and conclusive, subject to appeal or a decision by the State Minister acting under section 42 of the Commonwealth *Native Title Act 1993*.

Amendment 24 provides an exception to the non-disclosure requirements of section 90 of the *Native Title (Queensland) Act 1993* in the case of a prosecution of an offence under section 85(2) of the *Native Title (Queensland) Act 1993*.

Amendment 25 provides for assessors to help the Queensland Native Title Tribunal and the Land Appeal Court when those bodies exercise jurisdiction under the *Native Title (Queensland) Act 1993*. Assessors are subject to the control and direction of the Queensland Native Title Tribunal when helping either the Queensland Native Title Tribunal or the Land Appeal Court. Also, a regulation may provide for assessors to help and take part in the decision-making processes of the Wardens Courts.

Amendment 26 incorporates a term defined in the Commonwealth *Native Title Act 1993*.

Amendment 27 removes a reference to repealed legislation.

Amendment 28 inserts a provision which prevents multiple compensation for acts which are essentially the same act.

Amendment 29 amends a heading.

Amendment 30 provides that a reference to provisions of the Commonwealth *Native Title Act 1993* in a section heading does not form a part of this Act.

Amendment 31 provides that a regulation under section 148 of the *Native Title (Queensland) Act 1993* may alter the application of a State Compulsory Acquisition Act to native title to ensure that acts under a State Compulsory Acquisition Act are excluded from the coverage of section 26(2) of the Commonwealth *Native Title Act 1993*.

Amendment 32 corrects a reference to the Commonwealth *Native Title Act 1993*.

Amendment 33 provides that for the purposes of every State Mining Act native title holders will have rights equivalent to ordinary title holders.

Amendment 34 omits a reference to the Wardens Court as an arbitral body.

Amendment 35 provides that a regulation under section 153 of the *Native Title (Queensland) Act 1993* may alter the application of a State Mining Act to native title to ensure that acts under a State Mining Act are excluded from the coverage of section 26(2) of the Commonwealth *Native Title Act 1993*.

Amendment 36 corrects a minor drafting error.

Amendments 37 to 43 operate to amend the *Aboriginal Land Act 1991*.

Amendment 37 amends section 2.04 to ensure that Aboriginal Land includes land incorporated into an existing deed of grant or lease granted under section 5.04A.

Amendment 37 also amends section 2.05 to clarify when land is considered to be transferable or transferred land.

Amendment 37 also amends section 2.06 to enable certain land (available land) which was not transferable land on 12 June 1991 to be declared by regulation as transferable land.

Amendment 37 also amends sections 2.07, 2.08, 2.09 and 2.10 by replacing a power to make declarations by order in council with a power to make regulations.

Amendment 37 also amends section 2.11 so that granted land can include parcels of claimable land that have been incorporated into a deed of grant or a lease granted under section 5.04A.

Amendment 37 also amends section 2.12 to do two things. First, it simplifies and clarifies the Minister's duty to consult with Aboriginal people to determine whether transferred land will be available for claim.

Second, it replaces a power to make declarations by order in council with a power to make regulations. Consultation must still occur within the policy framework established by the legislation.

Amendment 37 also amends section 2.13 to do three things. First, it simplifies the operation of section 2.13 by removing an unnecessary administrative process. Second, it replaces a power to make declarations by order in council with a power to make regulations. Third, it amends the definition of interest as it applies in this section to include native title interest.

Amendment 37 also amends section 2.15 to replace a power to make declarations by order in council with a power to make regulations.

Amendment 37 also amends section 2.16 to do two things. First, it corrects a reference to a repealed Act. Second, it replaces a power to make declarations by order in council with a power to make regulations.

Amendment 37 also amends section 2.17 to replace a power to make declarations by order in council with a power to make regulations.

Amendment 37 also amends section 3.02 to simplify the Minister's duty to consult prior to appointing trustees for transferable land. This will allow trustees to be identified with certainty. Consultation must still occur within the policy framework established by the legislation.

Amendment 37 also amends section 3.03 to do two things. First, it clarifies the fact that the amendment to section 2.06 above is subject to section 3.03(2) (where, if land becomes transferable land after the enactment date, 12 June 1991, the Minister must prepare deeds and appoint trustees as soon as possible). Second, it clarifies the fact that land can become transferable land after the enactment date solely as provided by sections 2.06 and 2.08.

Amendment 37 also inserts a new section, section 3.04A, to allow an area of transferable land to be included in an existing deed of grant of transferred land.

Amendment 38 amends section 3.07 to correct references to repealed legislation.

Amendment 38 also amends section 3.15 to replace a power to make declarations by order in council with a power to make regulations.

Amendment 38 also amends section 4.06 to do two things. First, it provides an avenue for appeal against a decision of the Registrar that a claim has not been duly made. Second, this amendment will preclude vexatious claims over claimable land after the Land Tribunal has made a recommendation to the Minister for a grant in fee simple or for the grant of a lease over claimable land.

Amendment 38 also amends section 4.08(c) to correct a minor drafting error.

Amendment 38 also inserts a new section, section 4.08A, to enable the Land Tribunal to reject vexatious repeat claims.

Amendment 38 also amends section 4.17 to clarify the basis upon which the Land Tribunal may recommend the grant of land. The amended section establishes a hierarchy on the basis of the grounds on which claims are proven.

Amendment 38 also inserts a new section, section 5.04A, to allow an additional area of claimable land to be included in existing areas of granted land without the need for a further hearing.

Amendment 39 amends sections 5.18 and 5.20 to replace powers to make declarations by order in council with a power to make regulations.

Amendment 39 also amends section 8.10 to ensure that the basis for the dismissal of Land Tribunal members under the *Aboriginal Land Act 1991* is consistent with the basis for the dismissal of Queensland Native Title Tribunal members under the *Native Title (Queensland) Act 1993*.

Amendment 39 also amends section 8.20 to ensure that the Land Tribunal's manner of operating is consistent with that of the Queensland Native Title Tribunal.

Amendment 39 also amends section 8.24 to prescribe those persons who have the power to summon a person to give evidence or produce documents before the Land Tribunal.

Amendment 40 amends section 8.26A to clarify those circumstances under which the Queensland Native Title Tribunal may operate as though it were the Land Tribunal.

Amendment 41 amends section 8.29 to provide an avenue for appeal against a decision of the Chairperson of the Land Tribunal that a claim has not been duly made.

Amendment 42 amends section 8.30A to clarify what evidence the Queensland Native Title Tribunal may receive in an inquiry; identifies those bodies from whom that evidence may be received; and adds reports and recommendations to the various matters that may be adopted by that Tribunal in an inquiry.

Amendment 43 inserts a new section, section 8.31A, which provides for a Land Tribunal member to complete those existing tasks which have commenced but which have not been completed at the time the member's appointment expires.

Amendment 43 also deletes two unnecessary sections, sections 9.05 and section 9.09.

Amendment 43 also amends section 9.10 to replace a power to make orders in council with a power to make regulations.

Amendment 43 also inserts a new section, section 9.11, to ensure that section 43 of the *Reprints Act 1992* applies to future reprints of the *Aboriginal Land Act 1991*.

Amendments 44 to 50 are made to the *Torres Strait Islander Land Act 1991* to ensure that existing consistencies between that Act and the *Aboriginal Land Act 1991* are maintained. Excepting that Amendment 44 amends section 2.17 of the *Torres Strait Islander Land Act 1991* to replace a power to make orders in council with a power to make regulations. There is no equivalent section to section 2.17 (which concerns the definition of boundaries of the Torres Strait area) in the *Aboriginal Land Act 1991*.

Amendment 51 amends section 44 of the *Land Act 1962* to specify the constitution of the Land Appeal Court when hearing appeals from the Queensland Native Title Tribunal.

Amendment 52 inserts a new part, Part 14, into the *Native Title (Queensland) Act 1993* to ensure that section 43 of the *Reprints Act 1992* applies to future reprints of the *Native Title (Queensland) Act 1993*.