



BREAKING NEWS

AUSTRALIAN GOVERNMENT REFORMS TO THE NATIVE TITLE SYSTEM

Prepared by Native Title Unit of the Attorney-General's Department

On 21 August 2006 Attorney-General, the Hon Philip Ruddock MP, announced details of the Government's proposals to improve the resolution of native title claims. The proposals comprise a significant element of the Australian Government's broader package of complementary measures to improve the performance of the native title system as a whole. The Attorney-General has previously observed that the overall structure of the *Native Title Act 1993* is well established and the system is working, as evidenced by the increasing number of native title determinations and agreements. However, the framework remains too time consuming and expensive, and all stakeholders recognise there is significant room for improvement. The Government is implementing a coordinated package of reforms across all elements of the system, with a view to ensuring native title processes work more effectively and efficiently in the interests of all parties.

The Claims Resolution Review

The Federal Court and the National Native Title Tribunal (NNTT) are central to the native title system and play a key role in the resolution of native title claims. In late 2005 the Attorney-General established a review of the processes for resolving claims and appointed two independent consultants, Mr Graham Hiley QC and Dr Ken Levy to undertake the review. The consultants were asked to examine the role of the Court and NNTT in resolving claims and to advise the Government on measures for the more efficient management of claims within the existing framework of the Native Title Act.

The consultation process was extensive, including meetings in most State and Territory capitals with key stakeholders, as well as the consideration of 36 written submissions to the review. Stakeholders who participated in this process include representatives from Native Title Representative Bodies, key industry groups, State and Territory government officials, private legal practitioners, the Federal Court and the NNTT.

In announcing the Government's proposals, the Attorney-General released the detailed report of the

Review together with the Government's response. The response accepts most of the 24 recommendations made by the consultants, and adopts one of the options for institutional reform identified in the report.

Key elements of the Government response

Better communication and coordination

The Government considers it essential for the NNTT and the Court to work closely together to provide a spectrum of dispute resolution processes that can be applied as appropriate to claims. Measures to assist both institutions to operate with a common purpose are critical to enhancing the effectiveness of the native title system. Accordingly, the Government's response outlines measures to strengthen coordination between the NNTT and the Court, both in relation to particular claims and as well as in approaches taken by both institutions to broader case management. The measures include proposals for improved communication between the institutions, changes to enable the NNTT to assist the Court on specific matters (such as through a right to appear before the Court) as well as on progressing mediation in regions (through provision of regional mediation reports and work plans).


Removing duplication of functions

It is currently possible for parties to native title matters to be in mediation before both the NNTT and the Court at the same time. This can create confusion for parties and has significant resource implications. The Review concluded some changes to the respective functions of the Court and NNTT were needed to address this issue and presented a number of options for institutional reform.

The Government's preferred option is to retain the existing requirement for the Court to refer claims to the NNTT for mediation, and to make clear the Court cannot order separate mediation of matters while they are subject to mediation before the Tribunal. Although the Court will remain able to conduct alternative dispute resolution procedures (including mediation) for native title claims in specific circumstances, the reforms will ensure parties are only in mediation before one body at one time.

Effectiveness of NNTT mediation

The Government agreed with the consultants' recommendations on measures to ensure NNTT



mediation is as effective and efficient as possible. The measures include conferral of enhanced powers upon the Tribunal, such as the power to compel parties to attend mediation and to require production of documents. The NNTT's functions will be broadened, including through provision for a new inquiry function relating to particular matters associated with claims.

Behaviour of parties

While modifications to the institutional arrangements are both necessary and appropriate, the Government recognises parties to native title proceedings have a vital role in improving the effectiveness of the native title system, and that timely resolution of claims will require the cooperation of all parties. Under the proposed changes, all participants in mediation before the NNTT will be required to mediate in good faith. There will also be greater responsibility on claimants to progress claims. Claims made in response to future act notices, where the future act has been completed, may be dismissed if the applicant fails to take reasonable steps to progress the matter. Applicants of unregistered claims will also be required to amend their claims or provide additional information in order to meet the merits requirements of the registration test. The Government is also considering measures to ensure participation by non-government respondents is better directed to issues relevant to their specific interests.

The Government has made clear the proposed changes are not intended to wind back rights of native title holders, or to upset the existing balance of rights within the system. However, the Government considers all parties involved in native title processes have a shared responsibility and interest in acting in a flexible way to secure meaningful and realistic outcomes.

Next steps

FEATURE

NATIVE TITLE VICTORY FOR THE NOONGAR PEOPLE

On September 19, Justice Murray Wilcox handed down a preliminary finding that the Noongar people had established native title rights and interests over the metropolitan area in Perth, as part of the wider single Noongar claim covering 193,956 sq km from Hopetoun in the south to north of Jurien Bay. The Noongar people, represented by the South-West Aboriginal Land and Sea Council (SWALSC), had lodged the Single Noongar claim in the court in September 2003. Wilcox J

The Government is currently preparing legislative amendments necessary to implement the recommendations from the review, along with other changes to give effect to the inter-related reform measures. The other measures include:

- minor and technical amendments to the Native Title Act to address specific issues identified by stakeholders in relation to the operation of the legislation
- reforms to the program for funding respondents to native title claims to strengthen the focus on resolution of issues through agreement-making
- measures to assist in the effective function of prescribed bodies corporate, the bodies established to manage native title once it has been recognised
- further liaison with key stakeholders, including State and Territory governments, on steps to ensure greater transparency and communication between all parties involved in native title matters
- Reforms to improve the responsiveness, effectiveness, and accountability of Native Title Representative Bodies, which are fundamental to the operation of the native title system.

Further information about the reforms to the native title system is available at <http://www.ag.gov.au/nativetitlesystemreform>. The report of the Claims Resolution Review and the Government's response are available at <http://www.ag.gov.au/claimsresolutionreview>.

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said that the claimants, communally, held native title rights and interests that had survived since sovereignty despite the impact of colonisation in the area and the disruptions in the practice of traditional laws and customs caused by settlement. The judgement did not resolve issues of extinguishment, and, due to the complexity of that inquiry the judge recommended that the parties reach a negotiated settlement.

The full decision is available at: http://www.austlii.edu.au/au/cases/cth/federal_ct/2006/1243.html