

2013-2014

The Parliament of the  
Commonwealth of Australia

THE SENATE

*Presented and read a first time*

**Native Title Amendment (Reform) Bill  
2014**

**No.     , 2014**

*(Senator Siewert)*

**A Bill for an Act to amend the *Native Title Act 1993*  
to further the interests of Aboriginal peoples and  
Torres Strait Islanders, and for related purposes**



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1     **A Bill for an Act to amend the *Native Title Act 1993***  
2     **to further the interests of Aboriginal peoples and**  
3     **Torres Strait Islanders, and for related purposes**

4     The Parliament of Australia enacts:

5     **1 Short title**

6                     This Act may be cited as the *Native Title Amendment (Reform) Act*  
7                     2014.

8     **2 Commencement**

9                     This Act commences on the day after this Act receives the Royal  
10                    Assent.

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1     **3 Schedule(s)**

2                   Each Act that is specified in a Schedule to this Act is amended or  
3                   repealed as set out in the applicable items in the Schedule  
4                   concerned, and any other item in a Schedule to this Act has effect  
5                   according to its terms.

6     **4 Object**

7                   The object of this Act is to implement reforms to the *Native Title*  
8                   *Act 1993* to improve the effectiveness of the native title system for  
9                   Aboriginal peoples and Torres Strait Islanders.

1       **Schedule 1—Amendment of the Native Title**  
2                       **Act 1993**  
3

4       **1 At the end of subsection 13(5)**

5               Add:

6                       ; or (c) that the determination relates to an area in relation to which  
7                               paragraphs 47C(1)(b) and (c) apply; or

8                       (d) that the determination relates to an area in relation to which  
9                               the agreement required by paragraph 47D(1)(b) has been  
10                              given.

11                    Note:       Sections 47C and 47D provide for extinguishment of native title rights  
12                                       and interests in relation to certain areas to be disregarded.

13       **2 Subsection 26(3)**

14               Repeal the subsection.

15       **3 Paragraph 31(1)(b)**

16               Repeal the paragraph, substitute:

17                       (b) the negotiation parties must, for a period of at least 6 months  
18                               starting on the notification day, negotiate in good faith using  
19                               all reasonable efforts to come to an agreement about:

20                              (i) the doing of the act; or

21                              (ii) the conditions under which each of the native title  
22                                       parties might agree to the doing of the act.

23       **4 After subsection 31(1)**

24               Insert:

25                       (1A) For the purposes of paragraph (1)(b), *negotiate in good faith using*  
26                               *all reasonable efforts* includes but is not limited to the following:

27                              (a) attending, and actively participating in, meetings at  
28                                       reasonable times including, where reasonably practicable, at  
29                                       a location where most of the members of the native title  
30                                       parties reside, if so requested by them;

31                              (b) disclosing relevant information (other than confidential or  
32                                       commercially sensitive information) in a timely manner;

33                              (c) making reasonable offers and counter-offers;

- 1 (d) demonstrably giving genuine consideration to proposals  
2 made by other negotiation parties;  
3 (e) responding to proposals made by other negotiation parties in  
4 a reasonable, timely and detailed manner, including  
5 providing reasons for the relevant response;  
6 (f) refraining from capricious or unfair conduct that undermines  
7 the beneficial nature of the right to negotiate.

8 (1B) It is not necessary that a negotiation party engage in misleading,  
9 deceptive or unsatisfactory conduct in order to be found to have  
10 failed to negotiate in good faith.

11 (1C) In determining whether or not a negotiation party has negotiated in  
12 good faith using all reasonable efforts, the arbitral body must have  
13 regard to the financial resources of the negotiation party and, if the  
14 negotiation party is a native title party, any demands imposed on  
15 the native title party in relation to cultural and religious practices.

16 **5 Subsection 31(2) (heading)**

17 Repeal the heading, substitute:

18 *Negotiation in good faith using all reasonable efforts*

19 **6 Subsection 31(2)**

20 After “good faith”, insert “using all reasonable efforts”.

21 **7 After subsection 31(2)**

22 Insert:

23 (2A) In any proceeding in which the application of paragraph (1)(b) is  
24 raised, the party asserting that it has negotiated in good faith using  
25 all reasonable efforts has the onus of proving that it has done so.

26 **8 Paragraph 31(4)(b)**

27 After “good faith”, insert “using all reasonable efforts”.

28 **9 Subsection 35(1)**

29 Omit “Any”, substitute “Subject to subsection (1A), any”.



1 **10 After subsection 35(1)**

2 Insert:

- 3 (1A) A negotiation party may not apply to the arbitral body under  
4 subsection (1) unless the negotiation party has negotiated in good  
5 faith using all reasonable efforts, in accordance with section 31.

6 **11 Subsection 36(2) (heading)**

7 Repeal the heading, substitute:

8 *Determination not to be made where failure to negotiate in good*  
9 *faith using all reasonable efforts*

10 **12 Subsection 36(2)**

11 After “good faith”, insert “using all reasonable efforts”.

12 **13 At the end of Division 4 of Part 2**

13 Add:

14 **47C National, State or Territory park areas covered by claimant**  
15 **application**

16 *When section applies*

- 17 (1) This section applies if:
- 18 (a) an application under section 61 is made in relation to an area;
  - 19 and
  - 20 (b) when the application is made, the area is, or is part of, an area
  - 21 (such as a national, State or Territory park):
  - 22 (i) that is set aside; or
  - 23 (ii) in which an interest is granted or vested;
  - 24 by or under a law of the Commonwealth, a State or a
  - 25 Territory for the purpose of preserving the natural
  - 26 environment of the area, whether that setting aside, granting
  - 27 or vesting resulted from a dedication, reservation,
  - 28 proclamation, condition, vesting in trustees or otherwise; and
  - 29 (c) when the application is made, one or more members of the
  - 30 native title claim group occupy the area.

1 *Prior extinguishment to be disregarded*

- 2 (2) For all purposes under this Act in relation to the application, any  
3 extinguishment of the native title rights and interests in relation to  
4 the area by any of the following acts must be disregarded:  
5 (a) the setting aside, granting or vesting mentioned in  
6 paragraph (1)(b);  
7 (b) the creation of any other prior interest in relation to the area.

8 *Effect of determination*

- 9 (3) If the determination on the application is that the native title claim  
10 group holds the native title rights and interests claimed:  
11 (a) the determination does not affect:  
12 (i) the validity of the creation of any prior interest in  
13 relation to the area; or  
14 (ii) any interest of the Crown in any capacity, or of any  
15 statutory authority, in any public works on the land or  
16 waters concerned; and  
17 (b) the non-extinguishment principle applies to the creation of  
18 any prior interest in relation to the area.

19 **47D Agreements to disregard prior extinguishment**

20 *When section applies*

- 21 (1) This section applies if:  
22 (a) an application under section 61 is made in relation to an area;  
23 and  
24 (b) before a determination on the application is made, there is an  
25 agreement in writing between the applicant and the  
26 Government party that the extinguishment of native title  
27 rights or interests by a prior act affecting native title in  
28 relation to the area, or any part of the area, covered by the  
29 application be disregarded.

30 *Prior extinguishment to be disregarded*

- 31 (2) For all purposes under this Act in relation to the application, any  
32 extinguishment of the native title rights and interests by any of the  
33 following acts must be disregarded:
-

- 1 (a) the prior act itself;
- 2 (b) the creation of any other interest in relation to the area as
- 3 result of the prior act;
- 4 (c) the doing of any act by virtue of holding the interest.

5 *Effect of determination*

- 6 (3) If the determination on the application is that the native title claim
- 7 group holds the native title rights and interests claimed:
  - 8 (a) the determination does not affect:
    - 9 (i) the validity of the creation of any prior interest in
    - 10 relation to the area; or
    - 11 (ii) any interest of the Crown in any capacity, or of any
    - 12 statutory authority, in any public works on the land or
    - 13 waters concerned; and
  - 14 (b) the non-extinguishment principle applies to the creation of
  - 15 any prior interest in relation to the area.

16 **14 After section 61**

17 Insert:

18 **61AA Presumptions relating to applications**

- 19 (1) This section applies to an application for a native title
- 20 determination brought under section 61 if all of the following
- 21 circumstances exist:
  - 22 (a) the native title claim group defined in the application applies
  - 23 for a determination of native title rights and interests where
  - 24 the rights and interests are found to be possessed under laws
  - 25 acknowledged and customs observed by the native title claim
  - 26 group;
  - 27 (b) the members of the native title claim group reasonably
  - 28 believe the laws so acknowledged and the customs so
  - 29 observed to be traditional;
  - 30 (c) the members of the native title claim group, by the laws
  - 31 acknowledged and the customs observed, have a connection
  - 32 with the land or waters the subject of the application;
  - 33 (d) the members of the native title claim group reasonably
  - 34 believe that persons, from whom one or more of them is
  - 35 descended, acknowledged traditional laws and observed

1 traditional customs at sovereignty by which those persons  
2 had a connection with the land or waters the subject of the  
3 application.

4 (2) If this section applies to an application, it must be presumed, in the  
5 absence of proof to the contrary:

6 (a) that the laws acknowledged and customs observed by the  
7 native title claim group are traditional laws acknowledged  
8 and traditional customs observed at sovereignty; and

9 (b) that the native title claim group has a connection with the  
10 land or waters by those traditional laws and traditional  
11 customs; and

12 (c) if the native title rights and interests asserted are capable of  
13 recognition by the common law—that the facts necessary for  
14 the recognition of those rights and interests by the common  
15 law are established.

#### 16 **61AB Continuing connection**

17 A court may determine that subsection 223(1) has been satisfied,  
18 despite finding that there has been:

19 (a) a substantial interruption in the acknowledgement of  
20 traditional laws or the observance of traditional customs; or

21 (b) a significant change to traditional laws acknowledged or  
22 traditional customs observed;

23 if the primary reason for the substantial interruption or the  
24 significant change is the action of a State or a Territory or a person  
25 or other party who is not an Aboriginal person or a Torres Strait  
26 Islander.

#### 27 **15 Subsection 61A(4) (heading)**

28 Repeal the heading, substitute:

29 *Section not to apply in section 47, 47A, 47B, 47C or 47D cases*

#### 30 **16 Paragraph 61A(4)(a)**

31 Omit “or 47B”, substitute “, 47B, 47C or 47D”.

#### 32 **17 Paragraph 61A(4)(b)**

33 Omit “or 47B”, substitute “, 47B, 47C or 47D”.

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1 **18 After subsection 223(1)**

2 Insert:

3 *Traditional laws and customs*

4 (1A) Without limiting subsection (1), **traditional laws acknowledged** in  
5 that subsection includes such laws as remain identifiable through  
6 time, regardless of whether there is a change in those laws or in the  
7 manner in which they are acknowledged.

8 (1B) Without limiting subsection (1), **traditional customs observed** in  
9 that subsection includes such customs as remain identifiable  
10 through time, regardless of whether there is a change in those  
11 customs or in the manner in which they are observed.

12 *Connection*

13 (1C) To avoid doubt, and without limiting subsection (1), it is not  
14 necessary for a connection with the land or waters referred to in  
15 paragraph (1)(b) to be a physical connection.

16 (1D) Nothing in subsection (1) requires:

- 17 (a) traditional laws to be acknowledged continuously; or
- 18 (b) traditional customs to be observed continuously; or
- 19 (c) a connection with the land or waters to be maintained  
20 continuously.

21 **19 Subsection 223(2)**

22 Repeal the subsection, substitute:

23 *Hunting, gathering and fishing rights and interests, rights to trade,*  
24 *and other rights and interests of a commercial nature covered*

25 (2) Without limiting subsection (1), **rights and interests** in that  
26 subsection includes:

- 27 (a) hunting, gathering, or fishing, rights and interests; and
- 28 (b) the right to trade and other rights and interests of a  
29 commercial nature.

30 **20 Application of amendments**

31 (1) This item applies if:

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- 1 (a) a claimant application; or  
2 (b) a revised native title determination application;  
3 made under the *Native Title Act 1993* before the commencement of  
4 item 8, has not been determined.
- 5 (2) The amendments made by this Schedule apply in relation to the  
6 application.
- 7 (3) The application:  
8 (a) may be amended to state that section 47C or 47D applies to  
9 it; and  
10 (b) if it is so amended—must, for the purposes of sections 63 and  
11 66 of the *Native Title Act 1993*, be treated as if it were a new  
12 application filed in the Federal Court under section 61 of that  
13 Act, accompanied by:  
14 (i) any affidavit under paragraph 62(1)(a) or (3)(a); and  
15 (ii) any prescribed documents under paragraph 61(5)(d);  
16 that accompanied the application when it was originally filed.