Australian Government

Land Access.

11
LAND ACCESS – INDIGENOUS RATIONS
A GUIDE FOR INVESTORS

Native Title

Native title rights and interests exist in accordance with the laws and customs of Indigenous people where:

- those people have maintained their traditional connection with the land; and
- their title has not been removed by a law or other action of government (such as a grant of freehold title).

The Native Title Act

Native title was first recognised in Australia by the High Court in *Mabo* in 1992. The *Native Title Act 1993* (NTA) commenced on 1 January 1994. The aims of the NTA are:

- to recognise and protect native title;
- to establish a national framework for future dealings affecting native title, and to set out processes for those dealings;
- to establish a mechanism for determining claims to native title; and
- to confer legal validity on past grants of titles that could be affected by the existence of native title.

The NTA recognises and protects native title, carefully balances the interests of Indigenous people, miners, pastoralists and other land users, and ensures that governments can continue to improve infrastructure and manage natural resources.

The NTA provides for the recognition and funding by the Australian Government of Native Title Representative Bodies (NTRBs) to undertake a number of functions including facilitating and assisting native title holders or persons who may hold native title in relation to native title applications, and developments that may affect native title (called 'future acts') including mineral exploration and development. Among other things, NTRBs provide for the representation of native title holders in negotiations towards Indigenous Land Use Agreements (ILUAs) and other agreements, between native title holders and proponents.

Reforms

In 1998, the NTA was amended in response to the High Court's decision in *Wik* where it held that native title could exist on leasehold land. In 2007, two separate Acts amended various aspects of the NTA.

The *Native Title Amendment Act 2009* commenced on 18 September 2009. The Act effected institutional reform to the native title system by giving the Federal Court key control of native title matters, including over mediation. The Act also allows the Court to make determinations covering matters beyond native title, enables the Court to rely on a statement of facts agreed between parties, improves NTRB provisions and makes minor and technical changes to improve the operation of the native title system.

Onshore Exploration and Mineral/ Petroleum Projects

Under Australia's federal system of government, the States and Territories have responsibility for land management, including grants of onshore exploration permits, and mining and petroleum titles.

Consistent with the NTA, the grant of an exploration permit or grant of a mineral or petroleum title may affect native title for the period of the title. However, native title is not extinguished.

On land where native title has not been extinguished, the NTA gives registered native title claimants or native title holders a right to negotiate with project proponents in relation to certain acts, including the grant of an exploration, mining or petroleum permit or title. The NTA requires native title claimants to demonstrate the merits of their claim before they gain access to the right to negotiate.

- The NTA does not provide a right to veto a project.
- It allows mining and petroleum titles to be renewed without the 'right to negotiate' where they do not involve a larger area, a longer term or new rights.
- It provides, under specified circumstances, a negotiation process with native title parties prior to the issue of an exploration or mining interest.

11
Land Access.

Summary of Native Title Processes

Applicants for onshore mining or petroleum titles may be required under the NTA (or approved State/Territory legislation) to negotiate an agreement with native title holders, or registered native title claimants who have registered a claim over the area prior to the grant of the titles.

If agreement between the native title parties and the company involved cannot be reached after six months, a party may apply to an arbitral body for a determination in relation to the Act. The arbitral body must take all reasonable steps to make a determination within a further six months. The arbitral body's determination may include conditions, but cannot impose any conditions based on the value of resources or production as a condition for approving the grant. However, such conditions are possible as a result of an agreement between the parties.

The NTA enables the States and Territories to establish their own Commonwealth-accredited regimes to integrate native title requirements into their land management systems, provided the legislation is consistent with the requirements of the NTA, and is approved by Federal Parliament.

The National Native Title Tribunal has prepared a booklet which provides an overview of native title in Australia called "Short Guide to Native Title and Agreement-Making" and can be found on the NNTT website at www.nntt.gov.au/Indigenous-Land-Use-Agreements/Procedures-and-Guidelines/Documents/Short%20guide%20to%20registration.pdf. It is for people who are finding out about native title for the first time, or those who want general information about:

- native title;
- how native title is recognised;
- native title on pastoral and agricultural leases;
- native title and exploration, mining and future development;
- mediation;
- ILUAs; and
- the role of the National Native Title Tribunal.

The Tribunal also has a series of fact sheets which focus on these and other native title topics. To access the fact sheets and other information visit their web site at **www.nntt.gov.au**.

The NTA also enables proponents and native title parties to negotiate voluntary but legally binding agreements (ILUAs) as a flexible means of taking native title interests into account in exploration or project developments.

Offshore Exploration or Mineral/ Petroleum Projects

The Australian Government administers offshore exploration and development.

The NTA requires that offshore grants and other Commonwealth actions are undertaken in a non-discriminatory manner. This ensures that offshore native title interests are given the same consideration as holders of other offshore rights and interests.

The right to negotiate does not apply in the case of offshore projects. Applicants for offshore mineral or petroleum titles are not subject to the formal negotiation and arbitration processes contained in the NTA. However, the Commonwealth undertakes consultations with native title interests as part of the administrative procedures covering the release of acreage in Commonwealth offshore areas.

These processes may result in special conditions applying in some acreage. Any conditions are set out in the information packages provided to companies when they apply for exploration permits covering the acreage involved.

11
Land Access.

Protection of Indigenous heritage

The Commonwealth provides protection for Indigenous heritage under two pieces of legislation: the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act).

The EPBC Act protects National Heritage places and World Heritage properties as matters of national environmental significance. Many of these heritage places are listed for their Indigenous heritage values. Any action that is likely to have a significant impact on the values of a listed National Heritage place or a World Heritage property must be referred to the Australian Government Minister for the Environment, Heritage and the Arts (the Minister) for consideration. If the Minister decides that the action is likely to have a significant impact on a matter of national environmental significance, then the action requires approval under the EPBC Act.

Sections 23 and 26 of the EPBC Act protect Indigenous heritage as part of the environment from actions in Commonwealth marine areas, on Commonwealth land or an action by a Commonwealth agency that will have a significant impact on the environment.

The purpose of the ATSIHP Act is the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters that are of particular significance to Aboriginals in accordance with Aboriginal tradition. Aboriginal people can apply to the Minister for protection of significant Aboriginal areas or objects. If the Minister is satisfied that the area or object is of particular significance in accordance with Aboriginal tradition he may make a protective declaration. The ATSIHP Act is a measure of last resort allowing the Commonwealth to provide protection where state or territory laws and processes prove to be ineffective.

States and territories have primary responsibility for the protection of Indigenous heritage. State and territory laws generally protect sites of Indigenous cultural significance – these include archaeological, anthropological and historical sites. In general, it is an offence to alter a site in any way without the consent of the relevant State or Territory Minister.

Information on the EPBC Act and the ATSIHP Act can be found at the following web address: www.environment.gov.au/heritage/laws/indigenous/.

Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)

ALRA provides for detailed regulation of exploration and mining on Aboriginal land in the Northern Territory. The process is initiated by a company obtaining consent to negotiate from the Northern Territory Government. The consent allows the company to negotiate with Traditional Owners for an agreement which covers exploration and usually provisions about possible mining.

Amendments to ALRA in 2006 and delegation of responsibility for administering the exploration licence applications to the NT Government have improved the procedures to enable companies to access country.

Northern Territory Government has published "A Guide to Exploration and Mining on Aboriginal Land" (June 2006) which can be found at: www.nlc.org.au/html/files/07_20_06_Mining%20Exploration%20Guide.pdf.

These fact sheets have been produced as a collaborative project between the Australian Trade Commission, Department of Resources, Energy and Tourism and Geoscience Australia.