

1994

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

NATIVE TITLE BILL 1994

EXPLANATORY MEMORANDUM

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OUTLINE

On 2 June 1992 the High Court handed down what has become known as the Native Title Decision (1992) 175 CLR 1. Attachment A is a summary of the decision and its relevance to the ACT.

Following extensive consultations with the States, Territories, industry groups and Aboriginal peoples and Torres Strait Islanders the Commonwealth Parliament has enacted the *Native Title Act 1993* [the Commonwealth Act]. The Commonwealth Act provides a national scheme for the recognition and protection of native title and for its coexistence with existing land management systems.

The *Native Title Bill 1994* [the Bill] will result in the ACT participating in the national scheme. In particular the Bill validates and confirms existing titles, legislation and land management practices and usages to the maximum extent allowed by the Commonwealth Act.

It is not possible to understand the operation of the Bill without an appreciation of the operation of the Commonwealth Act. Attachment B is an outline of the operation of the Commonwealth Act. The outline also refers, where appropriate, to provisions of the Bill.

Details of the Bill

Preamble

Legislation that is historically significant traditionally has a preamble that summarises the historical facts that have led to the passage of the legislation and sets out its objective.

The Preamble refers to:

- the prior occupation, since time immemorial, of Australia by Aboriginal peoples and Torres Strait Islanders
- the central place that land plays in Aboriginal peoples' and Torres Strait Islanders' spiritual, social, cultural and economic life. The existence in the ACT of sites that evidence the use of the sites by various groups of Aboriginal peoples at different times for a variety of purposes
- the dispossession and dispersal of Aboriginal peoples and Torres Strait Islanders that has occurred since European settlement
- the fact that some Aboriginal peoples and Torres Strait Islanders have maintained their links with the land
- the High Court's rejection, in the Native Title Decision, of the doctrine of *terra nullius* and to the statement of the common law of Australia with respect to native title that is made in that Decision
- the passage by the Commonwealth Parliament of the *Native Title Act 1993* with the objective that native title will be recognised and protected; future dealings with native title will be regulated according to standards set in the Act; native title claims can be determined; and past acts that may be invalidated because of the existence of native title will be validated
- the Legislative Assembly for the Australian Capital Territory's intention to participate in the national scheme enacted by the Commonwealth Parliament

Clauses 1 and 2 are formal, they provide for the Bill's short title and that it will commence on Gazettal.

Clause 3 sets out that, in accordance with the Commonwealth Act, the objects of the Bill are to:

- validate past acts which may be invalidated by the existence of native title

- confirm existing rights to natural resources and access to waterways and public places.

Clause 4 provides for the citation of the Commonwealth Act.

Clause 5 provides that words used in the Bill have the same meaning as they do in the Commonwealth Act. This is convenient because the Bill makes the ACT a part of the national scheme that is established by the Commonwealth Act.

Part II - sections 6 - 9

Section 6 states the Part is enacted in accordance with section 19 of the Commonwealth Act.

Section 7 validates past acts that are attributable to the ACT. [Explanation: page 11 for "past act".]

Section 8(1) provides that a Category A past act, other than a public work, extinguishes native title. [Explanations: page 11 for "Category A past act", page 12 for "public work".]

Section 8(2) provides that a past act which is a public work extinguishes native title.

Section 8(3) provides that a Category B past act extinguishes native title to the extent it is inconsistent with native title. [Explanation: page 12 for "Category B past act".]

Section 8(4) provides that a Category C past act or a Category D past act is subject to the non-extinguishment principle. [Explanations: page 13 for "Category C past act", page 13 for "Category D past act" and page 13 for "non-extinguishment principle".]

Section 8(5) provides that an extinguishment of native title that occurs because of the validation of a pastoral lease does not of itself give the right to remove Aboriginal persons from the lease.

Section 9 provides that reservations in favour of Aboriginal peoples or Torres Strait Islanders and non-native title rights of Aboriginal peoples or Torres Strait Islanders are not affected by section 8.

Sections 8(5) and 9 are not likely to have any special relevance to land or Aboriginal peoples or Torres Strait Islanders in the ACT. The ACT Government is not aware that Aboriginal peoples reside on or exercise access rights over pastoral leases. It appears at least arguable that the ACT's rural leases are agricultural leases rather than pastoral leases. [Under the Commonwealth Act a "pastoral lease" is a lease for maintaining or breeding sheep, cattle or other animals or for another pastoral purpose and an "agricultural lease" is a lease for agricultural purposes - sections 248 and 247 of Commonwealth Act respectively.]

The ACT Government is not aware of any reservation that has been made for the benefit of Aboriginal peoples or Torres Strait Islanders. It is also not aware of any

way in which the effect of validation set out in section 8 could affect non-native title rights or interests of Aboriginal peoples or Torres Strait Islanders.

However, sections 8(5) and 9 must be included in the Bill because section 19 of the Commonwealth Act provides that the Bill may validate past acts attributable to the ACT if it contains provisions to the same effect as sections 15 and 16 of the Commonwealth Act [sections 8(5) and 9 are to the same effect as sections 15(2) and 16 respectively].

Part III - sections 10 - 12

Section 10 states that this Part is enacted in accordance with section 212 of the Commonwealth Act.

Section 11 confirms:

- existing ownership by the Crown of natural resources, such as minerals
- the Crown's existing right to use, control and regulate the flow of water. For example, in the Cotter Catchment
- existing fishing access rights

Section 12 confirms public access to waterways and their beds, banks or foreshores and to places that were on 31 December 1993 public places. This would confirm the public's access to, for example, the Murrumbidgee River and Namadgi National Park.

As set out in section 212(3) of the Commonwealth Act neither confirmation will extinguish or impair any native title rights and interests.

ATTACHMENT A

SUMMARY OF NATIVE TITLE DECISION AND ITS RELEVANCE TO THE ACT

The report of the Decision runs to approximately 200 pages and comprises 5 separate reasons for judgment [Brennan J with whom Mason CJ and McHugh J agreed; Deane and Gaudron JJ; Dawson J; and Toohey J]. With the exception of Dawson J the Court agreed that the rights of Australia's indigenous peoples in relation to land survived non-indigenous settlement of Australia. These rights were variously referred to in the reasons for judgment as "native title" or "traditional title" with "native title" being the most commonly used expression.

The judgments of the majority indicate that in some circumstances native title survives to this day.

The judgments contain a number of views on the nature of native title, the circumstances in which it survives and on the effect and consequences of non-indigenous activity that has over the years been inconsistent with native title. As a result there is some scope for uncertainty over the Decision. However, the relevance of the Decision for land titles in the ACT is reasonably clear.

The starting point in this is the judgment of Brennan J. As set out above his judgment was agreed with by Mason CJ and McHugh J and accordingly it expresses the view which had the greatest support. After a lengthy examination of the issues raised by the case Brennan J set out his conclusions in summary form. The following points are drawn from this summary:

- native title survived non-indigenous settlement, but the title was liable to be extinguished by a valid exercise of power which is inconsistent with the continued enjoyment of native title.
- an alienation of land by the Crown that is inconsistent with native title extinguishes the title. As examples of inconsistent grants he instanced grants of freehold and leasehold. The grant of lesser interests in land, such as an authority to prospect for minerals would not necessarily extinguish native title.
- the use by the Crown of land in a way that precludes enjoyment of native title extinguishes the title. Examples of such Crown use include the construction of roads and government buildings. Not all Crown uses extinguish native title, for example, the declaration and use of an area as a national park would not necessarily extinguish it.
- the nature of native title is to be ascertained according to the laws and customs of the indigenous people who are entitled to the title. The laws and customs can develop over time and are not frozen in the state they were in at the time of non-indigenous settlement.

- native title is extinguished if the indigenous people cease to acknowledge the laws and customs that link them to the land.

Accordingly, for native title to survive at least two tests must be satisfied:

1. The Crown must not have extinguished the title.
2. The indigenous people must have maintained their links with the land.

A.C.T. POSITION

Extinguishment

Non-indigenous settlement of the area that is now the ACT commenced in the first half of the 19th century. This settlement was facilitated by the granting of freehold and leasehold interests over large areas. These grants covered very nearly all of what is now the city of Canberra and the surrounding rural areas of the ACT. In what is now the Namadgi National Park the grants were not as extensive. And in the part of the Park which is the Cotter River Catchment Area there were very few grants.

Large areas of the ACT have been appropriated for public purposes. These purposes include:

- environment protection, Namadgi National Park.
- water catchment, Cotter River Catchment Area.
- scientific research, Orroral Valley Tracking Station, Honeysuckle Creek, Mount Stromlo.
- public recreation, parks and lakes.
- roads.
- water storage and reticulation, sewage treatment and stormwater.
- electricity transmission.
- legislative, executive and judicial functions.

The effect of these appropriations on native title is not always easy to establish. Building an office block would seem to extinguish the title, but using the Cotter River Catchment Area as Canberra's water supply may not extinguish all aspects of the title.

It is also necessary to examine the operation of legislation which applies in the ACT. Some of this legislation could have the effect of extinguishing or at least affecting

native title. Any suggestion that the legislation did operate in this way would have to be examined against the common law presumption that legislation does not affect existing rights unless it does so in clear terms. For example:

Cotter River Act 1914 makes it an offence to fish in the Cotter catchment. It also makes it an offence to camp or picnic without permission in the area. These offences are said not to affect the rights of any person who holds a Crown Grant, Conditional Purchase, Lease, Licence or Permissive Occupancy.

Trespass on Territory Land Act 1932 formerly the *Trespass on Commonwealth Land Ordinance 1932* makes it an offence to camp in an area that is not designated as a camping area.

Careless Use of Fire Act 1936 makes it an offence to light fires in certain areas and at certain times of the year.

Summary of land that has not been alienated

The land that has not been alienated by freehold or leasehold grants includes:

- the more significant watercourses and their river flats. These include the Murrumbidgee River, Molonglo River, Naas River and Gudgenby River.
- land that was reserved for purposes associated with grazing activities. This includes land reserved for travelling stock reserves, water, reserves, camping reserves and the like. The land may have been resumed from previous freehold and leasehold grants.
- trig stations on the region's more prominent peaks and hill tops.
- the more inaccessible land in what is now Namadgi National Park.

A more detailed examination of the circumstances of the use of these categories of land would need to be made to determine whether native title had otherwise been affected.

Maintenance by indigenous people of links with the land

This is a matter the ACT Government has no special knowledge of. However, it seems likely the links will be strongest in areas that have not been alienated or appropriated for non-indigenous uses.

Racial Discrimination Act 1975 (Cth)

The Racial Discrimination Act came into force on 31 October 1975. The High Court examined the relevance of this legislation to the extinguishment of native title rights in litigation that preceded the Native Title Decision (1988) 166 CLR 186. The

Act has the effect that title to land may not be dealt with in a way that discriminates on the basis of race.

For example, if titles generally may be extinguished only after a notification process is completed and compensation paid then native title can be extinguished only after these requirements are met. Also native title cannot be extinguished merely because it is native title or because it is enjoyed by the members of a particular race.

SUMMARY OF A.C.T. POSITION

Based on the above the ACT Government has been advised that:

- **It is very unlikely a Native Title Decision style claim for the ACT's residential, commercial and rural lands will succeed.**

To succeed the claim would have to relate to a lease that has been granted or a government appropriation that occurred since 31 October 1975, the date on which the Racial Discrimination Act commenced. The land the subject of the lease or appropriation would have to be land that was not included in any of the freehold or leasehold grants or the appropriations that were made prior to that date or where native title was not otherwise extinguished. Leasehold or freehold grants covered nearly all of the area that is now Canberra and the surrounding land. And the claimant would have to be able to demonstrate continuity of traditional links with the land.

- Areas such as Namadgi National Park are subject to different considerations. Some of the land in these areas was alienated by New South Wales authorities in the years prior to the ACT being established. Other areas have been appropriated for public purposes, the Cotter River Catchment being the most important example. The entire area is the subject of legislation which seems inconsistent with at least some aspects of indigenous use of the area.

The effect, if any, on native title of the appropriations and relevant legislation is difficult to assess.

ATTACHMENT B

OUTLINE OF OPERATION OF THE COMMONWEALTH ACT

Native title

The Act largely relies on the common law as set out in the Native Title Decision to provide a meaning for the term "native title". In section 12 it declares the common law on native title to have the force of a law of the Commonwealth. In section 223 it defines native title by reference to traditional laws and customs. The section also puts beyond doubt that hunting, gathering, or fishing rights are native title rights or interests. And it includes in the term some statutory rights and interests. So far as is known only the common law meaning of the term is relevant to the ACT.

Claims relating to native title

The Act provides for a native title claim to be made by a person who claims to hold the title. It is also possible for a person who has an interest in land or water and for Commonwealth, State and Territory Ministers to apply to the National Native Title Tribunal [the Tribunal] for a determination that native title does or does not exist in an area. Accordingly, if the status of land is uncertain a Government can remove the uncertainty by applying for a determination [sections 13 and 61].

Applications can also be made for the revocation or variation of a determination [sections 13 and 61] and for compensation where the validation of a title in accordance with the Act has extinguished or affected native title or where a future dealing with the land extinguishes or affects native title [section 20 and 61].

The Act establishes machinery for making decisions on applications that native title has survived in a particular area [see section 13 and Part 3 in particular]. As it has been decided the ACT is to rely on Commonwealth machinery for making determinations about native title there is no need for this machinery to be duplicated in ACT legislation.

The provisions in the Commonwealth Act that provide for applications to be made to, and determinations of native title to be made by, the Tribunal can operate in the ACT without any ACT legislation being passed.

Validations

In view of the Native Title Decision there is a possibility that titles to land in the ACT, legislation that relates to land and actions that have been taken in relation to land may be invalid or otherwise defective. The Commonwealth Act validates past acts that are attributable to the Commonwealth [section 14]. This would apply to actions of the Commonwealth prior to Self-Government Day [11 May 1989] and to any land management activity it has undertaken since that day. Shortly before Self-Government Day land in the ACT was divided into National Land [land required by the Commonwealth for its own purposes] and Territory Land [the

remainder of the land in the Territory]. Territory Land is much more extensive than National Land. On Self-Government Day the ACT became responsible for land management of Territory Land and the Commonwealth is responsible for land management of National Land.

The consequences of this validation are set out in sections 15, 16 and 17 of the Commonwealth Act. Section 19 of the Commonwealth Act allows the States and Territories to validate past acts that are attributable to them provided the State or Territory legislation includes provisions that are to the same effect as sections 15 and 16 of the Commonwealth Act. In accordance with this section clause 7 of the Bill validates past acts that are attributable to the ACT; clauses 8 and 9 are to the same effect as sections 15 and 16 of the Commonwealth Act.

Sections 14, 15, 16 and 17 of the Commonwealth Act require some explanation. Section 17 is discussed below in relation to compensation.

Section 14 validates past acts that are attributable to the Commonwealth.

Meaning of "past act"

Section 228 defines past act. Speaking very broadly a past act is legislation that was enacted before 1 July 1993 or any other act that occurred before 1 January 1994. It is also necessary that the act was invalid to some extent because of the existence of native title.

NOTE: an act is not a "past act" merely because it occurred in the past. To be a "past act" for the purposes of the Act it is also necessary that it be invalid because of the existence of native title. The ACT Government is not aware that acts that occurred in the past in the ACT are invalid because of the existence of native title. For example, the extensive grants of freehold that were made during the 19th century are considered valid and in accordance with the Native Title Decision they are considered to have extinguished native title.

An act that occurs after these dates may still be a past act. For example, if the act consists of the exercise of an option that arose before the date or is a renewal or extension that was required to be given before the date.

Past acts are placed in 4 categories [Categories A to D].

Category A past act

Section 15(1)(a) provides that a **Category A past act extinguishes native title**. The section does not deal with public works, see section 15(1)(b) below. Clause 8(1) of the Bill is to the same effect. But see above NOTE re meaning of "past act". It appears unlikely any land titles in the ACT are past acts.

Section 229 defines **Category A past act**. These include any of the following that exist on 1 January 1994, or are past acts because of the rule relating to extensions and

renewals that is mentioned above:

- freehold grants - but not freehold grants to the Crown in any of its capacities or to a statutory authority of the Crown. There have been no freehold grants in existence in the ACT since the mid-seventies when the Commonwealth acquired the last grants as part of its land acquisition program.
- leases - The lease must be for commercial, agricultural, pastoral or residential purposes. Very nearly all leases in the ACT are considered to fall into the commercial, agricultural or residential categories. It may be that some leases for community purposes, for example, would not be Category A past acts. The leases cannot be to the Crown etc.
- public works - these are defined in section 253 and include buildings and other structures that are fixtures, roads, railways, stock routes and major earthworks. A dam wall such as that at Cotter Dam would be a public work.

Section 15(1)(b) provides that **public works** [see above] **extinguish native title**. Clause 8(2) of the Bill is to the same effect. Public works are dealt with separately to other Category A past acts because of slight differences in the operation of the relevant definitions. These differences are not considered significant for the operation of the ACT Bill.

Category B past act

Section 15(1)(c) provides that a **Category B past act extinguishes native title to the extent it is inconsistent with native title**. Clause 8(3) of the Bill is to the same effect, but as set out above it appears unlikely any land titles in the ACT are past acts.

Section 230 defines **Category B past act**. The acts are leases that are still in force on 1 January 1994 which are not mining leases or leases that are Category A past acts. The rule relating to extensions and renewals applies to Category B past acts.

In the ACT it appears that what are referred to as community leases would, if invalid, be Category B past acts. Examples of the leases are those for religious, charitable, and some community related activities, such as for sporting clubs, or for Scout and Guide halls.

It appears that a validation of a lease that falls into this category would extinguish native title. They provide for the organisation that has the lease to have exclusive possession.

Category C or D past act

Section 15(1)(d) provides that a **Category C and a Category D past act is subject to the non-extinguishment principle**. Clause 8(4) is to the same effect.

Section 231 defines **Category C past act** as the grant of a mining lease, this is not considered relevant to the ACT.

Section 232 defines **Category D past act** as a past act that is not in any of the other Categories. The examples given in the Explanatory Memorandum to the Commonwealth Act are beekeeping licences and camping permits. It appears that other examples would be legislation repealed before 1 January 1994 and grants which expired before 1 January 1994 to which the extended definition of past act in section 228 does not apply.

Section 238 sets out the effect of the **non-extinguishment principle**. The objective of this principle is to preserve native title to the maximum extent. For example, if the Category C or Category D past act is wholly inconsistent with the native title the native title has no effect, but if the past act is removed then the native title's effect is revived. But as set out above for the act to be a Category C or D past act it must be invalid. If the act was valid it may extinguish or affect the native title, but in either case the non-extinguishment principle will not apply.

Section 15(2) sets out that the extinguishment of native title that is effected by section 15(1) does not by itself give a right to eject Aboriginal persons who are residing on or exercising access over a pastoral lease. The equivalent ACT provision is clause 8(5), but the point appears unlikely to arise in the ACT.

Section 16 provides that the validations that are effected by section 15 do not affect reservations in favour of Aboriginal peoples or Torres Strait Islanders nor does it affect rights of such people that are not native title rights. The equivalent ACT provision is clause 9, but the point appears unlikely to arise in the ACT.

Future acts

The Commonwealth Act establishes a regime for future dealings by the States and Territories which affect native title land. The regime applies regardless of any legislation by a State or Territory. Accordingly, it is not necessary for the ACT Assembly to legislate on the matter.

The regime depends on a classification of acts as permissible or impermissible.

Section 233 defines **future act** as making legislation on or after 1 July 1993 or any other act that takes place on or after 1 July 1994. As set out above some acts that take place on or after these dates are past acts because of the operation of the rule relating to extensions and renewals. The section expressly states that validation legislation such as the *Native Title Bill* is not a future act. The Bill depends for its effectiveness on it complying with section 19 of the Commonwealth Act, see above.

Section 235 defines permissible future act as:

- legislative action which applies in the same way to native title land as land held under another form of title.
- other action which could be done if the native title land was instead land held under another form of title.
- a renewal, re-grant, or extension of a commercial, agricultural or residential lease.
- a low impact future act. These are defined in section 234. The Explanatory Memorandum for the Commonwealth Act explains that they are acts such as the grant of a bee-keeping licence or a camping permit.
- an agreement covered by section 21, which provides that native title holders may surrender their native title or authorise any act in relation to it on terms and conditions that are acceptable to them. For example, the title can be exchanged in return for a form of title that could facilitate commercial development of the land.

Section 236 defines impermissible future act as a future act that is not a permissible future act. Section 22 makes an impermissible future act invalid to the extent it affects native title. [But see section 24 below.]

Section 23 makes a permissible future act valid.

If the future act is a compulsory acquisition nothing in the Commonwealth Act prevents any act that gives effect to the purpose of the acquisition from extinguishing native title, but otherwise the non-extinguishment principle applies. Compensation is payable to the native title holders. An example, of this process would be a compulsory acquisition to allow a school to be built. The acquisition would be subject to the non-extinguishment principle, but the building of the school would extinguish native title.

If the future act is not a compulsory acquisition the non-extinguishment principle applies and compensation is payable to the native title holders.

Section 24 allows land the native title status of which is uncertain to be dealt with. For the section to apply a person who wishes to deal with the land must lodge an application for a determination of native title with the Tribunal [such applications are referred to as non-claimant applications]. The application will be examined by the Registrar of the Tribunal and if the land it covers is not subject to an existing determination or a claim notice of the non-claimant application will be sent to, amongst others, a representative Aboriginal/Torres Strait Islander body for the area. A period of 2 months is provided for a person who claims to hold native title in the area to apply for a determination. If no application is made the non-claimant

applicant can deal with the land. Depending on the nature of the use the native title, if any, may be extinguished and compensation will be payable.

Section 25 permits future acts that take place because of legally enforceable rights that were created before 1 January 1994. The non-extinguishment principle applies to the acts and compensation is payable if compensation would be payable if the act had been done in relation to land held under another form of title.

Right to negotiate

Sections 26 - 44 of the Commonwealth Act deal with what is described as the right to negotiate. This right is primarily directed towards mining activity.

Compensation

As set out above the Commonwealth Act provides that compensation is to be paid in a number of circumstances. The Commonwealth Act establishes the right to compensation and it sets out who is to pay the compensation. Usually the compensation is paid by the Commonwealth, State or Territory to which the compensable act is attributable. It is not necessary for the ACT Assembly to provide a right to compensation.

An application for compensation must be made to the Registrar of the Tribunal [section 50(2)]. Generally, **compensation is to be just terms** for extinguishment of native title and for any loss, diminution, impairment or other effect on their native title rights and interests, native title holders are entitled to compensation under the same regimes as are applicable to ordinary title holders.

Confirmation of certain rights

Section 212 of the Act allows the ACT to confirm certain rights relating to natural resources, waters and fishing and to confirm existing public access to and enjoyment of various areas [waterways, beds and banks or foreshores of waterways and places that were public places on 31 December 1993. Clauses 11 and 12 of the Bill confirm these rights.

Section 212 goes on to provide that the confirmation will not extinguish or impair native title rights.

Section 211 of the Commonwealth Act provides that the exercise of some native title rights [hunting, fishing, gathering, cultural or spiritual activity or a prescribed activity] may be conducted without having to hold any permit that would otherwise be required. It would appear this section would be relevant to, for example, the operation of nature conservation legislation.