

6. *Native Title Act 1993*



↵NATIVE TITLE ACT↵ 1993 - SECT 43

Modification of Subdivision if satisfactory alternative State or Territory provisions

SECT. *Determination about alternative provisions*

(1) If:

- (a) a law of a State or Territory provides for alternative provisions to those contained in this Subdivision in relation to some or all acts to which this Subdivision applies that are attributable to the State or Territory; and
- (b) the Commonwealth Minister determines in writing that the alternative provisions comply with subsection (2);

then, while the determination is in force, the alternative provisions have effect instead of this Subdivision.

Requirement to be satisfied

(2) The alternative provisions comply with this subsection if, in the opinion of the Commonwealth Minister, they:

- (a) contain appropriate procedures for notifying registered ↵native↵ title bodies corporate, representative bodies, registered ↵native title claimants and potential native↵ title claimants of the ↵act↵; and
- (b) require negotiation in good faith among the persons concerned; and
- (c) provide for mediation by a person or body to assist in settling any dispute among the persons concerned regarding the ↵act↵; and
- (d) give registered ↵native↵ title bodies corporate and registered ↵native title claimants the right to object against the act↵; and
- (e) make provision on similar terms to section 30 and contain time limits similar to those applicable under this Subdivision; and
- (f) provide that the body determining the objection consists of, or includes, persons enrolled for at least 5 years as legal practitioners of:
 - (i) the High Court; or
 - (ii) another federal court; or
 - (iii) the Supreme Court of a State or Territory; and
- (g) make provision to the same effect as section 39 in relation to matters that are required to be taken into account by the body determining the objection; and
- (h) if the alternative provisions involve the hearing and determination of the objection by a person or body other than the NNTT or a recognised State/Territory body for the State or Territory--provide for a member of the recognised State/Territory body (if any) or of the NNTT to participate in the determination; and

- (i) provide that any decision of the body determining the objection may only be overruled on grounds of State or Territory interest or of national interest; and
- (j) make appropriate provision for compensation for the ~~fact~~, including provision for trusts on similar terms to those in subsections 36C(5), 41(3) and 42(5); and
- (k) if the alternative provisions allow a Minister to make a determination in relation to the ~~fact~~ in circumstances other than those covered in paragraph (i)--provide for those circumstances to be similar to those set out in section 36A and for requirements similar to those in sections 36B and 36C to apply.

Revocation of determination

(3) If at any time the alternative provisions are amended so that they no longer comply with subsection (2), the Commonwealth Minister must:

- (a) advise the State Minister or the Territory Minister concerned in writing of the fact; and
- (b) if, at the end of 180 days after doing so, the alternative provisions do not comply and subparagraphs (c)(i) and (ii) do not apply--in writing, revoke the determination made under paragraph (1)(b); and
- (c) if:
 - (i) at the end of 180 days after advising the State Minister or Territory Minister, the alternative provisions do not comply and the Commonwealth Minister is satisfied that the State Minister or the Territory Minister is using his or her best endeavours to ensure that the alternative provisions will comply; and
 - (ii) before the end of the 180 days, the Commonwealth Minister determined in writing that a further period should apply for the purposes of this paragraph; and
 - (iii) at the end of the further period, the alternative provisions still do not comply;in writing, revoke the determination made under paragraph (1)(b).

Note: A determination mentioned in subparagraph (c)(ii) is a disallowable instrument: see section 214.

Regulations to make transitional provisions

(4) The regulations may prescribe any modifications of ~~this Act~~ that are necessary to deal with transitional matters arising from the making, amendment or revocation of determinations under this section.

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NATIVE TITLE ACT 1993 - SECT 43A

Exception to right to negotiate: satisfactory State/Territory provisions

SECT. *Determination about alternative provisions*

(1) If:

(a) a law or laws of a State or Territory provide for alternative provisions to those contained in this Subdivision in relation to some or all acts to which this Subdivision applies that:

(i) are attributable to the State or Territory; and

(ii) relate, to any extent, to an area of land or waters that is an alternative provision area (see subsection (2)); and

(b) the Commonwealth Minister determines in writing that the provisions comply with subsections (4) and (6) and that the requirements of subsection (7) are complied with;

then, subject to subsection (10), while the determination is in force, the alternative provisions have effect instead of this Subdivision.

Meaning of alternative provision area

(2) An "alternative provision area" is:

(a) an area:

(i) that is, or was (whether before or after this Act commenced), covered by a freehold estate in fee simple or by a lease (other than a mining lease); and

(ii) over which all native title rights and interests have not been extinguished; or

Example 1: An example of such an area is an area covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease (including one subject to section 47).

Example 2: An example of a freehold estate in fee simple over which all native title rights and interests may not have been extinguished is one whose grant or vesting is covered by subsection 23B(9), (9A), (9B) or (9C).

(b) an area that is, or was (whether before or after this Act commenced):

(i) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in right of the State or Territory or by the making, amendment or repeal of legislation of the State or Territory, under which the whole or a part of the land or waters in the area was to be used for public purposes generally or for a particular purpose; and

(ii) in use for public purposes, for the particular purpose or for a similar purpose; or

Example: An example of an area covered by paragraph (b) is an area containing a national park.

(c) an area that, when the act is done, is wholly within a town or city (see section 251C).

Notification of proposed determination

(3) Before making the determination, the Commonwealth Minister must:

- (a) notify all representative Aboriginal/Torres Strait Islander bodies for the land or waters concerned of the proposed determination; and
- (b) invite submissions from them about the proposed determination; and
- (c) consider any submissions made in response to the invitation.

Requirement to be satisfied: procedures etc.

(4) For the purposes of paragraph (1)(b), the alternative provisions comply with this subsection if, in the opinion of the Commonwealth Minister, they:

- (a) contain appropriate procedures for notifying each of the following that an act to which the provisions apply is to be done:
 - (i) any registered native title claimant (a "claimant") in relation to any of the land or waters to which the act relates;
 - (ii) any registered native title body corporate (a "body corporate") in relation to any of that land or waters;
 - (iii) any representative Aboriginal/Torres Strait Islander body in relation to any of that land or waters; and
- (b) give any claimant or body corporate the right to object, within a specified period after the notification, to the doing of the act so far as it affects their registered native title rights and interests; and
- (c) if the act is of the kind mentioned in subparagraph 26(1)(c)(iii) (which deals with certain compulsory acquisitions)--provide for consultation (including provide in relation to mediation) between:
 - (i) any claimants, and bodies corporate, who object; and
 - (ii) the State or Territory;about ways of minimising the act's impact on registered native title rights and interests in relation to the land or waters concerned; and
- (d) in any other case--provide for consultation (including provide in relation to mediation) between:
 - (i) any claimants, and bodies corporate, who object; and
 - (ii) the person who requested or applied for the doing of the act;about ways of minimising the act's impact on registered native title rights and interests in relation to the land or waters concerned, including about any access to the land or waters or the way in which any thing authorised by the act might be done; and
- (e) if any person objects as mentioned in paragraph (b), provide for the objection to be heard by an independent person or body; and

Example: The independent person or body could be a State or Territory tribunal which deals with acts of the kind concerned, for example, a mining warden where the act is the grant of a mining lease.

(f) provide for judicial review of the decision to do the act; and

Example: The judicial review could be by the Supreme Court of the State or Territory.

(g) provide that, if the independent person or body hearing any objection as mentioned in paragraph (e) makes a determination upholding the objection, or that contains conditions about the doing of the act that relate to registered native title rights and interests, the determination must be complied with unless:

(i) the Minister of the State or the Territory responsible for indigenous affairs is consulted; and

(ii) the consultation is taken into account; and

(iii) it is in the interests of the State or the Territory not to comply with the determination; and

(h) if the act is of the kind mentioned in subparagraph 26(1)(c)(iii) (which deals with certain compulsory acquisitions)--confer on each claimant and body corporate procedural rights that are not less favourable than those they would have on the assumption that they instead held ordinary title to any land concerned and to the land adjoining, or surrounding, any waters concerned.

*Meaning of **determination***

(5) In paragraph (4)(g):

"determination" includes recommendation.

"in the interests of" the State or the Territory includes:

(a) for the social or economic benefit of the State or the Territory (including of Aboriginal peoples and Torres Strait Islanders); and

(b) in the interests of the relevant region or locality in the State or the Territory.

Requirement to be satisfied: compensation

(6) For the purposes of paragraph (1)(b), the alternative provisions comply with this subsection if, in the opinion of the Commonwealth Minister, they provide for compensation for the effect of the act on native title to be payable and for any dispute about the compensation to be determined by an independent person or body.

Requirement to be satisfied: preservation of areas of significance

(7) For the purposes of paragraph (1)(b), the requirements of this subsection are complied with if, in the opinion of the Commonwealth Minister, a law of the Commonwealth, the State or the Territory provides, for the whole of the land or waters to which the alternative provisions relate, in relation to the preservation or protection of areas, or sites, that may be of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.

Different provisions for different kinds of land or waters

(8) Laws of a State or Territory may make different provision under subsection (1) in relation to different kinds of land or waters.

Note: In such a case, the Commonwealth Minister would need to make separate determinations under that subsection.

Revocation of determination

(9) If at any time the alternative provisions are amended so that they no longer comply as mentioned in paragraph (1)(b), the Commonwealth Minister must:

(a) advise the State Minister or the Territory Minister concerned in writing of the fact; and

(b) if, at the end of 90 days after doing so, the alternative provisions do not comply and subparagraphs (c)(i) and (ii) do not apply--in writing, revoke the determination made under paragraph (1)(b); and

(c) if:

(i) at the end of 90 days after advising the State Minister or Territory Minister, the alternative provisions do not comply and the Commonwealth Minister is satisfied that the State Minister or the Territory Minister is using his or her best endeavours to ensure that the alternative provisions will comply; and

(ii) before the end of the 90 days, the Commonwealth Minister determined in writing that a further period should apply for the purposes of this paragraph; and

(iii) at the end of the further period, the alternative provisions still do not comply;

in writing, revoke the determination made under paragraph (1)(b).

Note: A determination mentioned in subparagraph (c)(ii) is a disallowable instrument: see section 214.

Exclusion of certain compulsory acquisitions

(10) The alternative provisions do not apply to an act of the kind mentioned in subparagraph 26(1)(c)(iii) (which deals with certain compulsory acquisitions) if the act involves the acquisition of native title rights and interests in relation to land or waters in both an alternative provision area and an area that is not an alternative provision area.

Regulations to make transitional provisions

(11) The regulations may prescribe any modifications of this Act that are necessary to deal with transitional matters arising from the making, amendment or revocation of determinations under this section.

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