

South Australia

NATIVE TITLE (SOUTH AUSTRALIA) ACT 1994

An Act relating to native title; and amending the Acts Interpretation Act 1915.

*This Act is reprinted pursuant to the Acts Republication Act 1967 and incorporates all amendments in force as at **22 January 2001**.*

It should be noted that the Act was not revised (for obsolete references, etc.) by the Commissioner of Statute Revision prior to the publication of this reprint.

NATIVE TITLE (SOUTH AUSTRALIA) ACT 1994

being

Native Title (South Australia) Act 1994 No. 92 of 1994
[Assented to 15 December 1994]¹

as amended by

Statutes Amendment (Native Title) Act 1998 No. 23 of 1998 [Assented to 2 April 1998]²

Native Title (South Australia) (Validation and Confirmation) Amendment Act 2000 No. 84 of 2000
[Assented to 14 December 2000]³

¹ Came into operation (except Parts 3-5) 15 December 1994: *Gaz.* 15 December 1994, p. 2129; Part 5 came into operation 9 May 1996; Parts 3 and 4 came into operation 17 June 1996: *Gaz.* 9 May 1996, p. 2440.

² Part 3 (ss. 9 & 10) came into operation 21 May 1998: *Gaz.* 21 May 1998, p. 2199; s. 11 came into operation 2 April 2000 (by virtue of the Acts Interpretation Act 1915, s. 7(5)).

³ **Came into operation 22 January 2001: *Gaz.* 18 January 2001, p. 68.**

N.B. The amendments effected to this Act by the *Native Title (South Australia) (Miscellaneous) Amendment Act 2000* had not been brought into operation at the date of, and have not been included in, this reprint.

NOTE:

- Asterisks indicate repeal or deletion of text.
- Entries appearing in bold type indicate the amendments incorporated since the last reprint.
- For the legislative history of the Act see Appendix.

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The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Native Title (South Australia) Act 1994*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

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**PART 2
BASIC CONCEPTS**

Interpretation of Acts and statutory instruments

3. (1) In this Act and in every other Act or statutory instrument, unless the contrary intention appears—

"**Aboriginal peoples**" means peoples of the Aboriginal race of Australia;

"**native title**"—*see section 4*;

"**native title declaration**" means a declaration that land is subject to, or not subject to, native title;

"**native title holder**" (or any other expression referring to a person or persons who hold native title in land) means—

- (a) if a body corporate is registered on a register of native title maintained under the law of the Commonwealth or the State as holding the native title on trust—the body corporate; or
- (b) in any other case—the person or persons who are recognised at common law as holding the native title;

"**native title land**" means land in respect of which native title exists or might exist but does not include—

- (a) land found or declared by the Supreme Court or the Environment, Resources and Development Court not to be subject to native title; or
- (b) land found or declared by a competent authority under a law of the Commonwealth not to be subject to native title;

"**native title question**" means a question about—

- (a) the existence of native title in land; or
- (b) the nature of the rights conferred by native title in a particular instance; or
- (c) compensation payable for extinguishment or impairment of native title; or
- (d) acquisition of native title in land, or entry to and occupation, use or exploitation of, native title land under powers conferred by an Act of the Parliament; or
- (e) any other matter related to native title,

(but does not include a question arising in criminal proceedings);

"**registered representative**" of native title holders means—

- (a) the body corporate that is the registered native title body corporate in relation to the native title under the law of the Commonwealth; or
- (b) the body corporate registered in the register of native title kept under the law of the State as the registered representative of the native title holders;¹

"**registered representative**" of persons who are registered under the law of the Commonwealth or the State as claimants to native title in the land means—

- (a) the person registered under the *Native Title Act 1993* (Cwth) in the *Register of Native Title Claims* as the registered native title claimant; or
- (b) the person registered in the *State Native Title Register* as the registered representative of the claimants;

"**representative Aboriginal body**" means—

- (a) in relation to the area described in schedule 1 of the *Pitjantjatjara Land Rights Act 1981*—Anangu Pitjantjatjara; and
- (b) in relation to the area described in schedule 1 of the *Maralinga Tjarutja Land Rights Act 1984*—Maralinga Tjarutja; and
- (c) in relation to an area defined by regulation for the purposes of this definition—a body representative of Aboriginal people prescribed by regulation.²

(2) A body may only be prescribed as a representative Aboriginal body for a defined area if the Minister is satisfied that—

- (a) the body is broadly representative of the Aboriginal peoples in the area; and
- (b) the body satisfactorily performs its existing functions; and
- (c) the body will satisfactorily—
 - (i) facilitate the researching, preparation and making of claims, by Aboriginal individuals or groups, for determinations of native title or for compensation for acts affecting native title; and
 - (ii) assist in resolution of disagreements among Aboriginal individuals or groups about the making of such claims; and
 - (iii) assist Aboriginal individuals or groups by representing them, if requested to do so, in negotiations and proceedings relating to acts affecting native title or the provision of compensation in relation to such acts.

(3) In this Act—

"**Commonwealth Act**" means the *Native Title Act 1993* (Cwth);

"**Commonwealth Registrar**" means the Native Title Registrar appointed under Part 5 of the *Native Title Act 1993* (Cwth);

"**Commonwealth Minister**" means the Minister of State for the Commonwealth designated by regulation as the Commonwealth Minister for the purposes of this Act;

"**Court**" means the Supreme Court or the ERD Court;

"**ERD Court**" means the Environment, Resources and Development Court;

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"**mining tenement**" means—

- (a) a licence or lease authorising exploration for, or recovery of, minerals or petroleum; or
- (b) a claim registered under the *Mining Act 1971*;

"**proceedings**" does not include criminal proceedings;

"**Registrar**" means the Registrar of the ERD Court;

"**State Minister**" means the Minister designated by regulation as the State Minister for the purposes of this Act.

(4) An explanatory note to a provision of this Act forms part of the provision to which it relates.

¹ See Part 4.

² See subsection (2).

Native title

4. (1) The expression "**native title**" means the communal, group or individual rights and interests of Aboriginal peoples in relation to land or waters where—

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples; and
- (b) the Aboriginal peoples, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law; and
- (d) the rights and interests have not been extinguished or have revived.¹

(2) Without limiting subsection (1), "**rights and interests**" in that subsection includes hunting, gathering, or fishing, rights and interests.

(3) Subject to subsection (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples, those statutory rights and interests are also covered by the expression "**native title**".

(4) To avoid doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title):

- (a) in a pastoral lease granted before 1 January 1994; or
- (b) in legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

(5) To avoid doubt, native title in land was extinguished by an act occurring before 31 October 1975 that was inconsistent with the continued existence, enjoyment or exercise of native title in the land.

Explanatory note—

This subsection is intended to be consistent with principles governing the extinguishment of native title as stated in *Mabo v Queensland (No. 2)* (1992) 175 C.L.R. 1. Examples of this principle of major public importance are—

- (a) the valid grant, before 31 October 1975, of a freehold interest in land;
- (b) the valid grant, before 31 October 1975, of a lease (including a pastoral lease but not a mining lease);
- (c) the valid grant, assumption or exercise by the Crown, before 31 October 1975, of a right to exclusive possession of land.

However, if the grant of a freehold interest, a lease or a right of exclusive possession was made to or for the benefit of Aboriginal people, this subsection is not intended to apply to the grant unless it is a category A past act within the meaning of section 229, or a category B past act within the meaning of section 230, of the Commonwealth Act and, if it is a category B past act, this subsection only applies to the extent that the grant is inconsistent with the continued existence of native title in the land.

¹ If section 47 of the *Native Title Act 1993* (Cwth) is a valid enactment of the Commonwealth Parliament, it is possible that native title may revive in certain circumstances under that section.

**PART 3
NATIVE TITLE QUESTIONS**

DIVISION 1—JURISDICTION

Jurisdiction of Supreme Court and ERD Court

5. (1) The Supreme Court and the ERD Court each have jurisdiction to determine native title questions.¹

(2) However, if it is clear before proceedings are commenced that they involve a native title question, the proceedings should be commenced in the ERD Court.

(3) If proceedings are commenced in the ERD Court because of subsection (2), the Court has jurisdiction to decide not only the native title questions but also the other questions raised in the proceedings.

(4) The same procedural and other rules apply to both the Supreme Court and the ERD Court in exercising the jurisdiction to determine native title questions.

Explanatory note—

For example, the same rules about costs would be applied by both Courts.²

¹ The jurisdiction includes power to make a native title declaration ie a declaration that particular land is subject to or not subject to native title.

² See section 29 of the *Environment, Resources and Development Court Act 1993*.

Reference of proceedings between courts

6. (1) The Supreme Court may, and other courts of the State must, refer proceedings involving a native title question to the ERD Court for hearing and determination.

(2) If proceedings are referred under this section to the ERD Court for hearing and determination, the ERD Court has jurisdiction to hear and determine the native title question and the other questions involved in the proceedings that might, if it were not for the reference, have been determined by the court from which the proceedings were referred.

(3) The ERD Court may, on application by a party or on its own initiative, refer proceedings involving a native title question to the Supreme Court for hearing and determination.

(4) The Supreme Court may, on the application by a party or on its own initiative, remove proceedings involving a native title question from the ERD Court into the Supreme Court for hearing and determination.

(5) In deciding whether proceedings involving a native title question should be heard by the Supreme Court or the ERD Court, the following matters must be taken into consideration:

- (a) the importance of the questions involved in the proceedings; and
- (b) the complexity of the legal and factual questions involved in the proceedings.

DIVISION 2—NATIVE TITLE COMMISSIONERS

Native title commissioners

7. In proceedings involving a native title question, the Court must make use of the expert assistance of native title commissioners appointed under the *Environment, Resources and Development Court Act 1993*.

DIVISION 3—CONFERENCES

Conferences

8. (1) Before the Court proceeds to a formal hearing of contested proceedings involving a native title question, it must call a conference of the parties to the proceedings to explore the possibility of resolving the matters in dispute by agreement and without resorting to a formal hearing.

(2) However, the Court may dispense with a conference if the Court is of the opinion that no useful purpose would be served by a conference between the parties before the hearing of the matter or there is some other adequate reason for dispensing with a conference.

Mediator

9. (1) A mediator selected by the Court from among the Judges of the Court and the native title commissioners in accordance with the rules of the Court will preside at the conference.

(1a) A member of the Court may be appointed to assist a mediator in the conduct of the conference and a member so appointed is entitled to be present at the conference and to provide advice to the mediator.

(2) The mediator may adjourn or reconvene the conference from time to time.

(3) The mediator may allow a person to participate in the conference by—

(a) telephone; or

(b) closed-circuit television; or

(c) other means of communication.

(4) The mediator may exercise powers of the Court delegated by the rules.

Conclusion of conference

10. (1) If a settlement is reached at a conference, the Court may make orders to give effect to the terms of agreement.

(2) If it appears that there is no reasonable prospect of reaching a negotiated settlement within a reasonable time, the mediator must close the conference and report the failure to reach agreement to the Court.

Evidence

11. Evidence of anything said or done in a conference under this Division is inadmissible in proceedings before the Court unless all parties to the proceedings consent.

Disqualification

12. Unless all parties agree to the contrary, a member of the Court who has acted as mediator, or assisted a mediator, at a conference under this Division is disqualified from taking further part in the proceedings.

DIVISION 4—HEARINGS

Principles governing hearings

13. On the hearing of proceedings involving a native title question—

(a) the Court will proceed with the minimum of formality; and

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- (b) the Court is not bound by the rules of evidence and may inform itself as it thinks fit; and
- (c) the Court must act according to equity, good conscience and the substantial merits of the case and without regard to legal technicalities and forms.

Court to take into account matters of concern to Aboriginal people

14. (1) The Court must, in conducting proceedings involving a native title question, take account of the cultural and customary concerns of Aboriginal peoples.

(2) However, the Court is not required to inquire into matters of which there is no evidence before the Court.

DIVISION 5—NOTIFICATION OF HEARINGS AND DECISIONS

Registrar to be informed of applications etc involving native title questions

15. The Court must ensure that the Registrar is informed of—

- (a) applications to, and proceedings in, the Court involving native title questions; and
- (b) decisions of the Court on native title questions.

Notice of hearing and determination of native title questions

16. (1) When the Court is to hear a native title question and when the Court decides a native title question, the Registrar must give reasonable notice of the hearing or decision to—

- (a) all who hold or may hold native title in the land to which the proceedings relate;¹ and
- (b) any person who has a registered interest in the land; and
- (c) any person who holds a mining tenement over the land; and
- (d) the Commonwealth Registrar.

(2) A notice of hearing must state—

- (a) that an interested person may apply to the Court, within two months after the notice is given, to be joined as a party to the proceedings; and
- (b) if the hearing may result in a native title declaration—that the declaration may be made even though no person claiming native title in the land is joined as a party to the proceedings.

(3) The following are interested persons—

- (a) the registered representative of claimants to, or holders of, native title in the land; and
- (b) a person whose interests would be affected by the existence of native title in the land (including a person who proposes to carry out mining operations on the land); and
- (c) a representative Aboriginal body; and
- (d) the State Minister; and
- (e) the Commonwealth Minister.

(4) This section does not apply to a native title question arising in proceedings of a kind prescribed by regulation.

¹ For method of service see Part 5.

**PART 4
CLAIMS AND DETERMINATIONS OF NATIVE TITLE**

DIVISION 1—STATE NATIVE TITLE REGISTER

Register

17. (1) The Registrar must keep a register¹ of native title and claims to native title in land in the State.

(2) The Registrar must record in the register—

- (a) all decisions by the courts of the State on questions about the existence of native title in land or the nature of the rights conferred by native title; and
- (b) all decisions by competent authorities under the law of the Commonwealth about the existence of native title in land in the State or the nature of rights conferred over land in the State by native title; and
- (c) all claims to native title in land accepted under this Division; and
- (d) the name and address for service of the registered representative of the claimants; and
- (e) the information required by regulation.

(3) The register must be available for inspection during normal business hours on payment of the fee fixed by the regulations.

(4) However—

- (a) a part of the register must be set aside for the inclusion of information and materials of a nature that cannot be publicly disclosed without contravening Aboriginal tradition; and
- (b) the names and addresses of persons who claim native title in land (except names and addresses for service) must be included in that part of the register; and
- (c) the Court or the Registrar may direct that specified information or materials be included in that part of the register; and
- (d) that part of the register may only be inspected as authorised by the Court or the Registrar.

¹ The register may be referred to as the *State Native Title Register*.

DIVISION 2—REGISTRATION OF CLAIMS

Registration of claims to native title

18. (1) A person who claims to be entitled to native title in land may apply to the Registrar for registration of the claim.

(2) An application may be made under this section by a representative Aboriginal body on behalf of persons who claim to hold native title in land.

(3) An application under this section must—

- (a) be in writing; and

- (b) define the land to which the claim is made with sufficient particularity to enable it to be readily identified; and
- (c) state the nature of the rights conferred by the native title; and
- (d) state the basis on which native title is asserted; and
- (e) contain all information known to or ascertainable by reasonable inquiry by the applicant about the title to, and tenure of, the land and the history of the title to, and tenure of, the land, including information about present and former association by Aboriginal peoples with the land; and
- (f) state the name and address for service of the person who is to be the registered representative of the claimant; and
- (g) contain the information, and be accompanied by the documents, required by regulation; and
- (h) be accompanied by a statutory declaration verifying the information contained in the application.

(4) If the land over which native title is claimed is land in respect of which native title might exist, the Registrar must register the claim unless authorised to reject it under subsection (5).

(5) If, in the Registrar's opinion—

- (a) the application is frivolous or vexatious; or
- (b) the application cannot be made out for obvious reasons,

the Registrar must refer the application to a Judge of the ERD Court, or at the direction of the Judge to a Master of the ERD Court, and, if the Judge or Master agrees with the Registrar's assessment of the application, the Registrar must reject the application but, if the Judge or Master does not agree, the Registrar must register the claim.

(6) If the Registrar rejects an application for registration of a claim under this section, the applicant for registration may apply to the Court for a review of the decision to reject the application.

(7) On a review, the Court may confirm the decision to reject the application, or direct the Registrar to register the claim.

DIVISION 3—NATIVE TITLE DECLARATIONS

Native title declaration

19. (1) An application for a native title declaration in respect of land may be made to the Court by an interested person.

(2) The following are interested persons—

- (a) a person registered as a claimant to native title in the land; and
- (b) a person whose interests would be affected by the existence of native title in land (including a person who proposes to carry out mining operations on the land); and

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- (c) a representative Aboriginal body; and
- (d) the State Minister; and
- (e) the Commonwealth Minister.

Application for native title declaration

20. (1) An application for a native title declaration must—

- (a) be in writing; and
- (b) define the land to which the application relates with sufficient particularity to enable it to be readily identified; and
- (c) state the nature of the declaration sought by the applicant and the grounds on which the declaration is sought; and
- (d) contain all information known to or ascertainable by reasonable inquiry by the applicant about the title to, and tenure of, the land and the history of the title to, and tenure of, the land, including information about present and former association by Aboriginal peoples with the land; and
- (e) state the name and address for service of the applicant; and
- (f) contain the information, and be accompanied by the documents, required by regulation; and
- (g) be accompanied by a statutory declaration verifying the information contained in the application.

(2) An application for registration of a claim to native title in land is taken to be an application for a declaration that the land is subject to the native title that the claimant claims to have in the land.

(3) If an applicant claims to hold, or to represent the holders of, native title in land, the application must be made by way of an application for registration of the claim.

Concurrent proceedings

21. (1) If a non-claimant application is made under this Act, and there is a concurrent claimant application under the Commonwealth Act (accepted before or after the non-claimant application is made)—

- (a) the non-claimant application under this Act is, to the extent that it relates to the same land as the claimant application, stayed while proceedings based on the claimant application continue; and
- (b) to the extent that the non-claimant application relates to land that becomes subject to a native title declaration under the Commonwealth Act, is permanently stayed.

Explanatory note—

A **claimant application** is an application for a declaration that land is subject to native title made on behalf of the persons who claim to be entitled to the native title by the registered representative of those persons.

A **non-claimant application** is any other application for a native title declaration.

(2) However if a native title declaration under the Commonwealth Act is varied or revoked, the application revives to the extent that it relates to land that ceases to be subject to the declaration.

Cross-vesting scheme

22. (1) For the purpose of avoiding multiplicity of proceedings, the State Minister and the Commonwealth Minister may enter into an arrangement (a "**cross-vesting scheme**") providing reciprocal powers for the transfer of proceedings involving native title questions between the Court and Commonwealth authorities with power to adjudicate on native title questions.

(2) If proceedings are transferred to a Commonwealth authority under a cross-vesting scheme, the Commonwealth authority has, subject to the conditions of the scheme, jurisdiction to decide native title questions and also other questions arising in the proceedings.

Hearing and determination of application for native title declaration

23. (1) On the hearing of an application for a native title declaration, the Court may allow an interested person who desires to be heard on the application to introduce evidence, and to make submissions, relevant to the subject matter of the application.

(2) The following are interested persons—

- (a) the registered representative of claimants to native title in the land; and
- (b) a person whose interests would be affected by the existence of native title in the land (including a person who proposes to carry out mining operations on the land); and
- (c) a representative Aboriginal body; and
- (d) the State Minister; and
- (e) the Commonwealth Minister; and
- (f) any other person who, in the Court's opinion, may be in a position to contribute to the proper resolution of the questions at issue.

(3) If, after hearing the evidence and submissions, the Court is satisfied that native title exists in the land or a particular part of the land, the Court must, on the application of the representative of the claimants to native title in the land—

- (a) define the land in which the native title exists; and
- (b) state who holds the native title; and
- (c) define the nature and extent of the rights and interests conferred by the native title and, in particular—
 - (i) state whether the native title confers rights to the possession, occupation, use and enjoyment of the land to the exclusion of all others; and
 - (ii) state the rights and interests of the holders of the native title that the Court considers to be of importance; and
- (d) state the nature and extent of other interests in the land that may affect the native title or rights and interests deriving from the native title.

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(4) A declaration that native title exists in land is, subject to any qualification stated in the declaration, to be regarded as a comprehensive declaration of all native title in the land and hence excludes the possible existence of other native title in the same land.

(5) A native title declaration is, subject to any qualification stated in the declaration, conclusive except in proceedings by way of appeal from the declaration or for variation or revocation of the declaration.¹

(6) After hearing the evidence and submissions, the Court may, if satisfied that native title does not exist in the land, or a particular part of the land, to which the application relates, make a declaration to that effect.

¹ See section 25.

Registration of representative

24. (1) If the Court proposes to declare land subject to native title, the Court must invite a representative of the persons recognised at common law as holders of the native title (the "**common law holders**"), within a specified period—

- (a) to nominate a body corporate to be the registered representative of the holders of native title in the land; and
- (b) to indicate whether holders of native title in the land want the registered representative to hold the native title on their behalf.

(2) A body corporate—

- (a) is not eligible for nomination as the registered representative of the holders of native title in land unless it complies with the principles of eligibility prescribed by regulation; but
- (b) if it does comply with the principles of eligibility—may be the registered representative of different groups of Aboriginal people who hold different rights and interests in the same land or who hold rights and interests in different land.

(3) A body corporate nominated to be the registered representative of holders of native title in land—

- (a) must be recorded in the register as the registered representative; and
- (b) must carry out functions assigned by or under an Act to the registered representative.

(4) If a body corporate that is eligible for nomination under this section is not nominated within the period specified by the Court, the Court must select an eligible body corporate to be the registered representative of the holders of native title in accordance with the regulations.

(5) If—

- (a) the representative of holders of native title in the land indicate that they want the body corporate nominated to hold the native title on their behalf; and
- (b) the body corporate consents to hold the native title in trust,

the Court must make an order vesting the native title in the body corporate to be held in trust for the common law holders.

(6) The terms on which the native title is to be held on trust are to be as prescribed by regulation and the trustee must carry out functions given to it by regulation.

(7) The Court may on application by a representative of the persons who are recognised at common law as the holders of native title in land, order that the registered representative of, or trustee for, the native title holders be changed by substituting a nominated body corporate for the one previously recognised as the registered representative or trustee.

Revision of declaration

25. (1) An application may be made for variation or revocation of a native title declaration by—

- (a) the registered representative of the holders of native title in the land to which the declaration relates; or
- (b) the Commonwealth Minister; or
- (c) the State Minister; or
- (d) the Registrar.

(2) An application may only be made under this section on the ground that—

- (a) the declaration is no longer correct because of events that have taken place since it was made; or
- (b) the interests of justice require the variation or revocation of the declaration.

Merger of proceedings

26. If the Court has separate proceedings before it in which native title declarations are sought in relation to the same land, the proceedings must be amalgamated and heard together unless the Court is satisfied that there is good reason for hearing the proceedings separately.

Protection of native title from encumbrance and execution

27. If native title is held on trust under this Division, the native title—

- (a) cannot be dealt with except as authorised by regulation; and
- (b) cannot be taken in execution under the judgment of a court unless the native title is, under the terms of a dealing authorised by regulation, liable to be taken in execution under the judgment of a court.

PART 5
SERVICE ON NATIVE TITLE HOLDERS

Service on native title holder where title registered

28. (1) If native title is registered under the law of the Commonwealth or the State, a notice or other document is validly served on the holders of the native title if the notice or other document is given personally or by post to—

- (a) their registered representative; and
- (b) the relevant representative Aboriginal body for the land.

(2) If—

- (a) an Act provides for the service of notices or other documents on persons with an interest in land, but does not specifically prescribe a method of service on native title holders; and
- (b) native title is registered under the law of the Commonwealth or the State in the relevant land and the possibility that unregistered native title may concurrently exist in the same land has been excluded by declaration of a court of competent jurisdiction,

the Act is taken to provide for service on native title holders in accordance with this section (which applies to service on native title holders under the Act to the exclusion of provisions of the Act about how service is to be effected).

Service on native title claimants

29. (1) If a claim to native title is registered under the law of the Commonwealth or the State, a notice or other document is validly served on the claimants to that native title if the notice or other document is given personally or by post to—

- (a) their registered representative; and
- (b) the relevant representative Aboriginal body for the land.

Service where existence of native title, or identity of native title holders uncertain

30. (1) A notice or other document is validly served on all who hold or may hold native title in native title land if—

- (a) a copy of the notice or other document is given personally or by post to—
 - (i) all registered representatives of holders of native title in the land; and
 - (ii) all registered representatives of persons who are registered under the law of the Commonwealth or the State as claimants to native title in the land; and
 - (iii) the relevant representative Aboriginal body; and
 - (iv) the Commonwealth Minister; and
 - (v) the State Minister; and
- (b) notice of the nature and effect of the notice or other document is given as required by regulation.

(2) If—

- (a) an Act provides for the service of notices or other documents on persons with an interest in land, but does not specifically prescribe a method of service on native title holders; and
- (b) the land in question is native title land but there is no registered native title in the relevant land or, if there is, the possibility that unregistered native title may concurrently exist in the same land has not been excluded by declaration of a court of competent jurisdiction,

the Act is taken to provide for service on native title holders in accordance with this section (which applies to service on native title holders under the Act to the exclusion of provisions of the Act about how service is to be effected).

(3) Service of a notice or other document is effected when all requirements of this section for its service are completed.

**PART 6
VALIDATION AND EFFECT OF CERTAIN ACTS**

DIVISION 1—PRELIMINARY

Interpretation

31. (1) In this Part—

"NTA" means the *Native Title Act 1993* of the Commonwealth.

(2) Unless the contrary intention appears, a word or expression used in the NTA has the same meaning in this Part as it has in the NTA.

DIVISION 2—VALIDATION

Validation of past acts attributable to the State

32. Every past act attributable to the State is valid and is taken always to have been valid.¹

¹ See s. 19 NTA. An act **attributable** to the State is defined in s. 239 NTA. **Valid** is defined in s. 253 NTA.

Validation of intermediate period acts attributable to the State

32A. Every intermediate period act attributable to the State is valid and is taken always to have been valid.¹

¹ See s. 22F NTA. An **intermediate period act** is defined in s. 232A NTA. The term covers certain acts that took place between 1 January 1994 and 23 December 1996. An act **attributable** to the State is defined in s. 239 NTA. **Valid** is defined in s. 253 NTA.

Validation by agreement of future acts attributable to State

32B. (1) If—

- (a) an indigenous land use agreement to which the State is a party provides for the retrospective validation or conditional validation of a future act, or a class of future acts, attributable to the State; and
- (b) the requirements of section 24EBA(1) of the NTA are satisfied in relation to the agreement,

the future act or class of future acts is valid and is taken always to have been valid.¹

(2) In this section—

"**future act**" does not include an intermediate period act.

¹ See ss. 24EBA(1) and (3) NTA. **Indigenous land use agreements** are defined in ss. 24BA, 24CA and 24DA NTA. A **future act** is defined in s. 233 NTA. An act **attributable** to the State is defined in s. 239 NTA. **Valid** is defined in s. 253 NTA.

Section 24EBA(1) NTA requires—

- details of the agreement to be on the Register of Indigenous Land Use Agreements (see Part 8A NTA); and
- any person (other than the Crown in right of the Commonwealth, a State or a Territory) who is or may become liable under the agreement or otherwise to pay compensation in relation to the act or class of acts to be a party to the agreement.

DIVISION 3—PAST ACTS

Application of Division 3

32C. (1) This Division does not apply to a previous exclusive possession act.¹

(2) This Division does not apply to a previous non-exclusive possession act unless the act is a category A past act consisting of the grant of a pastoral lease or an agricultural lease.²

¹ See ss. 23E and 23C(3) NTA.

² See ss. 23I and 23G(2) and (3) NTA.

Effect of validation—category A past acts that are not public works

33. A category A past act (except a past act to which section 229(4) of the NTA applies) extinguishes the native title concerned.¹

¹ See ss. 19 and 15(1)(a) NTA. A **category A past act** is defined in s. 229 NTA. This category covers certain freehold grants, certain leasehold grants (commercial, agricultural, pastoral and residential leases and those parts of mining leases that are taken to be "dissected" under s. 245 NTA, such as lands on which there are city, town or private residences) and public works. **Lease, permit** and various types of leases are defined in ss. 242 to 249 NTA. Section 229(4) NTA applies to certain past acts consisting of the construction or establishment of a public work. **Public work** is defined in s. 253 NTA.

Effect of validation—category A past acts that are public works

34. (1) A category A past act to which section 229(4) of the NTA applies extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated.¹

(2) If section 229(4)(a) of the NTA applies to the past act, the extinguishment is taken to have happened on 1 January 1994.²

¹ See ss. 19 and 15(1)(b) NTA.

² Section 229(4)(a) NTA applies to a past act consisting of the construction or establishment of any public work if the work commenced to be constructed or established before 1 January 1994 and the construction or establishment had not been completed by that day.

Effect of validation—inconsistent category B past acts

35. A category B past act wholly or partly inconsistent with the continued existence, enjoyment or exercise of rights conferred by the native title concerned extinguishes the native title to the extent of the inconsistency.¹

¹ See ss. 19 and 15(1)(c) NTA. A **category B past act** is defined in s. 231 NTA. This category covers leasehold grants (other than leases that are category A past acts and mining leases.)

Effect of validation—category C and D past acts

36. The non-extinguishment principle applies to all category C and D past acts.¹

¹ See ss. 19 and 15(1)(d) NTA. A **category C past act** is defined in s. 231 NTA. This category deals with the grant of mining leases. **Mining lease** is defined in s. 245 NTA and **mine** in s. 253 NTA. A **category D past act** is defined in s. 232 NTA. It is the residual category of past acts. The effect of the **non-extinguishment principle** is set out in s. 238 NTA.

DIVISION 4—INTERMEDIATE PERIOD ACTS

Application of Division 4

36A. This Division does not apply to a previous exclusive possession act or a previous non-exclusive possession act.¹

¹ See ss. 23E and 23C(3) NTA and ss. 23I and 23G(3) NTA.

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Effect of validation—category A intermediate period acts that are not public works

36B. A category A intermediate period act (except such an act consisting of the construction or establishment of a public work) extinguishes the native title concerned.¹

¹ See ss. 22F and 22B(a) NTA. A **category A intermediate period act** is defined in s. 232B NTA. This category covers freehold estates, certain leasehold grants (Scheduled interests, commercial, exclusive agricultural, exclusive pastoral, residential and community purposes leases and those parts of mining leases that are taken to be "dissected" under s. 245 NTA, such as lands on which there are city, town or private residences), certain vestings and public works. **Lease, permit** and various types of leases are defined in ss. 242 to 249B NTA. **Scheduled interest** is defined in s. 249C NTA. **Public work** is defined in s. 253 NTA. An indigenous land use agreement registered under the NTA may change the effect of validation of intermediate period acts—see s. 24EBA(1)(a)(iii) and (6) NTA.

Effect of validation—category A intermediate period acts that are public works

36C. (1) A category A intermediate period act consisting of the construction or establishment of a public work extinguishes native title in relation to the land or waters on which the public work (on completion of its construction or establishment) was or is situated.¹

(2) The extinguishment is taken to have happened when the construction or establishment began.²

¹ See ss. 22F and 22B(b)(i) NTA. An indigenous land use agreement registered under the NTA may change the effect of validation of intermediate period acts—see s. 24EBA(1)(a)(iii) and (6) NTA.

² See s. 22B(b)(ii) NTA.

Effect of validation—inconsistent category B intermediate period acts

36D. A category B intermediate period act wholly or partly inconsistent with the continued existence, enjoyment or exercise of rights conferred by the native title concerned extinguishes the native title to the extent of the inconsistency.¹

¹ See ss. 22F and 22B(c) NTA. A **category B intermediate period act** is defined in s. 232C NTA. This category covers leasehold grants (other than leases that are category A intermediate period acts and mining leases). An indigenous land use agreement registered under the NTA may change the effect of validation of intermediate period acts—see s. 24EBA(1)(a)(iii) and (6) NTA.

Effect of validation—category C and D intermediate period acts

36E. The non-extinguishment principle applies to all category C and D intermediate period acts.¹

¹ See ss. 22F and 22B(d) NTA. A **category C intermediate period act** is defined in s. 232D NTA. This category covers mining leases. **Mining lease** is defined in s. 245 NTA and **mine** in s. 253 NTA. A **category D intermediate period act** is defined in s. 232E NTA. It is the residual category of intermediate period acts. The effect of the **non-extinguishment principle** is set out in s. 238 NTA. An indigenous land use agreement registered under the NTA may change the effect of validation of intermediate period acts—see s. 24EBA(1)(a)(iii) and (6) NTA.

DIVISION 5—PREVIOUS EXCLUSIVE AND NON-EXCLUSIVE POSSESSION ACTS**Effect of previous exclusive possession acts attributable to the State (other than public works)**

36F. (1) A previous exclusive possession act (apart from an excepted act) attributable to the State extinguishes native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned.¹

(2) The extinguishment is taken to have happened when the act was done.²

(3) However, no implication is to be drawn from this section that Parliament intends to alter the effect of an excepted act if its effect, apart from this section, was to extinguish native title.

(4) In this section—

"excepted act" means—

- (a) a previous exclusive possession act consisting of the construction or establishment of a public work; or
- (b) a previous exclusive possession act consisting of the grant or vesting of an interest under a lease that was acquired by the Indigenous Land Corporation before the date of assent to the *Native Title (South Australia) (Validation and Confirmation) Amendment Act 2000*; or
- (c) a previous exclusive possession act that was subject to a reservation or condition expressly for the benefit of Aboriginal people; or
- (d) a previous exclusive possession act consisting of the grant or vesting of a Scheduled interest if—
 - (i) the interest had ceased to exist by 23 December 1996; or
 - (ii) the interest arose under a miscellaneous lease granted solely or primarily for any of the following:
 - grazing and cultivation;
 - grazing, cultivation and nursery;
 - land based aquaculture and grazing;
 - vegetable and fodder growing and grazing;
 - fellmongering establishment; or
 - (iii) the interest arose under a lease granted under section 35 of the *National Parks and Wildlife Act 1972* solely or primarily for any of the following—
 - garden;
 - grazing and cropping.

¹ See ss. 23E and 23C(1)(a) NTA. A **previous exclusive possession act** is defined in s. 23B NTA. The term covers certain grants of freehold estates or leases on or before 23 December 1996 and public works if construction or establishment commenced on or before 23 December 1996. An act **attributable** to the State is defined in s. 239 NTA and, for certain purposes, s. 23JA NTA. Various types of **leases** are defined in ss. 242 to 249B NTA. **Scheduled interest** is defined in s. 249C NTA. **Public work** is defined in s. 253 NTA.

² See s. 23C(1)(b) NTA.

Effect of previous exclusive possession acts that are public works attributable to the State

36G. (1) A previous exclusive possession act attributable to the State consisting of the construction or establishment of a public work extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated.¹

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(2) The extinguishment is taken to have happened when the construction or establishment of the public work began.²

¹ See ss. 23E and 23C(2)(a) NTA. An act **attributable** to the State is defined in s. 239 NTA and, for certain purposes, s. 23JA NTA.

² See s. 23C(2)(b) NTA.

Confirmation of validity of use of certain land held by Crown etc.

36H. To avoid doubt, if an act consisting of the grant or vesting of an interest in relation to land or waters to or in the Crown in any capacity or a statutory authority becomes a previous exclusive possession act when the land or waters are used to any extent in a way that extinguishes native title in relation to the land or waters, the use of the land or waters in that way is valid.¹

¹ See ss. 23E and 23DA NTA.

Effect of previous non-exclusive possession acts attributable to the State

36I. (1) Subject to subsection (2), if a previous non-exclusive possession act is attributable to the State—

- (a) to the extent that the act involves the grant of rights and interests that are not inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned, the rights and interests granted, and the doing of any activity in giving effect to them, prevail over the native title rights and interests but do not extinguish them; and
- (b) to the extent that the act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned—
 - (i) if, apart from this Act, the act extinguishes the native title rights and interests—the native title rights and interests are extinguished; and
 - (ii) in any other case—the native title rights and interests are suspended while the lease concerned, or the lease as renewed, re-made, re-granted or extended, is in force; and
- (c) any extinguishment under this subsection is taken to have happened when the act was done.¹

(2) This section does not apply to a previous non-exclusive possession act that is a category A past act consisting of the grant of a pastoral lease or an agricultural lease.²

¹ See ss. 23I and 23G(1) NTA. A **previous non-exclusive possession act** is defined in s. 23F NTA. An act **attributable** to the State is defined in s. 239 NTA and, for certain purposes, s. 23JA NTA.

² See s. 23G(2) NTA.

Notification of certain non-exclusive agricultural or pastoral leases

36J. (1) Before granting a non-exclusive agricultural lease or non-exclusive pastoral lease to give effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996 (and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made)—

- (a) notice of the proposed grant must be given to—
 - (i) all registered representatives of holders of native title in the land concerned; and

- (ii) all registered representatives of persons who are registered under the law of the Commonwealth or the State as claimants to native title in the land concerned; and
 - (iii) the relevant representative Aboriginal body; and
- (b) those persons must be given an opportunity to comment.¹
- (2) A notice under subsection (1)—
- (a) may relate to a number of different leases proposed to be granted over a specified period;
 - (b) must be given in the way determined in writing by the Commonwealth Minister for the purposes of the NTA.²

¹ See ss. 23I and 23HA NTA. A **non-exclusive agricultural lease** is defined in s. 247B NTA and a **non-exclusive pastoral lease** in s. 248B NTA.

² See ss. 23I and 23HA NTA.

DIVISION 6—MISCELLANEOUS

Extinguishment does not confer right to eject or remove Aboriginal peoples

37. An extinguishment of native title effected by this Act does not by itself confer a right to eject or remove Aboriginal people who reside on or who exercise access over land or waters covered by a pastoral lease the grant, re-grant or extension of which is validated by this Act.¹

¹ See ss. 19 and 15(2) NTA.

Preservation of beneficial reservations and conditions

38. If—

- (a) a past act, intermediate period act, previous exclusive possession act, or previous non-exclusive possession act, attributable to the State contains a reservation or condition for the benefit of Aboriginal peoples; or
- (b) the doing of the act would affect rights or interests (other than rights conferred by native title) of Aboriginal peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in this Act affects that reservation or condition or those rights or interests.¹

¹ See ss 19 and 16 NTA; ss 22F and 22C NTA; 23E and 23D NTA; ss 23I and 23H NTA. An act **attributable** to the State is defined in s. 239 NTA and, for certain purposes, s. 23JA NTA.

PART 7
CONFIRMATION OF CROWN AND OTHER RIGHTS

Confirmation

39. (1) The existing ownership of natural resources by the Crown is confirmed.

(2) All existing rights of the Crown to use, control and regulate the flow of water are confirmed.

(3) All existing fishing access rights under the law of the State prevail over any other public or private fishing rights.

(4) Existing public access to and enjoyment of the following places is confirmed:

(a) waterways;

(b) beds and banks or foreshores of waterways;

(c) coastal waters;

(d) beaches;

(da) stock-routes;

(e) areas that were public places at 31 December 1993.

(5) Nothing in this section—

(a) extinguishes native title; or

(b) affects land or an interest in land held by Aboriginal peoples under a law that confers benefits only on Aboriginal peoples.

**PART 8
MISCELLANEOUS**

Regulations

40. The Governor may make regulations for the purposes of this Act.

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SCHEDULE

Amendment of Acts Interpretation Act 1915

The *Acts Interpretation Act 1915* is amended by striking out the definition of "**land**" in section 4 and inserting the following definition:

"**land**" includes—

- (a) a building or structure affixed to land;
- (b) waters and airspace over land;
- (c) the bed of any body of waters;
- (d) subsoil and subterranean waters;.

APPENDIX

LEGISLATIVE HISTORY

(entries in bold type indicate amendments incorporated since the last reprint)

Section 9(1):	amended by 23, 1998, s. 9(a)
Section 9(1a):	inserted by 23, 1998, s. 9(b)
Section 12:	substituted by 23, 1998, s. 10
Section 16(4):	inserted by 23, 1998, s. 11
Part 6 heading:	substituted by 84, 2000, s. 3
Part 6 Division 1 heading:	inserted by 84, 2000, s. 3
Part 6 Division 2 heading:	inserted by 84, 2000, s. 4
Sections 32A and 32B:	inserted by 84, 2000, s. 5
Part 6 Division 3 heading:	inserted by 84, 2000, s. 5
Section 32C:	inserted by 84, 2000, s. 5
Part 6 Division 4 heading:	inserted by 84, 2000, s. 6
Sections 36A - 36E:	inserted by 84, 2000, s. 6
Part 6 Division 5 heading:	inserted by 84, 2000, s. 6
Sections 36F - 36J:	inserted by 84, 2000, s. 6
Part 6 Division 6 heading:	inserted by 84, 2000, s. 6
Section 38:	substituted by 84, 2000, s. 7
Section 39(4):	amended by 84, 2000, s. 8(a)
Section 39(5):	amended by 84, 2000, s. 8(b)