

# **NATIVE TITLE (QUEENSLAND) STATE PROVISIONS BILL 1998**

## **EXPLANATORY NOTES**

### **GENERAL OUTLINE**

#### **Title of the Bill**

*Native Title (Queensland) State Provisions Bill 1998*

#### **Policy Objectives of the Bill**

The policy objectives of the Bill are:

1. to take advantage of the enabling provisions of the *Native Title (Amendment) Bill 1997* (Cwlth) to ensure the validation of those intermediate period acts which took place after the date of commencement of the *Native Title Act 1993* (Cwlth), on 1 January 1994, and before the High Court's decision in *Wik*, on 23 December 1996, and which may have been invalid because of native title;
2. to confirm the extinguishing effect of previous exclusive and non-exclusive possession acts on native title;
3. to omit certain provisions from the *Native Title (Queensland) Act 1993* which have not been proclaimed or are no longer appropriate as a result of the *Native Title (Amendment) Bill 1997* (Cwlth); and
4. to make certain consequential amendments of a minor and technical nature to the *Aboriginal Land Act 1991*, *Fossicking Act 1994*, *Land Act 1994* and the *Torres Strait Islander Land Act 1991*.

#### **Achieving the Policy Objectives of the Legislation**

The proposed legislation achieves these policy objectives by:

- validating intermediate period acts which took place after the date

of commencement of the *Native Title Act 1993* (Cwlth), on 1 January 1994, and before the High Court's decision in *Wik*, on 23 December 1996, in accordance with the provisions of the *Native Title (Amendment) Bill 1997* (Cwlth);

- providing that native title holders are entitled to compensation because of the validation of an intermediate act attributable to the State;
- confirming that native title has been extinguished by previous exclusive possession acts in accordance with the provisions of the *Native Title (Amendment) Bill 1997* (Cwlth);
- confirming the partial extinguishment of native title by previous non-exclusive possession acts in accordance with the provisions of the *Native Title (Amendment) Bill 1997* (Cwlth);
- providing for the payment of compensation to native title holders in accordance with the provisions of the *Native Title Act 1993* (Cwlth) where native title has been extinguished or partially extinguished as a result of an act attributable to the State;
- omitting those parts of the *Native Title (Queensland) Act 1993* relating to the establishment of a Queensland Native Title Tribunal, the Wardens Court (as an arbitral body), State Acquisition Acts and a number of other miscellaneous provisions which are now redundant as a result of the *Native Title (Amendment) Bill 1997* (Cwlth);
- omitting the reference in the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* to “the native title tribunal” as these provisions have not been proclaimed and no State native title tribunal exists;
- omitting the reference in the *Fossicking Act 1994* to a registered native title body corporate established under the *Native Title (Queensland) Act 1993* and inserting a reference to a registered native title body corporate established under the *Native Title Act 1993* (Cwlth) because the relevant provisions in the *Native Title (Queensland) Act 1993* have not been proclaimed and are to be omitted; and
- omitting the reference in the *Land Act 1994* to “a state native title register” and inserting a reference to “the native title register”

because the relevant provisions in the *Native Title (Queensland) Act 1993* have not been proclaimed and are to be omitted.

### **Administrative Cost**

The administrative cost to the Government will be those costs associated with determining whether or not compensation is payable for the extinguishment or partial extinguishment of native title and additional costs associated with the requirement contained within section 22H of the *Native Title Act 1993* (Cwlth) in relation to intermediate period mining acts.

### **Consistency with Fundamental Legislative Principles**

The Bill is consistent with the fundamental legislative principles contained in section 4 of the *Legislative Standards Act 1992*. Section 4 requires that legislation has sufficient regard to:

- (a) rights and liberties of individuals; and
- (b) the institution of Parliament.

#### Rights and liberties of individuals

With respect to the rights and liberties of individuals, section 4(3)(g) of the *Legislative Standards Act 1992* provides that one of the fundamental legislative principles is whether legislation does not adversely affect rights and liberties, or impose obligations, retrospectively. The Bill is consistent with this principle as the Bill simply confirms that native title has been extinguished by the grant of previous exclusive possession acts and partially extinguished by previous non-exclusive possession acts. This reflects the reasoning of the High Court in *Wik* and is consistent with the provisions of the *Native Title (Amendment) Bill 1997* (Cwlth).

Further, section 4(3)(i) of the *Legislative Standards Act 1992* provides that one of the fundamental legislative principles is whether legislation provides for the compulsory acquisition of property only with fair compensation. The Bill is consistent with this principle in that it provides that compensation is payable by the State for acts attributable to the State under the *Native Title Act 1993* (Cwlth).

Lastly, section 4(3)(j) of the *Legislative Standards Act 1992* provides that

one of the fundamental legislative principles is whether legislation has sufficient regard to Aboriginal tradition and Island custom. The Bill reflects the reasoning of the High Court in *Wik* and the provisions of the *Native Title (Amendment) Bill 1997* (Cwlth) in that it provides for the recognition and protection of native title where native title continues to exist.

### The institution of Parliament

With respect to whether the legislation has sufficient regard to the institution of Parliament, the Bill is consistent with fundamental legislative principles as the Bill does not allow for the delegation of legislative power, does not authorise the amendment of the Act other than by an Act and does not restrict, in any way, the scrutiny of any delegated legislative power by the Legislative Assembly.

### **Consultation**

Consultation has occurred with the following Departments:

- the Department of the Premier and Cabinet;
- the Department of State Development;
- the Treasury Department;
- the Department of Mines and Energy;
- the Department of Main Roads;
- the Department of Environment and Heritage; and
- the Department of Natural Resources.

Consultation has also occurred with representatives from indigenous, pastoral, agricultural and mining interests.

## **NOTES ON CLAUSES**

The *Native Title (Queensland) State Provisions Bill 1998* consists of three Parts.

Part 1 (clauses 1 and 2) of the *Native Title (Queensland) State Provisions Bill 1998* deals with the name and commencement of this Act.

Part 2 (clauses 3 to 20) of the *Native Title (Queensland) State Provisions Bill 1998* contains amendments to the *Native Title (Queensland) Act 1993*.

Part 3 (clause 21) of the *Native Title (Queensland) State Provisions Bill 1998* provides for amendments to other Acts.

*Clause 1* sets out the short title of the proposed Act.

*Clause 2* provides that the Act will commence on a day to be fixed by proclamation but also provides that the Act will otherwise automatically commence 9 months after the *Native Title Amendment Act 1998* (Cwlth) receives its Royal Assent.

*Clause 3* provides that Part 2 of the *Native Title (Queensland) State Provisions Bill 1998* amends the *Native Title (Queensland) Act 1993*.

*Clause 4* amends section 3 of the *Native Title (Queensland) Act 1993* so that the objectives of the *Native Title (Queensland) Act 1993* remain consistent with the objectives of the *Native Title Act 1993* (Cwlth).

*Clause 5* has the effect of omitting those definitions from section 4 of the *Native Title (Queensland) Act 1993* which are no longer relevant to that Act as amended by this Bill. It should be noted that because of section 5 of the *Native Title (Queensland) Act 1993* definitions within the *Native Title Act 1993* (Cwlth), in particular Part 15, apply equally to the *Native Title (Queensland) Act 1993*.

*Clause 6* renumbers existing section 7(b) of the *Native Title (Queensland) Act 1993* to become section 7(c) and inserts a new section 7(b) which provides that a further objective of Part 2 of the *Native Title (Queensland) Act 1993* is to validate intermediate period acts which are attributable to the State in accordance with section 22F of the *Native Title Act 1993* (Cwlth). Intermediate period acts are defined by section 232A of the *Native Title Act 1993* (Cwlth).

*Clause 7* inserts a new clause 8A into the *Native Title (Queensland) Act 1993* to validate every intermediate period act which is attributable to the State in accordance with section 22F of the *Native Title Act 1993* (Cwlth).

*Clause 8* reworks existing section 9 of the *Native Title (Queensland) Act 1993* so that the present references to Divisions 2 and 3 in sections 9(2) and 9(3) are replaced by a reference to the relevant sections of the Act,

namely sections 8 and new section 8A. The application of Divisions 2 and 3 to Part 2 of the *Native Title (Queensland) Act 1993* remains. This amendment is also required so as to reflect the insertion by clause 10 of this Bill of a new Division 2A and 2B into Part 2 into the *Native Title (Queensland) Act 1993*.

*Clause 9* provides that the heading to Division 2 of Part 2 of the *Native Title (Queensland) Act 1993* reflects the contents of that Division, namely the effect of validation of *past acts* on native title.

*Clause 10* inserts new Division 2A into Part 2 of the *Native Title (Queensland) Act 1993* which inserts new sections 13AA to 13AE. These sections confirm that the granting or vesting of a freehold estate, scheduled interest or certain leasehold tenures between 1 January 1994 and 23 December 1996 are category A intermediate period acts which extinguish native title and that the construction or establishment of public works between 1 January 1994 and 23 December 1996 are also category A intermediate period acts which extinguish native title over the land or waters upon which the public work is situated.

This clause additionally provides that Category B intermediate period acts extinguish native title to the extent to which they are inconsistent with native title and that the non-extinguishment principle applies to Category C and D intermediate period acts. Category A, B, C and D intermediate period acts are defined by sections 232B to 232E of the *Native Title Act 1993* (Cwlth).

This clause also creates a new Division 2B.

*Clause 11* amends existing section 13A of the *Native Title (Queensland) Act 1993* to reflect that existing Division 2 has been further divided into Division 2, and new Divisions 2A and 2B.

*Clause 12* amends the heading of existing Division 3 of Part 2 of the *Native Title (Queensland) Act 1993* to take account of the subdivision, by this Bill, of existing Division 2 of the *Native Title (Queensland) Act 1993* into Divisions 2 and 2A.

*Clause 13* amends the heading of existing section 14 of the *Native Title (Queensland) Act 1993* to properly describe the content of this section which deals with *past acts*. The clause also inserts this clarification into subsection (2) of section 14.

*Clause 14* inserts new section 14A into the *Native Title (Queensland) Act 1993*. New Section 14A ensures that the validation of intermediate period

acts under Division 2A of the Act does not affect any existing reservation or condition within the intermediate period act which is for the benefit of Aboriginal people or Torres Strait Islanders.

*Clause 15* recasts subsection (1) of existing section 15 of the *Native Title (Queensland) Act 1993* because the entitlement to compensation whilst confirmed by the *Native Title (Queensland) Act 1993* is provided for by the *Native Title Act 1993* (Cwlth). The clause confirms that native title holders are entitled to compensation for the validation of an intermediate period act attributable to the State.

Clause 15 also omits existing subsection (3) and (4) of section 15. The omission of subsection (3), which contains a reference to a specific section of the Commonwealth Act is no longer relevant because of the Commonwealth amendments. The principles to be applied with respect to compensation are contained within Division 5 of Part 2 of the *Native Title Act 1993* (Cwlth). Subsection (4) becomes redundant because clause 17 of this Bill omits the section to which the cross reference is made, namely section 26(2).

*Clause 16* amends section 18A of the *Native Title (Queensland) Act 1993* so that this section remains consistent with section 212(3) of the *Native Title Act 1993* (Cwlth) as amended by the *Native Title (Amendment) Bill 1997* (Cwlth).

*Clause 17* omits Parts 4 to 10 of the *Native Title (Queensland) Act 1993* which relate to the establishment and operation of recognised State arbitral bodies. These provisions are redundant as a result of the *Native Title (Amendment) Bill 1997* (Cwlth).

This clause inserts a new Part 4 (new sections 19 to 27) which confirms the total extinguishment of native title by previous exclusive possession acts which involve the grant of a freehold estate, scheduled interest or lease, as well as the extinguishment of native title on the land or waters upon which a public work has been established or constructed (section 20 and 21).

This clause inserts new section 22 which notes that the validation provisions (sections 10 to 13AE) do not apply where native title has already been extinguished by any previous exclusive possession act. The new section 23 also confirms the partial extinguishment of native title by previous non-exclusive possession acts to the extent that those acts are inconsistent with native title. Subsection (3) of section 23 also provides that the validating provisions do not apply where native title has already been

partially extinguished by previous non-exclusive possession acts. Extinguishment of native title by an exclusive possession act or non-exclusive possession act will not affect any beneficial reservation or condition in that act for the benefit of Aboriginal people or Torres Strait Islanders (section 24).

The new sections 25 and 26, inserted by clause 17, reflect the requirements of Commonwealth sections 23E and 23I respectively in order to take advantage of the confirmation of extinguishment provisions.

This clause also confirms that native title holders are entitled to compensation for extinguishment of their native title under this Division (section 27).

*Clause 18* omits existing sections 144, 144A and 144B of the *Native Title (Queensland) Act 1993* which are now superfluous provisions following the *Wik* decision and the provisions of this Bill.

*Clause 19* omits Division 2 of Part 12 of the *Native Title (Queensland) Act 1993* which relates to the compulsory acquisition of native title. These provisions are no longer necessary. The Commonwealth Bill removes the need to have particular pieces of legislation prescribed as “State Compulsory Acquisition Acts”. Importantly, the Commonwealth Bill provides that native title may be compulsorily acquired under any legislation where native title holders are accorded the same procedural rights as freeholders.

*Clause 20* omits Part 13 of the *Native Title (Queensland) Act 1993* which provided consequential amendments to other pieces of legislation. These amendments have been effected and their continued inclusion in the *Native Title (Queensland) Act 1993* is superfluous. The clause also omits Part 14 of the *Native Title (Queensland) Act 1993* which is unnecessary once the amendments contained in the Bill commence.

*Clause 21* provides that the Schedule amends the Acts contained within it.

The Schedule:

- omits the reference to “*the native title tribunal*” in the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* as these provisions in the *Native Title (Queensland) Act 1993* have not been proclaimed and are omitted by clause 17;



- omits the reference in the *Fossicking Act 1994* to “a registered native title body corporate established under the *Native Title (Queensland) Act 1993*” and replaces it with a reference to “a registered native title body corporate established under the *Native Title Act 1993 (Cwlth)*” because the relevant provisions in the *Native Title (Queensland) Act 1993* have not been proclaimed and are omitted by clause 17; and
- omits the reference in the *Land Act 1994* to “a native title register” and replaces it with a reference to “the native title register” because the relevant provisions in the *Native Title (Queensland) Act 1993* have not been proclaimed and are omitted by clause 17.