Act 1994 No. 45

NATIVE TITLE (NEW SOUTH WALES) BILL 1994"

NEW SOUTH WALES

EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

On 3 June 1992, the High Court of Australia in *Mabo and ors v. The State of Queensland (No. 2) (1992) 175 CLR 1* rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement and the consequential implication that absolute ownership of the land vested at that time in the Crown. Rather, the High Court found that native title rights and interests in relation to land survived European settlement, subject to the sovereignty of the Crown. The High Court held that the common law of Australia recognises a form of native title that, where it has not been extinguished, reflects the rights of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.

Following the decision of the High Court in *Mabo*, the Commonwealth Government enacted the Native Title Act 1993 of the Commonwealth ("the Commonwealth Native Title Act"), the major purpose of which is to provide a national scheme for the recognition and protection of native title. The Commonwealth Native Title Act also makes provision for the validation of past acts invalidated because of the existence of native title.

The object of this Bill is to participate in the national scheme established by the Commonwealth Government and to validate any past State acts invalidated because of the existence of native title. The Bill adopts many of the terms and concepts used in the Commonwealth Native Title Act. Where appropriate, headings and explanatory notes in the Bill contain references to relevant provisions of, and terms and concepts used in, the Commonwealth Native Title Act.

The Bill also makes miscellaneous amendments to certain other Acts.

The Bill commences with a Preamble that refers to the High Court's decision in *Mabo*, the enactment of the Commonwealth Native Title Act and the intention of the Parliament of New South Wales to participate in the national scheme established by the Commonwealth Government and to validate State acts invalidated because of the existence of native title.

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* Amended in committee—see table at end of volume.

The Bill is divided into 11 Parts and 1 Schedule as follows:

Part 1 of the Bill contains preliminary provisions.

Part 2 of the Bill contains provisions dealing with the validation of past acts and the effects of validation.

Part 3 of the Bill contains provisions dealing with the confirmation of certain rights.

Part 4 of the Bill provides for the exercise of functions under the proposed Act by the Land and Environment Court and wardens' courts and for the creation of the office of New South Wales native title registrar.

Part 5 contains provisions that are intended to ensure that the Land and Environment Court and wardens' courts are recognised bodies and arbitral bodies for the purposes of the Commonwealth Native Title Act.

Part 6 of the Bill contains provisions dealing with the holding of native title in trust and the native title functions of prescribed bodies corporate under the Commonwealth Native Title Act.

Part 7 of the Bill deals with applications for determination of native title and for compensation, and with applications to allow future acts to take place that may affect native title.

Part 8 of the Bill deals with inquiries, determination of contested applications and other determinations by the Land and Environment Court and wardens' courts.

Part 9 of the Bill deals with the creation and operation of the New South Wales native title register.

Part 10 of the Bill contains interim provisions to ensure that New South Wales law is consistent with the Commonwealth Native Title Act.

Part 11 of the Bill contains miscellaneous provisions.

Schedule 1 to the Bill contains miscellaneous amendments to various Acts.

The Bill contains the following provisions:

Preamble. This is self-explanatory.

PART 1—PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 sets out the main objects of the proposed Act which are:

(a) in accordance with the Commonwealth Native Title Act, to validate any past acts invalidated because of the existence of native title and to confirm certain rights; and

(b) to ensure that New South Wales law is consistent with standards set by the Commonwealth Native Title Act for future dealings affecting native title; and

(c) to establish State-based mechanisms for deciding claims to native title in accordance with the Commonwealth Native Title Act.

Clause 4 defines certain words and expressions for the purposes of the proposed Act. The term "Aboriginal peoples" is expressed to include Torres Strait Islanders.

Clause 5 provides that words and expressions used in the Commonwealth Native Title Act and the proposed Act have the same meanings in the proposed Act as they have in the Commonwealth Native Title Act.

Clause 6 provides that the proposed Act binds the Crown.

PART 2—VALIDATION AND ITS EFFECTS

The Commonwealth Native Title Act does not unilaterally validate past acts of the State that are invalid because of the existence of native title and any law (such as the Racial Discrimination Act 1975 of the Commonwealth). This must be done by the Government that did the acts. Section 19 of the Commonwealth Native Title Act allows a State to pass laws validating past acts attributable to a State if these laws do so on the same basis as the Commonwealth has validated its past acts under sections 15 and 16 of the Commonwealth Native Title Act. This Part is concerned to validate past acts in a way that is consistent with the Commonwealth Native Title Act.

Division 1—General

Clause 7 sets out the objects of this Part which are:

(a) to validate, in accordance with section 19 of the Commonwealth Native Title Act, past acts attributable to the State; and

(b) to provide for the effects of the validation.

(An **"act", "past act"** and an act **"attributable"** to a State are defined in sections 226, 228 and 239 respectively of the Commonwealth Native Title Act.)

Clause 8 provides that if a past act is an act attributable to the State the act is valid. This will remedy any invalidity due to the existence of native title.

Clause 9 deals with the application of the remaining provisions of the Part and is self-explanatory.

Division 2—Effect of validation on native title

Clause 10 sets out the effect of the validation of a Category A past act other than a public work. When validated, native title is taken to have been extinguished. (Section 229 of the Commonwealth Native Title Act defines Category A past acts to mean freehold grants, some leasehold grants (commercial, agricultural, pastoral and residential leases and those parts of certain mining leases (being in respect of lands on which there are city, town or private residences, or other buildings or works used in connection with such residences) that are taken to be "dissected" in accordance with section 245 of the Commonwealth Native Title Act) and public works.)

Clause 11 sets out the effect of the validation of a Category A past act which is a public work. If the public work has involved the construction of something on the land concerned, native title is taken to have been extinguished in respect of the land taken up by the construction. If construction is incomplete, then, in respect of the land required for the construction, native title is taken to be extinguished as at 1 January 1994.

Clause 12 sets out the effect of the validation of a Category B past act. When validated, native title is taken to have been extinguished by the act to the extent of the inconsistency with the rights and interests comprising the native title. (Section 230 of the Commonwealth Native Title Act defines Category B past acts as leasehold grants (other than leases that are category A past acts and mining leases).)

Clause 13 sets out the effect of the validation of a Category C past act or a Category D past act. This validation does not extinguish the native title, rather the non-extinguishment principle applies to the act. (Category C past acts are defined by section 231 of the Commonwealth Native Title Act to mean mining leases. Category D past acts are defined by section 232 of the Commonwealth Native Title Act as comprising the residual category of past acts. The effect of the non-extinguishment principle is set out in section 238 of the Commonwealth Native Title Act.)

Clause 14 provides that extinguishment of native title because of the operation of the Part does not of itself permit the removal of Aboriginal people who live on or exercise access over land or waters covered by a pastoral lease validated under the Part.

Division 3—Other effects of validation

Clause 15 provides that if a past act contains a reservation or condition for the benefit of Aboriginal people then that reservation or condition is preserved. This is not restricted to a reservation or condition in legislation only but also includes all those interests listed in the definition of "act" in the Commonwealth Native Title Act such as a lease, licence, permit, authority and instrument. This clause also states that if the doing of the past act would affect any other rights or interests (other than a native title right or interest) held by Aboriginal people (whether these arise under statute, common law or equity) then the validation of the past act does not affect that right or interest.

PART 3—CONFIRMATION OF CERTAIN RIGHTS

Section 212 of the Commonwealth Native Title Act allows a State to confirm any existing ownership of natural resources and certain water and fishing access rights and to confirm public access to and enjoyment of certain areas. This Part is intended to confirm those matters in a way that is consistent with the Commonwealth Native Title Act. The confirmation of ownership of natural resources, the right to flow of water and fishing access rights, and of existing public access to and enjoyment of waterways and other specified areas, does not extinguish any native title rights and interests and does not affect any conferral of land or waters, or other interest in land or waters, that confers benefits only on Aboriginal peoples.

Clause 16 sets out the object of this Part which is to confirm:

(a) any existing ownership of natural resources and certain water and fishing access rights; and

(b) public access to and enjoyment of beaches and certain other places.

Clause 17 confirms the existing ownership of all natural resources owned by the State. The clause confirms existing rights of the State to use, control and regulate the flow of water. The clause also confirms that existing fishing access rights under State law prevail over any other public or private fishing rights.

Clause 18 confirms public access to and enjoyment of waterways, beds and banks or foreshores of waterways, coastal waters, beaches and areas that were public places at the end of December 1993.

PART 4—LAND AND ENVIRONMENT COURT, WARDENS' COURTS AND NATIVETITLEREGISTRAR

This Part provides that it is the intention of Parliament that the Land and Environment Court and wardens' courts should exercise the functions given to them respectively by the proposed Act in the same way as similar functions are exercised by the Federal Court and the National Native Title Tribunal under the Commonwealth Native Title Act. The Part also provides for the establishment of the position of New South Wales native title registrar, the delegation of functions by that officer to registrars of wardens' courts and the exercise by the native title registrar and registrars of wardens' courts of functions delegated to them by the National Registrar.

Division 1—Land and Environment Court and wardens' courts

Clause 19 provides that it is the intention of Parliament that the Land and Environment Court and wardens' courts should exercise the functions given to them respectively by the proposed Act in the same way as similar functions are exercised by the Federal Court and the National Native Title Tribunal under the Commonwealth Native Title Act.

Clause 20 provides that the Land and Environment Court and wardens' courts must pursue the objective of carrying out their functions under the proposed Act in a fair, just, economical, informal and prompt way. The clause also provides that, in conducting inquiries and determining contested applications, the Land and Environment Court and wardens' courts:

(a) must take into account relevant cultural and customary concerns of Aboriginal peoples; and

(b) are not bound by technicalities, legal forms or rules of evidence.

These objectives will ensure that the processes of the Land and Environment Court and wardens' courts are accessible, efficient and as sensitive as possible to the needs of native title claimants while not compromising the overriding objective of deciding disputes fairly.

Clause 21 allows a court to adjourn proceedings, ,to allow a native title determination application to be made to the National Native Title Tribunal or the Land and Environment Court, if an assertion of the existence, nature or extent of, or the person or persons holding, native title (other than native title about which an approved determination of native title exists) is raisedand the court considers that the proceedings cannot proceed unless the assertion is dealt with. The court may adjourn the proceedings on its own initiative or on an application by a party to the proceedings.

Division 2—The Native Title Registrar

Clause 22 provides that the office of New South Wales native title registrar is to be established in the Land and Environment Court.

Clause 23 provides that the native title registrar has the functions given to the registrar under the proposed Act and any other functions delegated to the registrar under the Commonwealth Native Title Act.

Clause 24 provides for the delegation of functions to registrars of wardens' courts.

PART 5—RECOGNISED AND ARBITRAL BODIES

Section 251 of the Commonwealth Native Title Act gives the relevant Commonwealth Minister the power to decide whether a particular court, office, tribunal or body set up under a State law and nominated by that State will be a "recognised State/Territory body" for the purposes of the Commonwealth Native Title Act. This Part of the proposed Act establishes that it is the intention of the Parliament of New South Wales to nominate the Land and Environment Court and wardens' courts as recognised State/Territory bodies for the purposes of the Commonwealth Native Title Act.

Section 27 of the Commonwealth Native Title Act allows a recognised State/Territory body to also be an "arbitral body" for the purposes of the "right to negotiate" provisions of the Commonwealth Native Title Act. This Part of the proposed Act establishes that it is the intention of the Parliament of New South Wales that the Land and Environment Court and wardens' courts are to be arbitral bodies for the purposes of the Commonwealth Native Title Act.

Clause 25 states that the purpose of this Part is to provide for the Land and Environment Court and wardens' courts to each be a recognised State/Territorybody, and arbitral body, for New South Wales.

Clause 26 provides that it is the intention of Parliament that the Land and Environment Court and wardens' courts should be recognised StatdTemtory bodies. If the relevant Commonwealth Minister determines that these courts are recognised State/Territory bodies for the purposes of the Commonwealth Native Title Act:

- the Land and Environment Court has jurisdiction to determine native title determination applications, revised native title determination applications and compensation applications (other than those arising under or in relation to a State Mining Act (that is, under the Mining Act 1992, the Petroleum (Onshore) Act 1991 or an Act prescribed by regulations under the proposed Act to be a State Mining Act)); and
- each warden's court has jurisdiction to determine compensation applications arising under or in relation to a State Mining Act and any native title determination application by a person or persons claiming to hold native title (a "claimant application") that needs to be determined before the warden's court can determine a compensation application arising under or in relation to a State Mining Act.

Clause 27 provides that the Land and Environment Court and wardens' courts are to be arbitral bodies for the purposes of the Commonwealth Native Title Act, and have the relevant jurisdiction to perform that function. However, the Land and Environment Court must not be an arbitral body for matters arising under or in relation to a State Mining Act and a warden's court must not be an arbitral body for matters other than matters arising under or in relation to a State Mining Act. Jurisdiction under the proposed Act cannot be exercised by the Land and Environment Court and wardens' courts until the relevant Commonwealth Minister determines that both the Land and Environment Court and wardens' courts are recognised State/Territorybodies under the Commonwealth Native Title Act.

PART 6—HOLDING OF NATIVE TITLE IN TRUST AND NATIVE TITLE FUNCTIONS OF PRESCRIBED BODIES CORPORATE

Division 6 of Part 2 of the Commonwealth Native Title Act makes provision for native title to be held in trust on behalf of the native title holders (termed the "common law holders") by a suitable body corporate or, alternatively, if the common law holders do not nominate a body corporate for this purpose, for specified functions relating to the native title to be performed on behalf of the common law holders by a suitable body corporate. The Division is designed to provide a mechanism for efficient dealings with native tide and is consistent with existing systems under special legislation to provide land for the benefit of Aboriginal peoples.

Clause 28 requires the Land and Environment Court or a warden's court, when making a determination that native title exists, to also determine:

- whether a body corporate, nominated by the common law holders, is to hold the native title in trust on their behalf; and
- if the common law holders do not nominate a body corporate, which body corporate is to perform various functions relating to the native title on their behalf.

These determinations must be made by the Land and Environment Court or warden's court in the same way as the National Native Title Tribunal and Federal Court are required to make similar determinations under the Commonwealth Native Title Act. Regulations made under the proposed Act or the Commonwealth Native Title Act may prescribe the kinds of bodies corporate that may be determined for the purposes of the Part.

Clause 29 provides that, once a determination is made that a body corporate is to hold the native title in trust on behalf of the common law holders, the body corporate holds the native title in trust. The clause also provides that the body corporate must, on becoming a registered native title body corporate, perform the functions given to it as a registered native title body corporate under the proposed Act and the Commonwealth Native Title Act and any functions given to it by regulations made under the proposed Act and the Commonwealth Native Title Act.

Clause 30 provides that, if a determination is made that a prescribed body corporate is to perform functions on behalf of the common law holders (but is not to hold the native title in trust on their behalf), the body corporate must, on becoming a registered native title body corporate, perform the functions given to it as a registered native title body corporate under the proposed Act and the Commonwealth Native Title Act and any functions given to it by regulations made under the proposed Act and the Commonwealth Native Title Act.

Clause 31 states that regulations made under the proposed Act or under the Commonwealth Native Title Act may provide for the replacement of a prescribed body corporate with another body corporate at the initiative of the common law holders.

PART 7—APPLICATIONS ABOUT NATIVE TITLE

Part 3 of the Commonwealth Native Title Act contains provisions about what sorts of applications can be made under the Commonwealth Native Title Act. They are:

(a) applications for the determination of native title and for compensation; and

(b) applications to allow future acts to take place which may affect native title.

Part 3 of the Commonwealth Native Title Act sets out the mechanism for commencing the process leading to a determination. Part 3 of the Commonwealth Native Title Act also sets out what an application must contain and which applications can be dealt with by the National Native Title Tribunal and which must be referred to the Federal Court.

As noted above, clause 19 identifies the Land and Environment Court and wardens' courts as the bodies whose functions are, essentially and in accordance with the terms of the proposed Act, to perform the functions of the National Native Title Tribunal and the Federal Court envisaged by the Commonwealth Native Title Act. This Part gives effect to Part 3 of the Commonwealth Native Title Act in so far as the Land and Environment Court and wardens' courts are concerned.

Clauses 32–52 below, (which are consistent with sections 61–78 of the Commonwealth Native Title Act) provide that applications may be made to the Land and Environment Court or, if appropriate, wardens' courts in the same manner that applications may be made to the National Native Title Tribunal and the Federal Court.

Division 1—Native title and compensation applications

Clause 32 sets out the applications that may be made to the native title registrar under the Division and who may make the applications. Applications may be made for any of the following:

(a) a determination of the existence of native title ("a native title determination application");

(b) a revision of such a determination;

(c) a determination of any compensation that might be payable under State law.

A native title determination application may be either a "claimant application", that is, an application by a person or persons claiming to hold native title or a "non-claimant application", that is, an application by a person or persons who are not native title holders but who wish to know whether native title exists in relation to a particular area of land or waters. Such applications may only be made in relation to land or waters about which no approved determination of native title exists. "Approved determination of native title" is defined in section 253 of the Commonwealth Native Title Act.

A native title determination application may be made by:

- a person or persons claiming to hold native title either alone or with others; or
- a person who holds an interest in the whole area for which the determination is sought; or
- the Commonwealth Minister; or
- the State Minister.

A revised native title determination application may be made by:

- the registered native title body corporate; or
- the Commonwealth Minister; or
- the State Minister; or
- the National Native Title Registrar; or
- the native title registrar.

A compensation application may be made by:

- the registered native title body corporate (if any); or
- a person or persons claiming to be entitled to the compensation either alone or with others.

Applications may be made only about land or waters in the State.

Clause 33 requires applications to be in a specified form, to be given to the native title registrar and to contain the information about the matters to be determined that is prescribed by regulations made under the proposed Act.

Clause 34 provides that, if a claim is made by persons claiming native title or an entitlement to compensation on behalf of themselves and others, the application must describe the others, although it is not necessary to name them or to say how many there are. The description could be a tribal or language group name.

Clause 35 requires that a native title determination application by a person or persons claiming to hold native title in relation to an area (a "claimant application") must:

(a) be accompanied by an affidavit sworn by the applicant stating that the applicant believes that:
   - native title has not been extinguished; and
   - none of the area claimed is already covered by an approved determination of native title entered in the National Native Title Register or in the State native title register; and
   - all the statements made in the application are true; and

(b) contain all information known to the applicant about interests of other people in the land or waters claimed; and

(c) describe the area over which the claim is made; and

(d) give the name and address of one of the applicants who will become the registered native title claimant and the person who receives notices and can be sent documents by the other parties to the application.

The clause also provides for the making of regulations under the proposed Act setting out what documents and fees must accompany the application.

Clause 36 provides that if an application includes the things required by clauses 33 to 35, the native title registrar must accept it unless the native title registrar believes:

- in the case of a claimant, non-claimant or compensation application—the application is frivolous or vexatious; or
- in the case of a claimant or compensation application—prima facie the claim cannot be made out.

If the native title registrar does not accept the application, it must be referred to a Judge of the Land and Environment Court or, in a matter arising under or in relation to a State Mining Act, a warden who will then decide whether or not he or she agrees with the native title registrar.

If the Judge or warden agrees with the native title registrar, the applicant must be given the opportunity to satisfy the Judge or warden that the application is not frivolous or vexatious, or that a prima facie claim can be made out. If the applicant satisfies the

Judge or warden, the Judge or warden must direct the native title registrar to accept the application. If the applicant does not satisfy the Judge or warden, the Judge or warden must direct the native title registrar not to accept the application.

If the Judge or warden does not agree with the native title registrar, he or she must direct the native title registrar to accept the application.

Clause 37 requires the native title registrar to refer to a Judge of the Land and Environment Court or, in a matter arising under or in relation to a State Mining Act, a warden, an application that the native title registrar does not believe includes the things required by clauses 33 to 35.

If the Judge or warden agrees, the Judge or warden must give the applicant the opportunity to satisfy the Judge or warden that the applicant meets the requirements. If the applicant satisfies the Judge or warden, the Judge or warden must direct the native title registrar to accept the application. If the applicant does not satisfy the Judge or warden, the Judge or warden must direct the native title registrar not to accept the application.

If the Judge or warden believes the requirements of clauses 33 to 35 are complied with, the Judge or warden must direct the native title registrar to accept the application.

Clause 38 allows the native title registrar, if the Chief Judge of the Land and Environment Court or, in a mining matter, the chief warden agrees, to do the things that the Land and Environment Court and wardens' courts may do under clauses 61, 62 and 72 to 74. (For more detail about those clauses, see the relevant clause notes below.)

Clause 39 provides that, once an application is accepted, the native title registrar must notify anyone whose interests might be affected if a determination is made and, if it is a claimant application, record details of the application in the native title register.

The clause specifies the people whom the native title registrar must notify. In addition, the native title registrar must notify the public of the application in a way determined by the Minister. (This determination must conform with the procedures determined by the relevant Commonwealth Minister for the notification of the public under the Commonwealth Native Title Act.)

The clause requires any notices sent out to state certain things. If the application is a non-claimant application, the notice must state that the application will be regarded as being unopposed unless any persons claiming native title lodge a claimant application within 2 months after the notice is given. In any other case, the notice must state that a person who wants to be a party to the application must give notice to the National Registrar or the native title registrar within 2 months from the notice being given.

Clause 40 deals with non-claimant applications. The clause makes provision for certain procedures that apply only to these applications.

The clause provides that, if a non-claimant application is made and a person or persons then lodge, in a specified time, a claimant application that covers any part of the area covered by the non-claimant application, the non-claimant application is, if it is by a Minister, the Crown or a statutory authority, taken to be dismissed. In any other case, the non-claimant application is taken not to relate to the area covered by the claimant application.

If the claimant application is accepted, it proceeds in the normal way and the applicants under the non-claimant application may become parties to that application. If a claimant application is not lodged or, if lodged, is not accepted, the non-claimant application is taken to be unopposed. The procedure for dealing with unopposed applications is set out in clause 43. (For more detail about that clause, see below.)

Clause 41 sets out those persons who are to be regarded as parties to any application. As well as the applicant, the parties can be the following:

- any registered native title claimant
- the Commonwealth Minister
- the State Minister
- any registered native title body corporate for any of the land or waters covered by the application
- a person who holds a registered proprietary interest in the land or waters
- any representative Aboriginal/Torres Strait Islander body for any of the area covered by the application
- a person whose interests might be affected by a determination.

Under clause 39, these people are to receive notice of the application. They will be parties to the application if they let the native title registrar know, in the time set out in the notice, that they want to be parties.

Clause 42 provides that a Judge of the Land and Environment Court or, in appropriate cases, a warden will decide whether a person's interests are affected. A decision that a person's interests are affected is final and conclusive.

Clause 43 provides that, if an application is unopposed, the Land and Environment Court or, in a matter arising under or in relation to a State Mining Act, a warden's court, if it is satisfied that there is material before it that establishes a prima facie case for a determination being made and that such a determination is just and equitable, may make the determination sought.

An application is unopposed if:

- the period specified for letting the native title registrar know that a person wants to be a party has expired and no one except the applicant has come forward; or
- each party has told the Land and Environment Court or warden's court (as the case may be) in writing that they do not oppose it; or
- there has been a non-claimant application that is taken to be unopposed for the purposes of this clause under clause 40.

Clause 44 provides that the Land and Environment Court or, in a matter arising under or in relation to a State Mining Act, a warden's court must make a determination consistent with any agreement reached by the parties if:

- at the end of the notification period under clause 39, the parties inform the Land and Environment Court or warden's court that they have reached agreement about the determination; and

- the parties give the Land and Environment Court or warden's court a written and signed copy of the agreement; and
- the Land and Environment Court or warden's court believes that a determination in, or consistent with, those terms would be within its power and would be appropriate in the circumstances.

Clause 45 envisages that mediation is to be part of the process of resolving disputes between parties to an application. This clause requires the Land and Environment Court or, in a matter arising under or in relation to a State Mining Act, a warden's court to hold a mediation conference for all the parties or their representatives if the application is opposed or agreement cannot be reached. To ensure that the parties feel free to openly discuss matters in a conference, the person who presides over the conference must not take any further part in the processing of the application unless the parties agree.

Clause 46 deals with the situation where the parties reach agreement as a result of a mediation conference. The Land and Environment Court or warden's court must then make a determination consistent with the parties' agreement if:

- the parties inform the Land and Environment Court or warden's court that they have reached the agreement; and
- they give the Land and Environment Court or warden's court a written and signed copy of the agreement; and
- the Land and Environment Court or warden's court believes that a determination in, or consistent with, the agreement would be within its powers and is appropriate in the circumstances.

Clause 47 provides that, if an accepted application is not able to be dealt with as an unopposed application and no agreement between the parties is reached about it, the application must be referred to the Land and Environment Court or, in a matter arising under or in relation to a State Mining Act, a warden's court for determination in accordance with the provisions of Part 8.

Division 2—Right to negotiate applications

Clause 48 sets out the types of right to negotiate applications that can be made and who can make them.

A registered native title body corporate or a registered native title claimant can make an application under section 32 (Expedited procedure) of the Commonwealth Native Title Act. This is an objection to using the expedited procedure for a future act.

A relevant government, grantee, registered native title body corporate or a registered native title claimant can make an application under section 35 (Application for determination) of the Commonwealth Native Title Act for a determination to allow a permissible future act covered by Subdivision B (Right to negotiate) of Division 3 (Future acts and native title) of Part 2 (Native Title) of the Commonwealth Native Title Act to be done.

Clause 49 requires applications to be in a specified form, to be given to the native title registrar and to contain the information about the matters to be determined that is prescribed by regulations made under the proposed Act.

Clause 50 provides for the making of regulations under the proposed Act setting out what documents and fees must accompany an application.

Clause 51 requires that, if the requirements of clauses 48 to 50 above are complied with, the native title registrar must accept the application.

Division 3—Miscellaneous

Clause 52 permits the native title registrar to assist people to prepare applications and the material that has to go with them. This assistance may extend to conducting searches of land title registers, including the native title register.

PART 8—INQUIRIES, DETERMINATION OF CONTESTED APPLICATIONS AND OTHER DETERMINATIONS BY LAND AND ENVIRONMENT COURT AND WARDENS' COURTS

The National Native Title Tribunal has the functions in relation to applications, inquiries and determinations given to it by Part 3 (Applications) and Division 5 (Inquiries and determinations by the Tribunal) of Part 4 (National Native Title Tribunal) of the Commonwealth Native Title Act. These functions include the holding of inquiries into unopposed applications and right to negotiate applications. The Federal Court, on the other hand, has jurisdiction to determine contested claims to native title and contested claims to compensation which are referred to it by the National Native Title Tribunal.

All applications made under the Commonwealth Native Title Act must be lodged with the National Native Title Tribunal which will, to the extent possible, assist the parties to settle the matters. If a matter cannot be settled, the National Native Title Tribunal will refer it to the Federal Court for determination by the Federal Court. The Federal Court only has jurisdiction to hear applications that are referred to it by the National Native Title Tribunal.

As mentioned above, in New South Wales, it is the intention of the Parliament that the Land and Environment Court (in non-mining matters) and wardens' courts (in mining matters) will perform the functions of both the National Native Title Tribunal and the Federal Court under the Commonwealth Native Title Act. This Part contains clauses dealing with inquiries and other determinations (of the kind dealt with by the National Native Title Tribunal) and determinations of contested proceedings (of the kind dealt with by the Federal Court) by the Land and Environment Court and wardens' courts in accordance with the special procedures that apply to similar proceedings in the National Native Title Tribunal and Federal Court.

Division 1—General

Clause 53 deals with the operation of this Part and provides that Divisions 1, 2, 5 and 6 of the Part relate with all proceedings under the proposed Act. Division 3 deals only with inquiries while Division 4 deals only with contested applications that are not settled in accordance with the procedures provided in Part 7.

Clause 54 requires that there are to be native title assessors to exercise jurisdiction in inquiries and right to negotiate proceedings with Judges of the Land and Environment Court and wardens in wardens' courts and to assist the Land and Environment Court and wardens' courts in the determination of contested applications. The qualifications and terms and conditions of appointment of native title assessors are set out in the amendments to the Land and Environment Court Act 1979 in Schedule 1 to the proposed Act. The regulations under the proposed Act are to make provision for native title assessors appointed under the Land and Environment Court Act 1979 to exercise jurisdiction in, and to assist, wardens' courts.

The mechanism of using native title assessors recognises the special nature of applications for determinations of native title. One element that is unique to such claims is the gathering of evidence to establish the history of the land use and the relationship of the indigenous claimants to the land. In most cases, it will be a complex and time consuming task for the Land and Environment Court and wardens' courts to hear and evaluate the evidence presented to them.

Native title assessors provide an effective mechanism through which Aboriginal peoples can give evidence in a less formalised manner. It is also the intention that the native title assessors will have a role in the preliminary taking of evidence for the Land and Environment Court and wardens' courts. This means that native title assessors will not be involved if a proceeding goes on appeal to a Judge of the Land and Environment Court (in non-mining cases) or to a warden (in mining cases) because their assistance on factual matters will have already been sought, if necessary, for the initial court hearing.

On inquiries into unopposed applications and right to negotiate applications, native title assessors may adjudicate on matters with Judges or wardens. In contested matters however, native title assessors are subject to the direction and control of the Land and Environment Court or wardens' courts.

Clause 55 provides that the persons who are parties to the application under clause 41 are parties to an inquiry about an unopposed application or to a hearing of a contested application under this Part. For inquiries into the right to negotiate, the parties are the Government that proposes to make the grant, the persons who hold or claim native title to that area and the person who seeks the grant over that area. A person may also ask the Land and Environment Court or a warden's court for leave to be joined as a party if the person's interests are, or could be, affected by a determination in the matter.

This provision allows the Land and Environment Court or wardens' courts to join parties who, for whatever reason, were not previously joined as parties. For example, the State Minister may not wish to be made a party in the initial stages in order to give the other parties maximum flexibility in attempting to reach a negotiated or mediated settlement under Part 7 of the proposed Act but may wish to be a party once an application is contested and is to be determined under this Part.

Clause 56 provides that the Land and Environment Court or wardens' courts can:

- look at any relevant evidence given to native title assessors or given in other proceedings before it or other bodies; and
- make findings of fact from that evidence; and
- take into consideration any relevant recommendations and decisions made by a native title assessor, the Land and Environment Court or a warden's court or any other court or body.

This means that the Land and Environment Court and wardens' courts can save time and resources by choosing not to reconsider matters that have already been canvassed in earlier proceedings. However, recourse may not be had to evidence given or statements made at a mediation conference held under clause 45 or a conference held under clause 57 (see explanatory material on these clauses) unless the parties agree.

Division 2—Conferences, appearances, giving of evidence and orders generally

Clause 57 provides that a conference of the parties may be held to assist the parties to resolve matters. A conference for the purposes of an inquiry is to be presided over by a Judge, a native title assessor or the native title registrar in the Land and Environment Court or by a warden, a native title assessor or the native title registrar in a warden's court. A conference concerning a contested application must be presided over by a native title assessor who is assisting the Land and Environment Court or warden's court in the proceedings.

The use of conferences is a technique adopted to promote a prompt and orderly resolution of issues. The conferences are without prejudice which means that evidence cannot be given by a party at a later inquiry or hearing about things that were said or done at the conference, without the consent of the other parties. In addition, the person who presides over the conference cannot later sit on the Land and Environment Court or warden's court in the inquiry or hearing for the application unless the parties agree.

Clause 58 provides that a party has the right to be present at Conferences, inquiries and hearings of contested applications, except if the person presiding over the conference or the Land and Environment Court or warden's court at an inquiry or hearing decides under clause 60 that the conference, inquiry or hearing should be closed or restricted to certain parties only.

Clause 59 allows people to take part in conferences, inquiries and hearings by telephone or use of other electronic means. It is expected that courts will make extensive use of such means of communication in conducting conferences.

Clause 60 provides that, generally, conferences, inquiries and hearings of contested applications are to be held in public. The person presiding over a conference, or the Land and Environment Court or warden's court in an inquiry or on the hearing of a contested application, must take this into account when allowing telephone, television or other similar attendance at conferences, inquiries or hearings. The clause permits a presiding person or body to order that some or all of a conference, inquiry or hearing be kept private or to limit attendance to particular people. The presiding person or body can do this of the person's or its own accord or if one of the parties requests it.

In making a decision about privacy, a presiding person or body must take into account the cultural and customary concerns of Aboriginal peoples. This measure recognises the special nature of certain information about land in Aboriginal communities and the cultural and customary restrictions those communities may place on talking about that information.

Clause 61 provides that the Land and Environment Court and wardens' courts can place restrictions on publishing information or evidence from a Conference, inquiry or hearing of a contested application. The Land and Environment Court or a warden's court can do this on its own initiative or on the application of a party or the person who presided over the conference.

Clause 62 deals with technical aspects of proceedings. The Land and Environment Court, wardens' courts, native title assessors and the native title registrar can take sworn or affirmed evidence, and can make special arrangements for this if a witness attends by telephone or other means. The Land and Environment Court, wardens' courts and the native title registrar can order witnesses to attend hearings. A native title assessor may apply to the Land and Environment Court or a warden's court for an order to summon a person to appear before the native title assessor. All parties can call and examine witnesses. On conferences and inquiries, witnesses can only be cross-examined or re-examined if the presiding person or body allows this.

Clause 63 sets out the matters that must be included if the Land and Environment Court or a warden's court makes a decision or determination that compensation is payable. The decision or determination must identify:

- the persons entitled to compensation or the method for determining the persons entitled; and
- the method of determining the distribution of the compensation; and
- the method for deciding disputes about entitlements to compensation.

Division 3—Provisions applying only to inquiries

Subdivision 1—Inquiries generally

Clause 64 requires the Land and Environment Court to hold inquiries into unopposed applications and right to negotiate applications (other than those arising under or in relation to a State Mining Act) and wardens' courts to hold inquiries into unopposed applications and right to negotiate applications (but only about matters arising under or in relation to a State Mining Act).

Clause 65 provides that an inquiry can be about more than one application or issue.

Clause 66 provides that, generally, every party has the right to make submissions and to consider the evidence being presented by the other parties. This right is qualified to the extent that the Land and Environment Court or a warden's court decides that some evidence should be private as, for example, evidence that has special cultural or customary significance to Aboriginal people.

Clause 67 provides that questions of law are to be decided by the presiding member, who must be a Judge in the Land and Environment Court or a warden in a warden's court. Other questions are decided by a majority of members and, if there is no majority, by the presiding Judge or the warden.

Clause 68 provides that the Land and Environment Court or a warden's court can reject applications that it considers to be frivolous or vexatious. This means that it need not consider applications that are obviously without merit.

Clause 69 provides that, if an applicant does not establish a prima facie case, the Land and Environment Court or a warden's court can dismiss the application at any stage during the inquiry.

Clause 70 provides that the Land and Environment Court or a warden's court may dismiss an application if the applicant requests this in writing and the Land and Environment Court or warden's court is satisfied that this is appropriate.

Subdivision 2—Hearings

Clause 71 allows the Land and Environment Court and wardens' courts to hold hearings for the purposes of an inquiry.

Clause 72 allows the Land and Environment Court and wardens' courts to authorise appropriate persons to take evidence from a witness. For example, if a witness is in a remote location and cannot travel to the Land and Environment Court or a warden's court, the authorised person can stand in the place of the Land and Environment Court or warden's court and exercise all of the powers and functions of the Land and Environment Court or a warden's court under clause 62 in respect of that witness.

Clause 73 allows the parties to use interpreters when making submissions and giving evidence.

Clause 74 allows the Land and Environment Court and wardens' courts to retain, for a reasonable time, and copy or take extracts from, documents produced to them.

Clause 75 provides for expenses for witnesses at inquiries before the Land and Environment Court and wardens' courts to be paid as prescribed by regulations made under the proposed Act. If a person is called on behalf of a particular party, that party must pay. Otherwise, the State pays.

Subdivision 3—Determinations and reports

Clause 76 quires that, when an inquiry is complete, the Land and Environment Court or a warden's court must make a determination about the application and must state in the determination the facts on which it is based.

Clause 77 provides that the Land and Environment Court or a warden's court must make a determination about a right to negotiate application after holding an inquiry about the application, unless the parties have given it a copy of an agreement they have reached or an equivalent provision under any alternative State law imposes other or different requirements. Any findings of fact that the Land and Environment Court or warden's court has made must be included in the determination.

Clause 78 quires that determinations and reports must be in writing and given to each party.

Clause 79 provides that decisions and determinations of the Land and Environment Court and wardens' courts are final, subject to the decision made on an appeal from a decision or determination or the overruling of a determination made in a right to negotiate inquiry by the State Minister in the interests of the State under and in accordance with section 42 (Overruling of determinations) of the Commonwealth Native Title Act.

Division 4—Provisionsapplying only to contested applications

Clause 80 provides for the Land and Environment Court or a warden's court to make a determination, in accordance with an agreement by the parties about all or part of a contested matter before it, without proceeding to a hearing, completing the hearing or, if the agreement is about part of the matter only, without hearing that part of the matter. The conditions for making the determination are that:

- the parties give the Land and Environment Court or warden's court a written and signed copy of the agreement; and

- the Land and Environment Court or warden's court believes that a determination in, or consistent with, those terms would be within its power and would be appropriate in the circumstances.

Division 5—Appeals

Clause 81 provides that appeals may be made to a Judge of the Land and Environment Court or, in a matter arising under or in relation to a State Mining Act, a warden or to the Supreme Court from specified decisions and determinations of non-judicial members or officers. The parties have 28 days, which can be extended, from the time they are told of the decision in which to appeal. The Judge, warden or Supreme Court can confirm or set aside the decision or determination, and can remit the matter for rehearing by a non-judicial member or officer either with or without directions.

Clause 82 provides that appeals may be made to the Supreme Court on a question of law from a decision or determination by a Judge in the Land and Environment Court or a warden. The Supreme Court can remit the matter for rehearing by the Land and Environment Court or a warden in accordance with the Supreme Court's decision or can make any other order about the appeal that seems appropriate. However, an appeal against an interlocutory order or decision of a Judge of the Land and Environment Court or a warden cannot be made without the leave of the Supreme Court.

Clause 83 provides that decisions which are appealed against still have effect and can be implemented while the appeal is heard unless the person or body hearing the appeal orders otherwise to protect the positions of the parties to the appeal.

Clause 84 allows the person or court hearing an appeal, on the person's or its own initiative or on the application of a party, to place restrictions on the publishing of information or evidence given to the person or body.

Division 6—Miscellaneous

Clause 85 makes it an offence, punishable by a maximum fine of 40 penalty units (currently, $4,000) for a person to contravene a direction prohibiting the disclosure of evidence.

Clause 86 is designed to provide the native title registrar and native title assessors, when performing duties under the proposed Act, with similar protection to that provided for Judges of the Supreme Court.

Clause 87 provides that existing or former Judges, native title assessors, native title registrars or officers of the Land and Environment Court, wardens' courts and the Supreme Court cannot be called to give evidence about matters that are covered by a direction of the Land and Environment Court or a warden's court under clause 61 of the proposed Act or of either of those bodies or the Supreme Court under clause 84 of the proposed Act. The clause also provides that applications may be made to the Land and Environment Court, wardens' courts or the Supreme Court for a nondisclosure direction. The clause provides a similar regime for documents given to the Land and Environment Court, wardens' courts or the Supreme Court. The clause further provides that Judges, wardens, native title assessors, the native title registrar and other officers of the Land and Environment Court or wardens' courts cannot be called to give evidence in a court about any proceedings under the proposed Act before the Land and Environment Court or a warden's court (other than in a prosecution under clause 85).

PART 9—NATIVE TITLE REGISTER

This Part establishes a New South Wales native title register to record native title claims that are accepted for determination and determinations of native title. This Part provides for the contents of the New South Wales native title register, how it may be inspected by the public, that some parts of it may be confidential and how it is to be kept. Under this Part, the New South Wales native title registrar has powers to:

(a) establish and keep the New South Wales native title register; and

(b) record details of native title claims that are accepted for determination and of determinations and decisions; and

(c) provide for inspections of the register; and

(d) determine the confidentiality of parts of the register.

Clause 88 defines "claim" for the purposes of the Part.

Clause 89 provides for the existence of the register that the native title registrar is to establish and keep, and states that it may be kept on computer.

Clause 90 prescribes the essential information that must be kept on the register. This information includes, in the case of native title claims, the body with which an application was lodged, the date it was lodged, the name and address for service of the claimant and the area claimed and, in the case of determinations and decisions, the name of the body that made the determination or decision, the date on which it was made, the area of land or waters covered by the determination or decision and the matters determined or decided, including the names of the common law holders of the native title, the name of any prescribed body corporate that holds the native title in trust and the name and address of the registered native title body corporate. The clause also allows the native title registrar to include other appropriate details.

Clause 91 provides that the register is to be a public register. The register is to be available for public inspection for the fee prescribed by regulations to be made under the proposed Act. If the register is stored on a computer, the need for public access is satisfied by the public availability of a terminal and a print-out or both. This clause is subject to the requirement (under clause 92) that sensitive information is to be safeguarded and kept confidential.

Clause 92 provides that the native title registrar has a discretion to exclude public access to sensitive information on the register. The discretion is to be exercised if disclosure of the information would not be in the public interest. In exercising the discretion, the native title registrar must have regard to the cultural and customary concerns of Aboriginal people.

Examples of such information might include:

- the location or existence, or both, of sacred or secret sites;
- personal financial details;
- names of a claimant's relatives who are deceased.

Clause 93 requires the native title registrar to include in the register information that is provided to the registrar. It is important that the notification, registration and determination of claims is efficiently recorded so that the current status of any particular land is easily ascertainable by parties interested in that land.

Clause 94 provides that the New South Wales register may be located in the land registry under the Real Property Act 1900.

Clause 95 requires the New South Wales native title registrar to inform the National Registrar of all native title applications and determinations by recognised State/Territory bodies for New South Wales.

PART 10—INTERIM PROVISIONS

Because of the operation of the Commonwealth Native Title Act, it is essential that the compulsory acquisition laws of New South Wales contain provisions to allow the compulsory acquisition of native title. The payment of compensation for such compulsory acquisition must be in accordance with the Commonwealth Native Title Act. The operation of the Commonwealth Native Title Act also makes it necessary to ensure that the Mining Acts of New South Wales treat native title in a racially non-discriminatory way. This Part is designed to achieve those objectives.

Division 1—Object of this Part

Clause 96 states that it is the object of this Part to make, and permit the making, of various interim provisions pending a full review of New South Wales law, to ensure:

(a) New South Wales law is consistent with standards set by the Commonwealth Native Title Act for future dealings affecting native title; and

(b) that claims to native title can be dealt with by a State-based mechanism that is complementary to, and consistent with, the mechanism established by the Commonwealth Native Title Act.

Division 2—Compulsory acquisition

Clause 97 provides that the compulsory acquisition laws of New South Wales apply to native title with any changes made by the regulations under the proposed Act that are necessary to ensure consistency with the Commonwealth Native Title Act.

Division 3—Mining

Clause 98 provides that, for the purposes of every Mining Act of New South Wales, the owners of land include native title holders. The clause also provides that the native title holders are entitled to every right and privilege of other owners of land.

Clause 99 allows every Mining Act of New South Wales to be amended by regulations made under the proposed Act to give effect to the objects and provisions of the Commonwealth Native Title Act.

Division 4—Other interim provisions

Clause 100 provides that, for the purposes of an Act prescribed by regulations made under the proposed Act, the owners of land include the holders of native title in relation to land. The clause provides that the native title holders are entitled to every right and privilege of other owners of land. The clause also provides that the clause is not intended, by implication, to limit any rights of native title holders.

Clause 101 confers an interim regulation making power to amend such Acts as is necessary and convenient in order to carry out or give effect to the objects and provisions of the proposed Act or the Commonwealth Native Title Act. A regulation made under this clause expires 1 year after it is made or on the expiry of this Part of the proposed Act.

Clause 102 provides that Part 10 of the proposed Act expires 2 years after it commences.

PART 11—MISCELLANEOUS

Clause 103 specifies the way in which native title holders are to be notified of the doing of acts that affect or may affect native title rights and interests.

Clause 104 enables the Crown to recover from an authority of the State that does not represent the Crown compensation that the Crown has paid following acquisition of native title rights and interests by the authority under a compulsory acquisition law.

Clause 105 provides that notes included in the proposed Act are by way of explanation only and do not form part of the proposed Act.

Clause 106 confers power on the Governor to make regulations for the purposes of the proposed Act.

Clause 107 gives effect to the Schedule of miscellaneous amendments to other Acts.

Clause 108 provides for the review of the proposed Act within 5 years after its commencement.

SCHEDULE 1—MISCELLANEOUS AMENDMENT OF OTHER ACTS

Schedule 1 contains miscellaneous amendments of other Acts, including amendments to the Aboriginal Land Rights Act 1983, the Land and Environment Court Act 1979, the Mining Act 1992, the Petroleum (Onshore) Act 1991 and the Petroleum (Submerged Lands) Act 1982.

Amendments are also made to various Acts with respect to the compulsory acquisition of land. These Acts are the Crown Lands Act 1989, the Fisheries and Oyster Farms Act 1935, the Forestry Act 1916, the Hunter Water Board (Corporatisation) Act 1991, the Land Acquisition (Just Terms Compensation) Act 1991, the Local Government Act 1993, the National Parks and Wildlife Act 1974, the Pipelines Act 1967, the Roads Act 1993 and the Transport Administration Act 1988. The amendments to these Acts ensure, among other matters, that native title rights and interests can be compulsorily acquired and that, if the purpose of an acquisition is to confer rights or interests on persons other than the State or a public agency, the acquisition will be a permissible future act within the meaning of the Commonwealth Native Title Act and that the right to negotiate regime established by that Act will apply to it.