

# REVIEW OF FOREIGN PUBLIC WORKS LEGISLATION

## Phase II Report and Recommendations.

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## Introduction

This report represents Phase II of a review of the public works legislation of Australia, the United Kingdom, the United States and Canada. In Phase I of the review material from the respective jurisdictions was sourced and initially considered. In Phase II the material has been analysed on a provision by provision basis in accordance with the terms of reference.

In particular the terms of reference called for in-depth analysis of emerging trends in:

- ❑ the acquisition of, and compensation for, land required for a public purpose or utility, and
- ❑ the subsequent disposal of that land when no longer required for that purpose (or any other public purpose).

In addition the terms reference required the report to address the following key matters:

- ❑ Any emerging trends in the various pieces of legislation to the approach taken in the acquisition and disposal of land required or held for public purposes.
- ❑ Major differences in the approach taken in the acquisition and disposal of land required or held for public purposes between the current New Zealand legislation and the overseas legislation analysed.
- ❑ Recommendations as to which provisions are considered to be most effective in ensuring the needs of the state for current and future public works can be met and any litigious provisions which should be avoided.
- ❑ Recommendations as to which provisions are considered to be most equitable in ensuring the rights of landowners are taken into consideration when acquisition of their land for a public work is required.
- ❑ Recommendations as to which provisions for disposal are most effective in ensuring an equitable and contestable disposal process are followed.
- ❑ Recommendations as to any provisions that might be suitable for adaptation to the New Zealand situation.

The report sets out the provision by provision analysis for each country in turn. Recommendations and the key issues itemised above are then discussed.

The report seeks at all times to address the fundamental goals of the current review of New Zealand's Public Works legislation. The stated aims of the review are to reduce fiscal risk to the Crown, to make efficiency gains, to address Treaty of Waitangi issues raised by the Waitangi Tribunal, and to reflect changes in the social and economic environment relating to the acquisition of land for public works. To reach these goals I have focussed on aspects of the foreign experience which can assist the Crown to reach those stated aims and in particular to reduce fiscal risk.

In all the jurisdictions examined a balance has been struck between the rights of the individual and the public need. By a large it is recognised that individuals have a right to enjoy private property without confiscation. That right is subject to the eminent or underlying domain of the Crown or state which may resume land in the public interest. It is generally recognised that resumption should not occur without just compensation and due process. The major historical exception to that rule has been where native or aboriginal title has been extinguished. This has often occurred without compensation.

Though there are similarities between the various systems they differ in the level of protection afforded to citizens and the manner in which acquisitions occur. There are also differences in attitude towards aboriginal land rights and the speed with which jurisdictions have moved to address such inequities. The foreign jurisdictions provide a source of tested alternatives to New Zealand's current regime. The foreign jurisdictions have also experienced problems in respect of public works some of which are similar to our own difficulties and some of which are unique.

## **Preliminary Comments in respect of recommendations.**

This report contains various recommendations as to provisions or procedures which New Zealand could adopt in respect of its public works legislation. These recommendations arise from canvassing the statutory material of the various jurisdictions. At the time the terms of reference were negotiated I recommended reference to authoritative material such as texts or case law. As a result the terms of reference called for comment on general litigation trends in each jurisdiction and the consultation of appropriate texts or resources. This was important to gain an appreciation as to the results of various provisions and the kind of problems experienced. For instance an area which exposes the State to fiscal risk may be easily identifiable because a large amount of reported litigation arises in that area.

Fiscal risk will not always be obvious simply by reading provisions. For instance the risk may arise from an underlying set of social, political or economic circumstances which the provisions do not properly address.

Whilst the material consulted in the course of this review has assisted with identifying such areas the primary focus has been on core statutory material in accordance with the terms of reference. It should be noted that the texts consulted were written from a legal perspective rather than with a view to identifying risk. If little attention is paid by the texts to certain provisions it is a reasonable inference that there has been little judicial interest in those provisions. This also tends to indicate low fiscal risk but is obviously not conclusive. In particular a text may not refer to case because they do not contain material of legal significance. Yet such case may demonstrate fiscal risk.

Similarly in the time frame it has not been possible to undertake more than a cursory examination of case law as noted in those texts. No search has been made for decided cases in the respective areas. Comment on litigation trends is necessarily broad brush. It was obviously not feasible to begin to attempt to locate and analyse cases in jurisdictions

the size of the United Kingdom or the United States and such an undertaking is outside the scope of the terms of reference.

The recommendations contained in this report must be read subject to the points made above. In particular the provisions recommended as being superior to those in New Zealand are recommended on the basis of the material consulted. If such provisions were to be adopted it would be sensible to conduct further research to determine the nature and volume of litigation (other than that noted in this report) in the respective areas. It would also be useful to contact bodies administering the provisions for a practical account of their experience.

In respect of my recommendations in respect of non-statutory procedures in respect of acquisition and disposal it is suggested that the Land Information New Zealand seeks a preliminary legal opinion from its advisors as to whether such procedures would be subject to judicial review or other legal remedies.

Finally given that legislative change tends to promote uncertainty in the law (thus increasing the potential for litigation) the recommendations generally aim for simplification of the public works regime and/or reducing the prospect of challenge.

# Australia

Australia is currently into its fourth round of Public Works legislation following a relatively recent examination of the subject by the Law reform Commission in 1980. The Australian jurisdiction contains both federal and state public works legislation, each of which codifies acquisition and compensation procedures. There are 9 statutes in Australia that deal specifically with land acquisition law. State legislation is largely complimentary to the Federal provisions, but there is no truly unified approach. Generally, the power to acquire land by compulsory means will lie in a 'special' Act empowering that body. The rules governing process and compensation will be in the 'general' umbrella Act which regulates compulsory acquisition.

The federal provisions are limited to the purposes for which the federal government may make legislation under the constitution. Importantly the federal government has assumed the ability to legislate in respect of aboriginal title. Some of the state legislation does not contain compulsory acquisition powers which is interesting for the purposes of this inquiry. Though there are similarities between state statutes and the federal statute each Act needs to be individually interpreted. Australia and the various states have neglected to take the opportunity to adopt a unified approach.

There have also been relatively recent developments in Australia in respect of native title which need to be considered. In particular the passing of the Native Title Act has completely regulated the manner in which Native Title may be extinguished or impinged upon. Given difficulties in New Zealand and recommendations of the Waitangi Tribunal as to the way in which compulsory acquisition and disposal procedures dovetail into the sphere of Maori land claims New Zealand should seriously examine adopting some of Australian provisions.

State parliaments have an unchallenged right to enact legislation to expropriate real property. Each state parliament may enact legislation to take land with or without compensation: See the decision in *Commonwealth v New South Wales* (1915) 20 CLR 54 at 77.

However the Australian Constitution enshrines the right to be free from arbitrary confiscation without just compensation.

"CHAPTER I, SECTION 51

**Legislative powers of the Parliament**

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

Some states have procedures to allow some owner-initiated acquisition. See the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) and s 7 Land Acquisition and Compensation Act 1986 (Vic).

a) **Acquisition and compensation provisions.**

*i the general principles adopted when land is required by the state for a public purpose;*

The **Land Acquisition Act 1989 (Cth)** contains a general power to acquire land compulsorily for a public purpose in s 16:

**"S. 16 Modes of acquisition**

An interest in land may be acquired under this Act:

- (a) by agreement under section 40; or
- (b) by compulsory process under section 41."

Land may be acquired by agreement using the procedures in ss 19 and 40:

**"19 Steps in acquisition by agreement**

- (1) The principal steps in an acquisition by agreement are:
  - (a) the making of a pre-acquisition declaration under Part V;
  - (b) any reconsideration or review of the pre-acquisition declaration under Part V;
  - (c) the authorisation of the acquisition under section 40;
  - (d) the making of the agreement under Part VI; and
  - (e) the taking of actions required by the agreement to complete the acquisition.
- (2) The making of a pre-acquisition declaration is not required if:
  - (a) the relevant interest is available in the market within the meaning of section 40;
  - (b) the interest to be acquired is owned by another acquiring authority; or
  - (c) a certificate has been given under section 24."

The Act does not contain a definition of Minister.

**"40 Acquisition by agreement**

- (1) The Minister may authorise the acquisition by agreement of an interest in land, other than land in a public park, by an acquiring authority for a public purpose.
- (2) The acquiring authority may then enter into an agreement for the acquisition of the interest if:
  - (a) a pre-acquisition declaration in relation to the acquisition has become absolute and is in force;
  - (b) the Minister has given a certificate under section 24 in respect of the acquisition;
  - (c) the interest is available in the market; or
  - (d) the interest is owned by the Commonwealth or a Commonwealth authority.
- (3) The Minister shall cause to be laid before each House of the Parliament, within 15 sitting days of that House after the agreement is entered into, a statement describing:
  - (a) the interest;
  - (b) the situation of the land;
  - (c) the price at which the interest is being, or has been, acquired; and
  - (d) the public purpose for which the interest is being, or has been, acquired.
- (4) Failure to comply with subsection (3) in relation to an acquisition does not invalidate the acquisition.
- (5) The interest shall be taken to be available in the market if:
  - (a) the interest is currently advertised as being available for sale or lease;
  - (b) the interest is currently listed with a real estate agent, property manager or other person performing similar services as being available for sale or lease;

- (c) the owner of the interest has offered it to the acquiring authority in response to a publicly advertised request by the acquiring authority and the owner's offer has not been withdrawn; or
  - (d) the Minister has certified under subsection (6) that the acquisition of the interest by agreement by the acquiring authority would be a standard commercial transaction.
- (6) If the Minister is satisfied that the acquisition of an interest in land by an acquiring authority would amount to a normal commercial transaction between parties dealing with each other on equal terms, the Minister may give a certificate stating that the acquisition of the interest by the acquiring authority would be a standard commercial transaction."

If acquisition by agreement is not achieved, land may be acquired by compulsion using the procedures contained in ss 20 and 41.

**"20 Steps in acquisition by compulsory process**

- (1) The principal steps in an acquisition by compulsory process are:
  - (a) the making of a pre-acquisition declaration under Part V;
  - (b) any reconsideration or review of the pre-acquisition declaration under Part V; and
  - (c) the making of an acquisition declaration under Part VI.
- (2) The making of a pre-acquisition declaration is not required if a certificate has been given under section 24."

**"41 Acquisition by compulsory process**

- (1) If, in relation to the acquisition of an interest in land by an acquiring authority:
  - (a) a pre-acquisition declaration has become absolute and is in force; or
  - (b) a certificate has been given under section 24;
 the Minister may, subject to section 42, declare, in writing, that the interest is acquired by the acquiring authority by compulsory process.
- (2) The declaration shall:
  - (a) identify the land concerned; and
  - (b) specify the public purpose for which the interest is being acquired.
- (3) A copy of the declaration shall be published in the Gazette and, if practicable, in a newspaper circulating in the district in which the land is situated.
- (4) On the publication in the Gazette of a copy of the declaration, the interest is, by force of this Act:
  - (a) vested in the acquiring authority; and
  - (b) freed and discharged from all other interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.
- (5) Where, because of paragraph (4)(b), another interest in the land is, in whole or in part, divested, extinguished or diminished, that other interest shall, to that extent, be taken, for the purposes of this Act (except section 46), to have been acquired by compulsory process.
- (6) For the purposes of this Act, a person shall be taken to be affected by the declaration if:
  - (a) the person is an owner of the interest identified in the declaration; or
  - (b) the person is an owner of some other interest in the land that, because of paragraph (4)(b), is divested, extinguished or diminished."

Generally, compensation will be payable for land acquired: see s 52. (See also the Constitution rights detailed above).

**"52 Entitlement to compensation**

A person from whom an interest in land is acquired by compulsory process is entitled to be paid compensation by the Commonwealth in accordance with this Part in respect of the acquisition."

The Land Acquisition Act 1989 (Cth) has broad application: See s21.

**"21 Acquisitions to be in accordance with Act**

- (1) Subject to subsection (2), an acquiring authority shall not acquire an interest in land otherwise than in accordance with this Act unless:
  - (a) because of subsection 5(2) or (3), this Act does not apply in relation to the acquisition;
  - (b) the regulations provide that this Act does not apply in relation to the acquisition, by the acquiring authority, of interests in land in specified circumstances and the acquisition is an acquisition in those circumstances;
  - (c) the acquisition is authorised by a law of the Commonwealth (including a law passed or made after the commencement of this Act) and that law, or another law of the Commonwealth, expressly provides that the first-mentioned law has effect despite anything contained in this Act;
  - (d) the acquisition consists of the taking of a mortgage, charge or other similar security over an interest in land;
  - (e) the acquisition is effected by a law of the Commonwealth; or
  - (f) the interest is acquired otherwise than compulsorily or by agreement.
- (2) Nothing in this Act prevents the benefit of a restriction on the use of land becoming vested in an authority by the operation of a law other than this Act.
- (3) In spite of paragraph 48(1)(b) of the Acts Interpretation Act 1901, regulations made for the purpose of paragraph (1)(b) of this section may provide that the regulations shall take effect on a date to be fixed by the Minister by notice published in the Gazette.
- (4) The Minister shall not fix a date for the purpose of subsection (3) that is earlier than:
  - (a) the last day on which a notice could be given under subsection 48(4) of the Acts Interpretation Act 1901 in relation to the regulations; or
  - (b) if such a notice is given, the latest day on which the regulations could be disallowed by a House of the Parliament in which such a notice has been given."

The procedure starts with a declaration that certain land is suitable for acquisition under s 22 Land Acquisition Act 1989 (Cth). There are special procedures where land is needed urgently (termed a "quick-take procedure). See ss 24 and 25 below.

**"Division 1—Pre-acquisition declarations**

**"22. Declaration that land is suitable for acquisition**

- (1) The Minister may declare in writing that the Minister is considering the acquisition by an acquiring authority of an interest in land (other than a mortgage interest) for a public purpose.
- (2) The declaration shall identify the acquiring authority, the land, the interest in the land and the public purpose.
- (3) Except where the interest is a restriction on the use of land, the Minister shall include in the declaration:
  - (a) a statement that the land appears to the Minister to be suitable for use, or for development for use, for a public purpose; and
  - (b) a statement setting out:
    - (i) particulars of the use to which the land will be put or for which it will be developed; and
    - (ii) the reasons why the land appears to be suitable for that use or for development for that use.
- (4) Where the interest is a restriction on the use of land, the Minister shall include in the declaration:

- (a) a statement that it appears to the Minister to be appropriate for the acquiring authority to be given, for a public purpose, the benefit of the restriction on the use of the land; and
  - (b) a statement:
    - (i) explaining the nature of the restriction; and
    - (ii) setting out the reasons why it is appropriate for the acquiring authority to be given the benefit of the restriction.
- (5) The Minister may include in the declaration a statement that the proposed use of the land, or the proposed restriction on the use of the land, as the case may be, is connected with the implementation of a policy particulars of which are set out in the declaration.
- (6) If the Minister includes in the declaration a statement under subsection (5), the Minister may also include a statement:
- (a) that it is essential, for the implementation of the policy referred to in the statement under subsection (5), that the interest in the land be acquired; and
  - (b) that the declaration is, for that reason, not subject to review by the Administrative Appeals Tribunal.
- (7) The Minister shall give a copy of the declaration to each person whom the Minister believes, after diligent inquiry, to be a person affected by the declaration, together with:
- (a) a sketch showing the location of the land to which the declaration relates; and
  - (b) a statement setting out a summary of the principal rights conferred by this Act on persons whose interests in land are affected by a pre-acquisition declaration.
- (8) If documents referred to in subsection (7) are required to be given to 2 or more persons, the Minister shall, as far as practicable, ensure that the documents are given to the persons at or about the same time.
- (9) The declaration ceases to be in force if:
- (a) the interest is acquired under this Act;
  - (b) the declaration is revoked; or
  - (c) the declaration ceases to have effect because of section 25 or subsection 44(2) or 46(3).
- (10) For the purposes of this Act, a person shall be taken to be affected by the declaration if, and only if:
- (a) the person is an owner of the interest in land specified in the declaration (in this subsection called the declaration interest); or
  - (b) the person is an owner of some other interest in land that, if the declaration interest were acquired by compulsory process, would be in whole or in part divested, extinguished or diminished because of paragraph 41(4)(b).
- (11) For the purposes of this Act, an interest in land shall be taken to be affected by the declaration if, and only if:
- (a) the interest is the same as, includes or is included in, the interest in land specified in the declaration (in this subsection called the declaration interest); or
  - (b) the interest is some other interest in land that, if the declaration interest were acquired by compulsory process, would be in whole or in part divested, extinguished or diminished because of paragraph 41(4)(b).

### **"23 Publication of pre-acquisition declarations**

As soon as practicable after the making of a declaration under section 22, the Minister shall cause a copy of the declaration to be published in the Gazette and, if practicable, in a newspaper circulating in the district in which the relevant land is situated.

### **"24 Acquisitions where land required urgently etc.**

- (1) Where, in relation to the proposed acquisition of an interest in land by an acquiring authority, the Minister is satisfied that:
- (a) there is an urgent necessity for the acquisition and it would be contrary to the public interest for the acquisition to be delayed by the need for the making, and the possible reconsideration and review, of a pre-acquisition declaration; or

- (b) to require the making of a pre-acquisition declaration in respect of the proposed acquisition would result in a disclosure of information that would be prejudicial to the security, defence or international relations of Australia;  
the Minister may certify in writing that he or she is so satisfied.
- (2) The certificate may include such information relating to the proposed acquisition as the Minister considers appropriate.
- (3) If the Minister gives a certificate, the interest may be acquired by the acquiring authority without the preparation of a pre-acquisition declaration.
- (4) The Minister shall:
  - (a) cause a copy of the certificate to be laid before each House of the Parliament within 3 sitting days of that House after the giving of the certificate; and
  - (b) as soon as practicable, cause a copy of the certificate to be served on each person whom the Minister believes, after diligent inquiry, to be a person affected by the certificate.
- (5) The Minister may cause a copy of the certificate to be published in the Gazette, in a newspaper circulating in the district in which the land is situated, or in both the Gazette and such a newspaper.
- (6) The certificate ceases to be in force if:
  - (a) the interest is acquired under this Act;
  - (b) the certificate is revoked; or
  - (c) the certificate ceases to have effect because of subsection 46(3).
- (7) For the purposes of this Act, a person shall be taken to be affected by the certificate if, and only if:
  - (a) the person is an owner of the interest in land to which the certificate relates (in this subsection called the certificate interest); or
  - (b) the person is an owner of some other interest in land that, if the certificate interest were acquired by compulsory process, would be in whole or in part divested, extinguished or diminished because of paragraph 41(4)(b).

**"25 Effect of section 24 certificate on pre-acquisition declaration**

Where, after a pre-acquisition declaration has been made, the Minister gives a certificate under section 24 in relation to the same interest in land, the pre-acquisition declaration immediately ceases to have effect."

Under s 26, the landowner can apply to have the decision reconsidered.

**"26 Application for reconsideration of pre-acquisition declaration**

- (1) A person affected (within the meaning of subsection 22(10)) by a pre-acquisition declaration may apply to the Minister for a reconsideration of the declaration.
- (2) An application:
  - (a) shall be in writing; and
  - (b) shall set out the reasons for the application.
- (3) Subject to subsection (4), an application shall be made:
  - (a) if subsection 22(7) required that a copy of the declaration be given to the person—within 28 days after the day on which the copy was given to the person;  
or
  - (b) in any other case—within 28 days after the first day on which the Minister has complied with the requirements of subsection 22(7) and section 23 in relation to the declaration.
- (4) The Minister may, by writing and before the end of the period within which the person would otherwise be required to make an application, agree to an extension of that period."

Under s 28, the landowner can apply for a review of the decision.

**"28 Application for review of pre-acquisition declaration**

- (1) Subject to this section, where under section 27:
  - (a) the Minister has confirmed, or is to be regarded as having confirmed, a pre-acquisition declaration; or
  - (b) the Minister has varied such a declaration;  
a person affected (within the meaning of subsection 22(10)) by the declaration as so confirmed or varied may apply to the Administrative Appeals Tribunal for a review of the declaration.
- (2) Subsection (1) does not apply to an unreviewable pre-acquisition declaration.
- (3) An application:
  - (a) shall be in writing;
  - (b) may be made in accordance with the prescribed form within the meaning of paragraph 29(1)(b) of the Administrative Appeals Tribunal Act 1975; and
  - (c) shall set out the reasons for the application.
- (4) The time within which an application must be made is 28 days after the declaration was confirmed or varied, or is to be regarded as having been confirmed or varied, as the case may be.
- (5) The Tribunal may, before the end of the period referred to in subsection (4), agree to an extension of that period. "

Note that an application for review may be made only by a person affected by the proposed acquisition which means that they are the owner of the interest in land specified in the pre-acquisition declaration or that they are the owner of some other interest in land which if the compulsory acquisition proceeds, would be divested, extinguished or diminished.

**"30. Review of pre-acquisition declaration**

- (1) Where an application has been made to the Administrative Appeals Tribunal for review of a pre-acquisition declaration, the Tribunal shall make a decision in writing recommending to the Minister that the declaration be confirmed, be revoked or be varied as specified in the decision.
- (2) The Tribunal shall not recommend a variation that the Minister could not have made on a reconsideration of the declaration under section 27.

**"31. Considerations to be taken into account on review**

- (1) Subject to this section, the following matters are relevant to the review by the Administrative Appeals Tribunal of a pre-acquisition declaration:
  - (a) the nature of the public purpose identified in the declaration;
  - (b) except where the relevant interest in land is a restriction on the use of land:
    - (i) the nature of the proposed use of the relevant land;
    - (ii) the extent to which the proposed use is connected with the public purpose;
    - (iii) the extent to which the proposed use is in the public interest; and
    - (iv) the suitability of the land for, or for development for, the proposed use;
  - (c) where the relevant interest in land is a restriction on the use of land:
    - (i) the nature of the proposed restriction;
    - (ii) the extent to which the proposed restriction is connected with the public purpose;
    - (iii) the extent to which the proposed restriction is in the public interest; and
    - (iv) the appropriateness of the benefit of the proposed restriction being acquired by the acquiring authority;
  - (d) the effect of the acquisition of the interest in land to which the declaration relates upon persons affected (within the meaning of subsection 22(10)) by the declaration;

- (e) the extent to which the environment in the area in which the relevant land is situated would be affected if the land were used or developed, or the use of the land were restricted, as the case may be, in the manner proposed and, in particular, the extent to which that use or development, or that restriction, would benefit or impair:
    - (i) an area of scenic beauty;
    - (ii) a place of architectural, historical, archaeological, geological or scientific interest;
    - (iii) the conservation of flora and fauna that should, in the public interest, be preserved;
    - (iv) the amenity of the neighbourhood; or
    - (v) public utility services;
  - (f) whether there is some other means of accommodating the relevant acquiring authority's needs;
  - (g) matters contained in a statement given to the applicant under section 28 of the *Administrative Appeals Tribunal Act 1975* or lodged with the Tribunal under section 37 or 38 of that Act;
  - (h) practicable methods of avoiding or mitigating any injurious factors;
  - (j) any other matter that the Tribunal determines, on the application of the Minister or the applicant, to be relevant to the review.
- (2) The following matters are not relevant to the review:
- (a) the amount of compensation that may be payable under this Act if the acquisition proceeds;
  - (b) the fact that another interest in the land to which the declaration relates, or in other land in the vicinity of that land, has already been acquired.
- (3) If a statement under subsection 22(5) was included in the declaration, the Tribunal shall not inquire, directly or indirectly, into:
- (a) the merits of the policy, particulars of which are given in the statement; or
  - (b) the Minister's statement in accordance with that subsection that the proposed use, or proposed restriction on the use, as the case may be, of the relevant land is connected with the implementation of the policy.
- (4) If a matter being considered by the Tribunal has been the subject of an inquiry under section 11 of the *Environment Protection (Impact of Proposals) Act 1974*, the Tribunal shall accept the finding of the inquiry in relation to that matter.

**"32. Frivolous or vexatious applications for review**

- (1) Where, during the hearing of an application to the Administrative Appeals Tribunal for review of a pre-acquisition declaration, it appears to the person presiding at the hearing that the application is frivolous or vexatious, the person may:
  - (a) if the person is a presidential member—dismiss the application; or
  - (b) if the person is not a presidential member—adjourn the hearing so that it may be presided over by a presidential member.
- (2) Where a hearing is adjourned under paragraph (1)(b), the presidential member presiding at the resumption of the adjourned hearing may dismiss the application if he or she considers that it is frivolous or vexatious.
- (3) In this section:  
**presidential member** has the same meaning as in the *Administrative Appeals Tribunal Act 1975*."

Interestingly the Minister need only consider the Administrative Appeals Tribunals views and may still reject its recommendations.

**"33. Minister to consider Administrative Appeals Tribunal's recommendations**

- (1) Where the Administrative Appeals Tribunal recommends that the Minister take particular action in relation to a pre-acquisition declaration, the Minister shall consider the recommendation and shall:
  - (a) by writing accept the recommendation, and take such action (if any) as is necessary to give effect to the recommendation; or
  - (b) by writing reject the recommendation.
- (2) The Minister is not entitled to reject a recommendation of the Tribunal more than 90 days after the decision of the Tribunal comes into operation.
- (3) If the Minister rejects the recommendation, the Minister shall cause to be laid before each House of the Parliament, within 3 sitting days of that House after the rejection of the recommendation, a statement of the reasons for the rejection of the recommendation."

If the landowner will not sell voluntarily, the Commonwealth can acquire compulsorily under s 41 (see above). Then, the pre-acquisition declaration can be declared absolute, and a notice of acquisition can be issued under s 44.

**"44 Notice requiring acquisition**

- (1) Where:
  - (a) at least 28 days have elapsed since a pre-acquisition declaration became absolute;
  - (b) the declaration is still in force; and
  - (c) the interest in land to which the declaration relates has not been acquired; a person who is an owner of the interest may, by written notice given to the Minister, require that the interest be acquired.
- (2) If the interest is not acquired by an acquiring authority within 3 months after the giving of the notice, the declaration ceases to have effect at the end of that period.
- (3) The person may, in writing and before the end of the period referred to in subsection (2), agree to an extension of that period. "

The State statutes can vary this process, for example in the Land Acquisition (Just Terms Compensation) Act 1991 (NSW), the process begins with a notice of intention to acquire by compulsory process. See s 11 below.

**"11. Notice of intention to acquire land by compulsory process**

- (1) An authority of the State may not acquire land by compulsory process unless the authority has given the owners of the land written notice of its intention to do so.
- (2) The authority of the State is not prevented from acquiring the land by agreement after giving the proposed acquisition notice. "

***ii the provisions that exist for the payment of compensation, to whom and on what basis such compensation is valued;***

The Australian statutes go further than the United Kingdom in terms of what losses are able to be compensated for. The Australian Constitution, s 51(xxxi) provides that the Commonwealth shall only acquire property on "just terms". This has been interpreted as a call for compensation. The trend has been to allow more compensation for a wider range of losses.

**"51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:-...**

- (xxxix) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:"

The Lands Acquisition Act 1989 (Cth) contains a general entitlement to compensation.

**"52. Entitlement to compensation**

A person from whom an interest in land is acquired by compulsory process is entitled to be paid compensation by the Commonwealth in accordance with this Part in respect of the acquisition."

More specific provisions relating to compensation and the calculation of compensation are contained in ss 55-60 and 62-66.

**"55. Amount of compensation—general principles**

- (1) The amount of compensation to which a person is entitled under this Part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition.
- (2) In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including:
  - (a) except in a case to which paragraph (b) applies:
    - (i) the market value of the interest on the day of the acquisition;
    - (ii) the value, on the day of the acquisition, of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest;
    - (iii) any reduction in the market value of any other interest in land held by the person that is caused by the severance by the acquisition of the acquired interest from the other interest; and
    - (iv) where the acquisition has the effect of severing the acquired interest from another interest, any increase or decrease in the market value of the interest still held by the person resulting from the nature of, or the carrying out of, the purpose for which the acquired interest was acquired;
  - (b) if:
    - (i) the interest acquired from the person did not previously exist as such in relation to the land; and
    - (ii) the person's interest in the land was diminished, but not extinguished, by the acquisition;  
the loss suffered by the person because of the diminution of the person's interest in the land;
  - (c) any loss, injury or damage suffered, or expense reasonably incurred, by the person that was, having regard to all relevant considerations, including any circumstances peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence of:
    - (i) the acquisition of the interest; or
    - (ii) the making or giving of the pre-acquisition declaration or certificate under section 24 in relation to the acquisition of the interest;  
other than any such loss, injury, damage or expense in respect of which compensation is payable under Part VIII;
  - (d) if the interest is limited as to time or may be terminated by another person—the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted;
  - (e) any legal or other professional costs reasonably incurred by the person in relation to the acquisition, including the costs of:
    - (i) obtaining advice in relation to the acquisition, the entitlement of the person to compensation or the amount of compensation; and

- (ii) executing, producing or surrendering such documents, and making out and providing such abstracts and attested copies, as the Secretary to the Attorney-General's Department or a person authorised under subsection 55E(4) of the Judiciary Act 1903 requires.

**"56. Meaning of market value**

For the purposes of this Division, the market value of an interest in land at a particular time is the amount that would have been paid for the interest if it had been sold at that time by a willing but not anxious seller to a willing but not anxious buyer.

**"57. Special provision where market value determined upon basis of potential of land**

Where the market value of an interest in land acquired by compulsory process is assessed upon the basis that the land had potential to be used for a purpose other than the purpose for which it was used at the time of acquisition, compensation shall not be allowed in respect of any loss or damage that would necessarily have been suffered, or expense that would necessarily have been incurred, in realising that potential.

**"58. No general market for interest acquired**

- (1) This section applies where:
  - (a) an interest in land (in this section called the old land) is acquired from a person by compulsory process;
  - (b) immediately before the acquisition, the person was using the old land, or intended to use the old land, for a purpose other than the carrying on of a business;
  - (c) but for the acquisition, the land would have been, or would have continued to be, used for that purpose;
  - (d) at the time of the acquisition, there was no general demand or market for land used for that purpose; and
  - (e) the person has acquired, or intends to acquire, another interest in other land (in this section called the new land) in substitution for the acquired interest and intends to use the new land for the same purpose.
- (2) The market value of the acquired interest on the day of acquisition shall be taken to be the greater of:
  - (a) the amount that, apart from this section, would be the market value (if any) of that interest on that day; and
  - (b) the net acquisition cost in relation to the interest in the new land.
- (3) The net acquisition cost, in relation to the interest in the new land, is the amount calculated in accordance with the formula:  $CA + E - FI$   
where:
  - CA is the amount of the cost, or the likely cost, to the person of the acquisition of the interest in the new land;
  - E is the amount of the expenses and losses incurred, or likely to be incurred, by the person as a result of, or incidental to, ceasing to use the old land and commencing to use the new land for the same purpose; and
  - FI is the present value of any real and substantial saving in recurring costs (relating to land or an interest in land) gained by the person as a result of the relocation.

**"59. Interest affected by planning restriction**

- (1) This section applies where:
  - (a) an interest in land is acquired from a person by compulsory process;
  - (b) immediately before the acquisition, a planning instrument was in force having the effect of limiting or restricting the permissible use of the land to use for a purpose of a public nature;
  - (c) the planning instrument was made to meet the needs of an acquiring authority; and

- (d) the planning instrument was not in force in relation to the land at the time the person acquired the interest.
- (2) In determining the amount of compensation to which the person is entitled in respect of the acquisition of the interest:
  - (a) the limitation or restriction on the use of the land imposed by the planning instrument shall be disregarded;
  - (b) it shall be assumed that the land was subject only to such limitations and restrictions as would have been likely if there had been no proposal to limit or restrict the use of the land to use for the purpose permitted by the planning instrument; and
  - (c) the amount of any compensation paid or payable to the person in consequence of the planning instrument shall be deducted from the compensation to which the person would otherwise be entitled.

**"60. Matters to be disregarded in assessing compensation**

In assessing compensation, there shall be disregarded:

- (a) any special suitability or adaptability of the relevant land for a purpose for which it could only be used pursuant to a power conferred by or under law, or for which it could only be used by a government, public or local authority;
- (b) any increase in the value of the land caused by its use in a manner or for a purpose contrary to law;
- (c) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the purpose for which the interest was acquired; and
- (d) any increase in the value of the land caused by the carrying out, after a copy of the pre-acquisition declaration or certificate under section 24 in relation to the acquisition of the interest was given to the person, of any improvements to the land, unless the improvements were carried out with the written approval of the Minister.

**"62. Interest subject to mortgage**

- (1) This section applies where:
  - (a) an interest in land is acquired from a person (in this section called the owner) by compulsory process; and
  - (b) immediately before the acquisition, the interest was subject to one or more mortgages.
- (2) As a general rule, the compensation to which the owner is entitled in respect of the acquisition shall be determined as if the interest had not been subject to any mortgage.
- (3) If compensation is payable under this Part to a mortgagee, the compensation payable to the owner is reduced by so much of the compensation payable to the mortgagee as represents the amount calculated according to paragraph 65(1)(a).
- (4) If a mortgagee waives the right to compensation in respect of the acquisition of a mortgage interest, the compensation to which the owner would otherwise be entitled is increased by such amount as the owner should justly receive as compensation in respect of interest upon the mortgage debt accruing from the time of the acquisition, or in respect of any other liability to the mortgagee.

**"63. Crown land**

Where the interest of a State or Territory in Crown land of the State or Territory is acquired by compulsory process, the State or Territory is entitled to compensation as if:

- (a) it had been the proprietor of an estate in fee simple in the land or of any relevant lesser interest in the land, as the case requires; and
- (b) that estate or interest had been subject to any interest which a person other than the State or Territory had in the land immediately before the acquisition.

**"Division 3—Amount of compensation—mortgage interests**

#### **64. Interpretation**

- (1) For the purposes of this Division, money shall be taken to have been due to a mortgagee under, or to have been secured by, a mortgage at the time of acquisition of a mortgage interest only to the extent that, at that time:
  - (a) the right of the mortgagee to recover the money secured by the mortgage was not barred by a law relating to the limitation of actions; or
  - (b) the mortgagee was entitled to recover money secured by the mortgage by exercising a power of sale of, or other remedy in relation to, the interest in land subject to the mortgage.
- (2) For the purposes of this Division, the interest due to the mortgagee under a mortgage at a particular time is the interest that would be payable to the mortgagee if the mortgage were discharged at that time, other than so much (if any) of that interest as represents:
  - (a) costs of re-investing the principal under the mortgage; or
  - (b) a loss, or possible loss, of interest on the re-investment of the principal under the mortgage.

#### **"65 Amount of compensation**

- (1) The amount of compensation to which a mortgagee is entitled under this Part in respect of the acquisition of a mortgage interest under a mortgage (in this section called the relevant mortgage) is an amount equal to the sum of:
  - (a) so much of the sum of:
    - (i) the amount of the principal secured by the relevant mortgage at the time of acquisition of the mortgage interest; and
    - (ii) the amount of any interest, costs or charges due to the mortgagee under the relevant mortgage at that time;as does not exceed the amount of compensation payable under this Act to the mortgagor in respect of the acquisition of the interest in land that was subject to the relevant mortgage; and
  - (b) any legal or other professional costs reasonably incurred by the mortgagee in relation to the acquisition of the mortgage interest, including costs of:
    - (i) obtaining advice in relation to the acquisition, the entitlement of the mortgagee to compensation or the amount of compensation; and
    - (ii) executing, producing or surrendering such documents, and making out and providing such abstracts and attested copies, as the Secretary to the Attorney-General's Department or a person authorised under subsection 55E(4) of the Judiciary Act 1903 requires.
- (2) For the purposes of subsection (1), if:
  - (a) the relevant mortgage was the only mortgage over the interest in land immediately before the acquisition; or
  - (b) there were 2 or more mortgages over the interest in land immediately before the acquisition and the relevant mortgage had, at that time, priority over the other mortgage or mortgages;the compensation payable to the mortgagor in respect of the acquisition of the interest in land shall be taken to be the compensation that would have been payable to the mortgagor if there had been no mortgage over the interest.
- (3) For the purposes of subsection (1), if:
  - (a) there were 2 or more mortgages over the interest in land immediately before the acquisition; and
  - (b) the relevant mortgage did not have, at that time, priority over the other mortgage or mortgages;the compensation payable to the mortgagor in respect of the acquisition of the interest in land shall be taken to be the compensation that would have been payable to the mortgagor if there had been no mortgage over the interest, reduced by the principal secured at the time of the acquisition by, and the interest, costs and charges due at that time under, a mortgage or mortgages having priority over the relevant mortgage.

**"66 Particulars of mortgages may be required**

- (1) The Minister may, by written notice require a person from whom an interest in land, other than a mortgage interest, has been acquired by compulsory process, to provide the Minister with the following particulars:
  - (a) whether the interest was, immediately before the acquisition, subject to any mortgages;
  - (b) in relation to each mortgage (if any) to which the interest was, immediately before its acquisition, subject:
    - (i) the name and address of the mortgagee;
    - (ii) the amount of principal secured by the mortgage at the time of the acquisition of the interest; and
    - (iii) the amount of interest, costs and charges due under the mortgage at that time.
- (2) If the person fails to provide the Minister with the particulars within 30 days after the giving of the notice, or such further period as the Minister, by writing, allows, the Minister may agree with any person claiming to be a mortgagee of the interest in land as to the amounts due under the mortgage and the first-mentioned person is debarred from disputing the correctness of any amounts so agreed."

**Land Acquisition (Just Terms Compensation) Act 1991 (NSW)**

**"63. Pre-acquisition agreements on compensation**

- (1) An authority of the State and an owner of land may agree on the amount of compensation to which the owner will be entitled (or on any matter affecting the amount of any such compensation) if the land is acquired by compulsory process within a time (or in the circumstances) specified in the agreement.
- (2) Any such agreement has effect according to its tenor. "

**"64. Compensation in form of land or works**

Compensation to which a person is entitled under this Part may, if the person and the authority of the State concerned agree, be provided wholly or partly in the form of land or of the carrying out of works. "

**Basis of compensation**

Each statute sets out the relevant considerations when assessing compensation. These can be appreciably different from commonwealth to state to state.

The Lands Acquisition Act 1989 (Cth) sets out factors in s 55 (See above).

The Land Acquisition (Just Terms Compensation) Act 1991 (NSW) sets out considerations in s 55.

**"55. Relevant matters to be considered in determining amount of compensation**

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division):

- (a) the market value of the land on the date of its acquisition;
- (b) any special value of the land to the person on the date of its acquisition;
- (c) any loss attributable to severance;
- (d) any loss attributable to disturbance;
- (e) solatium;

- (f) any increase or decrease in the value of any other land of the person at the date of acquisition which adjoins or is severed from the acquired land by reason of the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired. "

The Land Acquisition and Compensation Act 1986 (Vic) sets out considerations in s 41.

**"41. General principles on which compensation is to be based**

- (1) Except as otherwise provided in this Part, in assessing the amount of compensation payable to a claimant in respect of an interest in land which is acquired under this Act, regard must be had to the following factors—
- (a) the market value of the interest on the date of acquisition;
  - (b) any special value to the claimant on the date of acquisition;
  - (c) any loss attributable to severance;
  - (d) any loss attributable to disturbance;
  - (e) the enhancement or depreciation in value of the interest of the claimant, at the date of acquisition, in other land adjoining or severed from the acquired land by reason of the implementation of the purpose for which the land was acquired;
  - (f) any legal, valuation and other professional expenses necessarily incurred by the claimant by reason of the acquisition of the interest.
- (2) If the market value of an interest in land is assessed on the basis that the land had potential to be used for a purpose other than the purpose for which it was used on the date of acquisition, compensation must not be allowed for—
- (a) any special value in respect of any pecuniary advantage that would necessarily have been forgone in realizing that potential; and
  - (b) any loss attributable to disturbance that would necessarily have been incurred in realizing that potential.
- (3) If less than the whole of the land in which a claimant's interest subsists is acquired or less than the whole of that interest is acquired, the market value of the acquired interest is the difference between the market value of the interest before the acquisition and the market value of the interest after the acquisition.
- (4) The expenses referred to in sub-section (1)(f) do not include any costs incurred by a claimant in the course of prosecuting any proceedings the Tribunal or the Court under Part 10.
- (5) If compensation has previously been paid in respect of the land pursuant to Part 5 of the Planning and Environment Act 1987, the amount of compensation payable under this Part in respect of an acquired interest in land or in respect of land in which an acquired interest subsists must be reduced by the prescribed amount.
- (6) If the claimant's interest in the acquired land was liable to expire or to be determined, the assessment of compensation payable under this Part in respect of that interest must take account of any reasonable prospect of renewal or continuation of the interest.
- (7) In this section the "prescribed amount" in relation to land is the amount calculated by the

following formula— 
$$\frac{A}{B} \times C$$

where—

A = the amount of compensation previously paid in respect of the land for loss of market value due to—

- (i) the reservation or proposed reservation of the land or part of the land for a public purpose in a planning instrument; or
- (ii) any part of the land being required for a public purpose.

B = the market value of the land in respect of which the compensation was paid, that value to be determined as if the underlying zoning applied to the land at the date which was the basis for the calculation of that compensation.

C = the compensation payable under this Part for market value and severance less the value of the land attributable to improvements of a durable nature made—

- (i) with the consent of the Authority under section 12(1)(b); or

- (ii) after the last date on which compensation was paid in respect of the land and before service of the most recent notice of intention to acquire an interest in the land."

Land Administration Act 1997 (WA) s 241. References the Minister in this Act are references to Minister for Lands. Refer ss 3 and 7.

**"Division 5 — Assessing compensation**

**241. How compensation to be assessed for interest in land taken**

- (1) In determining the amount of compensation (if any) to be offered, paid, or awarded for an interest in land taken under this Part, regard is to be had solely to the matters referred to in this section.
- (2) Regard is to be had to the value of the land with any improvements, or the interest of the claimant in the land, assessed as on —
  - (a) in the case of an interest taken for a railway or other work authorized by a special Act — the first day of the session of Parliament in which the Act was introduced;
  - (b) in the case of an interest taken by agreement under section 168 — the date of the execution of the agreement, unless the agreement provides otherwise; or
  - (c) in the case of an interest to which paragraphs (a) and (b) do not apply — the date of the taking, and discounting any increase or decrease in value attributable to the proposed public work.
- (3) If a notice of intention was registered in relation to the interest on a date before the date referred to in subsection (2), and a transaction relating to the land made between those dates affected the value of the interest, regard may be had to the value of the interest assessed as at the date referred to in subsection (2) and discounting the effect of the transaction.
- (4) No regard is to be had to the value of any improvements made without the consent of the Minister after the registration of a notice of intention.
- (5) Subject to subsection (4), in the case of a railway or other work authorized by a special Act, the value of any improvements made after the first day of the session of Parliament in which the Act was introduced but before the registration of the taking order are to be allowed, not exceeding their actual cost.
- (6) Regard is to be had to the loss or damage, if any, sustained by the claimant by reason of —
  - (a) removal expenses;
  - (b) disruption and reinstatement of a business;
  - (c) the halting of building works in progress at the date when the interest is taken and the consequential termination of building contracts;
  - (d) architect's fees or quantity surveyor's fees actually incurred by the claimant in respect of proposed buildings or improvements which cannot be commenced or continued in consequence of the taking of the interest; or
  - (e) any other facts which the acquiring authority or the court considers it just to take into account in the circumstances of the case.
- (7) If the fee simple in land is taken from a person who is also the holder in fee simple of adjoining land, regard is to be had to the amount of any damage suffered by the claimant —
  - (a) due to the severing of the land taken from that adjoining land; or
  - (b) due to a reduction of the value of that adjoining land,however, if the value of any land held in fee simple by the person is increased by the carrying out of, or the proposal to carry out, the public work for which the land was taken, the increase is to be set off against the amount of compensation that would otherwise be payable under paragraph (b).
- (8) If the interest in land is taken without agreement, an amount considered by the court or, for the purposes of making an offer, by the acquiring authority, appropriate to compensate for the taking without agreement may be added to the award or offer.
- (9) The additional amount under subsection (8) must not be more than 10% of the amount otherwise awarded or offered, unless the court, or, for the purposes of making an offer,

the acquiring authority, is satisfied that exceptional circumstances justify a higher amount.

- (10) If the interest in land taken produces any rent or profits, then at the option of the acquiring authority, either —
- (a) the amount of the rent or profits received by the acquiring authority, less the reasonable cost of collection, for the period from the date of registration of the taking order to the date of the payment of compensation or the date of the award, whichever is earlier, is to be added to the compensation payable; or
  - (b) interest is to be paid on the amount of compensation for the same period, at the rate of 6% per annum, or such higher rate as the acquiring authority or the court considers adequate having regard to the circumstances of each case,
- but if the interest in land ceases to produce any rent or profits after the taking, interest is to be paid in accordance with paragraph (b).
- (11) If the interest in land taken does not produce any rents or profits, interest is to be paid at the rate payable in respect of judgment debts as determined under section 142 of the Supreme Court Act 1935 ruling as at the date of entry for construction or carrying out of the work or the date of registration of the taking order, whichever is earlier, and the interest is payable from —
- (a) the date of the service of the claim on the acquiring authority; or
  - (b) the date of entry for construction or carrying out of the work,
- whichever is earlier, to the date —
- (c) when the offer was served on the claimant, if the compensation awarded by the Compensation Court or other court of competent jurisdiction is not more than the amount offered by the acquiring authority; or
  - (d) of settlement of the claim, in any other case.
- (12) Subject to subsections (10) and (11) —
- (a) when any amount representing an advance payment of compensation is paid to a claimant, interest on the total amount of compensation is payable only to the date of the first payment, and interest is payable thereafter only on the balance outstanding from time to time; and
  - (b) when any amount is offered by the acquiring authority as an advance payment of compensation under section 248 and the offer is not accepted by the claimant within 30 days of the day on which it was made, no interest is payable thereafter in respect of the amount so offered.
- (13) If —
- (a) the amount of any purchase money or compensation, or any payment on account, is payable under this Part or Part 9;
  - (b) the acquiring authority causes a notice to be published once in a daily newspaper circulating throughout the State stating that the authority intends to make the payment; and
  - (c) 3 months after the publication of the notice, no person has been able, or being able has not agreed, to give a sufficient discharge and receipt in respect of that amount, or any portion of that amount,
- the acquiring authority may cause the moneys to be paid into the Supreme Court and dealt with under section 249, and thereafter is not liable for any further interest payment on the moneys."

## Principles in Land Acquisition Act 1969 (SA) s 25.

### "SECT 25 Principles of compensation

- (1) The compensation payable under this Act in respect of the acquisition of land shall be determined according to the following principles:-
- (a) the compensation payable to a claimant shall be such as adequately to compensate him for any loss that he has suffered by reason of the acquisition of the land; and

- (b) in assessing the amount referred to in paragraph (a) of this section consideration may be given to-
    - (i) the actual value of the subject land; and
    - (ii) the loss occasioned by reason of severance, disturbance or injurious affection; and
  - (c) compensation shall be fixed as at the date of acquisition of the land; and
  - (d) where the claimant's interest in the subject land was liable to expire or be determined, any reasonable prospect of renewal or continuation of the interest must be taken into account; and
  - (e) any special suitability or adaptability of the land for any purpose shall not be taken into account if it could be applied to that purpose in pursuance only of statute, or if the suitability or adaptability is peculiar to the purposes or requirements of a particular person or of any Governmental or local governing authority but any bona fide offer to acquire the land made before the passing of the special Act shall be taken into account; and
  - (f) where the value of the land is enhanced by reason of its use, or the use of any premises on the land, in a manner that may be restrained by any court, or is contrary to law, or is detrimental to the health of any persons, the amount of that enhancement shall not be taken into account; and
  - (g) no allowance shall be made on account of the fact that the acquisition is effected without the consent, or against the will, of any person; and
  - (h) no allowance shall be made for any enhancement or diminution in the value of the land in consequence of-
    - (a) the passing of the special Act; or
    - (b) the acquisition under this Act of any other land; or
    - (c) any proposed or expected development of the land after its acquisition; and
  - (i) where the land is, and but for acquisition would continue to be, devoted to a particular purpose, and there is no general demand or market for land devoted to that purpose, the compensation may, if reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement; and
  - (j) allowance shall be made in favour of the Authority for any enhancement in value of land adjoining the subject land in which the claimant is interested by reason of development of the land after its acquisition, but in no case shall the claimant be liable to make any payment to the Authority in respect of such enhancement in value; and
  - (k) where a notice of intention to acquire land has been served upon a person interested in the land, any sales, transactions, arrangements, licences or approvals effected or obtained with respect to the land, and any improvements to the land effected, after service of the notice, shall not be taken into account unless it is proved that they were effected or obtained bona fide.
- (2) If native title land is acquired from native title holders, the native title holders must be compensated for the loss, diminution, impairment or other effect on the native title of the acquisition or the consequent use of the land for the purpose for which it was acquired.

Lands Acquisition Act 1978 (NT) s 66, sch 2. The term Minister is not defined in this Act.

**"66. ASSESSMENT OF COMPENSATION**

- (1) Subject to this section, compensation shall be assessed in accordance with the rules set out in Schedule 2.
- (2) The Chairman may, for the purpose of the assessment of compensation for land comprising or involving native title rights and interests, make rules modifying the rules set out in Schedule 2.

- (3) Where a claim is made for compensation in respect of the acquisition of native title rights and interests, the rules set out in Schedule 2 as modified under subsection (2) apply.

## **"SCHEDULE 2**

### **Section 66**

#### **RULES FOR THE ASSESSMENT OF COMPENSATION**

##### **1. VALUE TO THE OWNER**

Subject to this Schedule, the compensation payable to a claimant in respect of the acquisition of land under this Act is the amount that fairly compensates the claimant for the loss he has suffered, or will suffer, by reason of the acquisition of the land.

##### **2. MARKET VALUE, SPECIAL VALUE, SEVERANCE, DISTURBANCE**

Subject to this Schedule, in assessing the compensation payable to a claimant in respect of acquired land the Tribunal may take into account -

- (a) the consideration that would have been paid for the land if it had been sold on the open market on the date of acquisition by a willing seller to a willing buyer;
- (b) the value of any additional advantage to the claimant incidental to his ownership, or occupation of, the acquired land;
- (c) the amount of any reduction in the value of other land of the claimant caused by its severance from the acquired land by the acquisition; and
- (d) any loss sustained, or cost incurred, by the claimant as a natural and reasonable consequence of -
  - (i) the acquisition of the land; or
  - (ii) the service on the claimant of the notice of proposal, for which provision is not otherwise made under this Act.

##### **3. MARKET VALUE FOR USE OTHER THAN EXISTING USE**

If the amount referred to in rule 2(a) is determined upon the basis of a use for a purpose which is not the purpose for which the land was used on the date of acquisition, no amount shall be allowed under rule 2(d) in respect of any -

- (a) loss that would have been sustained; or
- (b) costs that would have been incurred, in adapting the land for use for that other purpose.

##### **4. CIRCUMSTANCE PECULIAR TO THE CLAIMANT**

For the purposes of rule 2(d), in determining whether a particular loss sustained, or cost incurred, by a claimant is a natural and reasonable consequence of -

- (a) the acquisition of the land; or
  - (b) the service on the claimant of the notice of proposal,
- the Tribunal shall take into account any circumstances peculiar to the claimant.

##### **5. [Omitted]**

##### **6. DETERMINABLE INTERESTS**

If, at the date of acquisition, the interest of the claimant in the land was -

- (a) due to expire; or
- (b) liable to be determined,

the Tribunal shall take into account any reasonable prospect of renewal or continuation of the interest, and the likely terms and conditions of that renewal.

##### **7. RESETTLEMENT**

(1) If -

- (a) the acquired land -
  - (i) was, immediately before the date of acquisition, used for a purpose for which there is no general demand or market for land; and

- (ii) but for the acquisition, would have continued to have been used for that purpose;
- and
- (b) the claimant has acquired, or genuinely intends to acquire, other land suitable for that purpose,
- the Tribunal shall take into account, in place of the amount referred to in rule 2(a), an amount ascertained by adding -
- (c) the cost of acquiring the other land; and
  - (d) the cost and losses incurred or likely to be incurred by the claimant as a result of, or incidental to, relocation,
- in each case calculated at the date when, in all the circumstances, it was or would be reasonably practical for the claimant to incur the cost or losses.
- (2) In assessing the amount of compensation under subrule (1) the Tribunal shall have regard to the amount, if any, by which the claimant has improved, or is likely to improve, his financial position by the relocation.

#### 8.MATTERS NOT TO BE TAKEN INTO ACCOUNT

The Tribunal shall not take into account -

- (a) any special suitability or adaptability of the acquired land for a purpose for which it could only be used -
  - (i) in pursuance of a power conferred by law; or
  - (ii) by the Commonwealth or the Territory, a statutory corporation to which the Financial Management Act applies, or a municipal council or community government council within the meaning of the Local Government Act;
- (b) any increase in value of the acquired land resulting from its use or development contrary to law;
- (c) any increase or decrease in the amount referred to in rule 2(a) arising from -
  - (i) the carrying out; or
  - (ii) the proposal to carry out,
- (d) any increase in the value of the land caused by construction, after the notice of proposal was served on the claimant, of any improvements on the land without the approval of the Minister.

#### 9.INTANGIBLE DISADVANTAGES

- (1) If the claimant, during the period commencing on the date on which the notice of proposal was served and ending on the date of acquisition -
- (a) occupied the acquired land as his principal place of residence; and
  - (b) held an estate in fee simple, a life estate or a leasehold interest in the acquired land,
- the amount of compensation otherwise payable under this Schedule may be increased by the amount which the Tribunal considers will reasonably compensate the claimant for intangible disadvantages resulting from the acquisition.
- (2) In assessing the amount payable under subrule (1), the Tribunal shall have regard to -
- (a) the interest of the claimant in the land;
  - (b) the length of time during which the claimant resided on the land;
  - (c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land;
  - (d) the period after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land;
  - (e) the period during which the claimant would have been likely to continue to reside on the land; and
  - (f) any other matter which is, in the Tribunal's opinion, relevant to the circumstances of the claimant.

#### 10. MORTGAGE DEBTS

The amount of compensation payable to a mortgagee in respect of a debt secured by a mortgage over acquired land shall not exceed the amount of compensation that would be payable for the acquisition of all interests in the land if there had been no mortgage secured over that land.

## 11. LOANS

- (1) If the amount of compensation assessed in accordance with this Schedule is insufficient to enable a claimant who occupied the acquired land as his principal place of residence continuously between the date of service of the notice of intention and the date of acquisition and -
- (a) who held an interest in fee simple in the acquired land;
  - (b) in whom an equity of redemption in respect of that land was vested; or
  - (c) who held a lease of that land granted under an Act -
    - (i) in perpetuity;
    - (ii) for a term of not less than 99 years;
    - (iii) with a right of purchase; or
    - (iv) which contained terms and conditions prohibiting the claimant from erecting or using any building on the land other than a dwelling-house,
- to purchase land to be used as a principal place of residence providing accommodation reasonably comparable with the accommodation on the acquired land, the Minister may offer to grant a loan to the claimant of an amount which, when added to the amount of compensation otherwise payable in respect of the acquired land, would be sufficient to enable the claimant to purchase land on which there is accommodation reasonably comparable with the accommodation on the acquired land.
- (2) The Minister shall, when making an offer under subrule (1), specify the maximum amount of the loan he is prepared to grant.
- (3) Repayment of a loan granted in accordance with this rule shall be secured by a mortgage to the Territory of the land purchased to provide the comparable accommodation.
- (4) A mortgage under subrule (3) -
- (a) shall provide for the amount secured to be repayable forth-with if -
    - (i) the land the subject of the mortgage is sold;
    - (ii) the claimant and his spouse or de facto partner cease to use the land as a principal place of residence; or
    - (iii) if both the claimant and his spouse or de facto partner have died; and
  - (b) shall contain such other terms and conditions as the Minister thinks fit to secure the repayment of the loan.

## 12. INTERPRETATION

- (1) In rules 9 and 11, a reference to a claimant includes a reference to a claimant's spouse and his de facto partner if any.
- (2) In this Schedule, "de facto partner" means -
- (a) in relation to a man - a woman who is living with him as his wife on a bona fide domestic basis although not married to him; and
  - (b) in relation to a woman - a man who is living with her as her husband on a bona fide domestic basis although not married to her."

## Lands Acquisition Act 1994 (ACT) s 45

### "S. 45 Amount of compensation-general principles

- (1) The amount of compensation to which a person is entitled under this Part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition.
- (2) In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including-
- (a) except in a case to which paragraph (b) applies-
    - (i) the market value of the interest on the day of the acquisition;
    - (ii) the value, on the day of the acquisition, of any financial advantage, additional to market value, to the person incidental to the person's ownership of the interest;

- (iii) any reduction in the market value of any other interest in land held by the person that is caused by the severance by the acquisition of the acquired interest from the other interest; and
  - (iv) where the acquisition has the effect of severing the acquired interest from another interest, any increase or decrease in the market value of the interest still held by the person resulting from the nature of, or the carrying out of, the purpose for which the acquired interest was acquired;
- (b) if-
- (i) the interest acquired from the person did not previously exist as such in relation to the land; and
  - (ii) the person's interest in the land was diminished, but not extinguished, by the acquisition;
- the loss suffered by the person because of the diminution of the person's interest in the land;
- (c) any loss, injury or damage suffered, or expense reasonably incurred, by the person that was, having regard to all relevant considerations, including any circumstances peculiar to the person, suffered or incurred by the person as a direct, natural and reasonable consequence of-
- (i) the acquisition of the interest; or
  - (ii) the making or giving of the pre-acquisition declaration or certificate under section 21 in relation to the acquisition of the interest;
- other than any such loss, injury, damage or expense in respect of which compensation is payable under Part VII;
- (d) if the interest is limited as to time or may be terminated by another person-the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted; and
- (e) any legal or other professional costs reasonably incurred by the person in relation to the acquisition, including the costs of-
- (i) obtaining advice in relation to the acquisition, the entitlement of the person to compensation or the amount of compensation; and
  - (ii) executing, producing or surrendering such documents, and making out and providing such abstracts and attested copies, as the Chief Executive or a person authorised under subsection 5 (4) of the Government Solicitor Act 1989 requires."

## **Compensation for lesser interests- leaseholds, easements, mineral rights, profits a prendre**

These are the provisions relating to compensation for rights other than freehold. The other Acts do not contain any other distinct variations.

### **Lands Acquisition Act 1989 (Cth)**

#### **"41 Acquisition by compulsory process...**

- (4) On the publication in the Gazette of a copy of the declaration, the interest is, by force of this Act:...
- (b) freed and discharged from all other interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates."

#### **"55 Amount of compensation—general principles**

- (1) The amount of compensation to which a person is entitled under this Part in respect of the acquisition of an interest in land is such amount as, having regard to all relevant matters, will justly compensate the person for the acquisition.

- (2) In assessing the amount of compensation to which the person is entitled, regard shall be had to all relevant matters, including:...
  - (d) if the interest is limited as to time or may be terminated by another person—the likelihood of the continuation or renewal of the interest and the likely terms and conditions on which any continuation or renewal would be granted;"

### Land Acquisition (Just Terms Compensation) Act 1991 (NSW)

**"62. Special provision relating to acquisition of easements or rights, tunnels etc.**

- (1) If the land compulsorily acquired under this Act consists only of an easement, or right to use land, under the surface for the construction and maintenance of works (such as a tunnel, pipe or conduit for the conveyance of water, sewage or electrical cables), compensation is not payable except for actual damage done in the construction of the work or caused by the work.
- (2) If land under the surface is compulsorily acquired under this Act for the purpose of constructing a tunnel, compensation is not payable (subject to subsection (1)) unless:
  - (a) the surface of the overlying soil is disturbed; or
  - (b) the support of that surface is destroyed or injuriously affected by the construction of the tunnel; or
  - (c) any mines or underground working in or adjacent to the land are thereby rendered unworkable or are injuriously affected.
- (3) If the land compulsorily acquired under this Act consists of or includes an easement or right to use the surface of any land for the construction and maintenance of works (such as canals, drainage, stormwater channels, electrical cables, openings or ventilators), the easement or right is (unless the acquisition notice otherwise provides) taken to include a power, from time to time, to enter the land for the purpose of inspection and for carrying out of any additions, renewals or repairs. Compensation under this Part is payable accordingly."

### Acquisition of Land Act 1967 (Qld)

- "12(5)** On and from the date of the publication in the gazette of the proclamation or, in the case of Brisbane City Council, the date of the publication in the gazette of the notification of resumption the land thereby taken shall be vested or become Crown land as provided by the foregoing provisions of this section absolutely freed and discharged from all trusts, obligations, mortgages, charges, rates, contracts, claims, estates, or interest of what kind so ever, or if an easement only is taken, such easement shall be vested in the constructing authority or, where the proclamation so prescribes, in the corporation requiring the easement, and the estate and interest of every person entitled to the whole or any part of the land shall thereby be converted into a right to claim compensation under this Act and every person whose estate and interest in the land is injuriously affected by the easement shall have a right to claim compensation under this Act.
- (5A) The amount of such compensation may be agreed upon between the constructing authority and the claimant subject, however, to the consent of any mortgagee of the land taken.
  - (5B) Failing such agreement every such claim may be enforced against the constructing authority concerned under, subject to and in accordance with this Act and that constructing authority shall be liable accordingly."

### **Disturbance**

There is some compensation available for disturbance.

## Solatum

This is an additional sum of compensation which is paid in respect of the hardship, inconvenience, trauma, or other unspecified loss caused by the acquisition. The different statutes treat solatum differently, and this is set out below. Queensland, Tasmania and Northern Territory do not have provisions for payment of a solatum.

S 248 Land Administration Act 1997 (WA) permits the payment of a sum of not more than 10%. Under the 1902 Act previously applicable in NSW, this payment was treated as a right.

### **"s 241. How compensation to be assessed for interest in land taken**

- (8) If the interest in land is taken without agreement, an amount considered by the court or, for the purposes of making an offer, by the acquiring authority, appropriate to compensate for the taking without agreement may be added to the award or offer.
- (9) The additional amount under subsection (8) must not be more than 10% of the amount otherwise awarded or offered, unless the court, or, for the purposes of making an offer, the acquiring authority, is satisfied that exceptional circumstances justify a higher amount."

s 44 of the Land Acquisition and Compensation Act 1986 (Vic) contains a discretion to pay a solatum:

### **"44. Solatum**

- (1) The amount of compensation may be increased by such amount, not exceeding 10% of the market value of the land, by way of solatum as is reasonable to compensate the claimant for intangible and non-pecuniary disadvantages resulting from the acquisition.
- (2) In assessing the amount payable under sub-section (1), there must be taken into account all relevant circumstances applicable to the claimant including, without limiting the generality of the foregoing—
  - (a) the interest of the claimant in the acquired land; and
  - (b) the length of time during which the claimant had occupied the land; and
  - (c) the inconvenience likely to be suffered by the claimant by reason of removal from the land; and
  - (d) the period of time after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land; and
  - (e) the period of time during which, but for the acquisition of the land, the claimant would have been likely to continue to occupy the land; and
  - (f) the age of the claimant; and
  - (g) where the claimant at the date of acquisition is occupying the land as the claimant's principal place of residence, the number, age and circumstances of other people (if any) living with the claimant.
- (3) If no solatum is paid to a claimant, a person other than a claimant who, at the date of acquisition, had occupied the acquired land for a continuous period of not less than 12 months before that date as the person's principal place of residence may claim from the Authority such amount, not exceeding 10% of the market value of the land, by way of solatum as is reasonable to compensate the person for intangible and non-pecuniary disadvantages resulting from the acquisition.
- (4) In determining the amount payable under sub-section (3), there must be taken into account all relevant circumstances applicable to the person, including the matters referred to in sub-section (2)(b), (c), (d), (e), (f) and (g).

- (5) If the Authority rejects a claim for solatium made by a person under sub-section (3), that person is to be taken to be a claimant and the claim to be a disputed claim for the purposes of this Act."

S. 25(1)(g) of the Land Acquisition Act 1969 (SA) provides that no solatium shall be paid:

"25. (1) The compensation payable under this Act in respect of the acquisition of land shall be determined according to the following principles:-...  
(g) no allowance shall be made on account of the fact that the acquisition is effected without the consent, or against the will, of any person; and..."

The Commonwealth Act allows a solatium if a residence is taken - see discussion below.

### **Acquisition of Residence**

Special provisions may apply where the principal residence of a landowner is acquired:

See ss 61 and 126 Land Acquisition Act 1989 (Cth)

#### **"61. Acquisition of a dwelling**

- (1) This section applies where:
- (a) an interest in land is acquired from a person by compulsory process;
  - (b) the interest entitled the person to occupy a dwelling on the land;
  - (c) immediately before the acquisition the person was occupying the dwelling as his or her principal place of residence; and
  - (d) because of the acquisition, the person has ceased to be entitled to occupy the dwelling as his or her principal place of residence.
- (2) The amount of compensation to which the person is entitled in respect of the acquisition is the sum of \$10,000 (or that amount as indexed by section 126) and the greater of the following amounts:
- (a) the amount of compensation to which the person would, apart from this section, be entitled;
  - (b) the amount necessary to reimburse the person for the costs of acquiring a reasonably equivalent interest in land that entitles the person to occupation of a reasonably equivalent dwelling.

#### **"126 Indexation of subsection 61(2) amount**

- (1) In this section:  
index number, in relation to an index year, means the All Groups Consumer Price Index number, being the weighted average of the 8 capital cities, published by the Australian Statistician in respect of that index year.  
index year means a period of 12 months commencing on 1 April.
- (2) Where the factor ascertained in accordance with subsection (4) in relation to a financial year is greater than one, section 61 has effect as if, for the amount of \$10,000 specified in subsection 61(2), there were substituted, on the first day of that financial year, an amount calculated by multiplying the existing amount by that factor.
- (3) For the purpose of subsection (2), the existing amount is:
- (a) if, because of the operation of subsection (2), section 61 already has effect as if an amount were substituted for the amount of \$10,000 specified in subsection 61(2)—the substituted amount; and
  - (b) in any other case—\$10,000.

- (4) The factor to be ascertained for the purpose of subsection (2) in relation to a financial year is the number (calculated to 3 decimal places) ascertained by dividing the index number for the index year that ended on the 31 March preceding the commencement of that financial year by the index number for the previous index year.
- (5) Where a factor ascertained under subsection (4) would, if calculated to 4 decimal places, end with a number greater than 4, the factor ascertained shall be taken to be the factor calculated to 3 decimal places and increased by .001.
- (6) Subject to subsection (7), if at any time, whether before or after the commencement of this Act, the Australian Statistician has published or publishes an index number in respect of an index year in substitution for an index number previously published in respect of the same index year, the publication of the later index number shall be disregarded for the purposes of this section.
- (7) If at any time, whether before or after the commencement of this Act, the Australian Statistician has changed or changes the reference base for the Consumer Price Index, then, for the purposes of the application of this section after the change, regard shall be had only to the index number published in terms of the new reference base."

See also, s34 Land Acquisition (Just Terms Compensation Act) 1991 (NSW). The term Minister is defined as follows: (refer s 3(3))

- “(3) In this Act, a reference to the Minister responsible for an authority of the State is:
- (a) if that authority is constituted by or under an Act—a reference to the Minister administering that Act; or
  - (b) if that authority is a Minister—a reference to that Minister.”

**"s 34. Former owner's right to occupy land until compensation paid etc.**

- (1) A person who was in lawful occupation of land immediately before it was compulsorily acquired under this Act and to whom compensation is payable under this Act is entitled to remain in occupation until:
  - (a) the compensation is duly paid to the person; or
  - (b) the authority of the State makes (in accordance with any other provision of this Act) an advance payment of not less than 90 per cent of the amount of compensation offered by the authority; or
  - (c) the authority of the State makes (in accordance with any other provision of this Act) a payment into the trust account kept under Part 3 of not less than 90 per cent of the amount of compensation offered by the authority,
 whichever first occurs.
- (2) Any such person is entitled to remain in occupation of any building that is the person's principal place of residence, or the person's place of business, for 3 months after it is compulsorily acquired, even though the person has ceased to be entitled to remain in occupation under subsection (1). However, if the Minister responsible for the authority of the State is satisfied that the authority requires immediate vacant possession of land, the authority is entitled to immediate vacant possession even though the 3-month period has not expired.
- (3) The terms on which a person remains in occupation of land that has been compulsorily acquired under this Act are, in the absence of agreement, such reasonable terms as are determined by the authority of the State (including terms as to the rental to be paid and the restrictions on the use of the land). The Residential Tenancies Act 1987 does not apply to that continued occupation.
- (4) Any such unpaid rent or other money due to the authority of the State may be set off against the compensation payable under this Act.

Section 45 Land Acquisition and Compensation Act 1986 (Vic).

**"45. Loans to dispossessed home owners**

- (1) If—
- (a) the whole or any part of land in which an acquired interest subsists is, on the date of acquisition of that land, occupied by the claimant as the claimant's principal place of residence; and
  - (b) the market value of the claimant's interest in the land does not exceed the amount prescribed from time to time by the Governor in Council; and
  - (c) the amount of compensation payable to the claimant under this Part is insufficient to enable the purchase of a similar interest in land to be used by the claimant as a principal place of residence providing accommodation reasonably comparable with the accommodation on the acquired land—
- the Authority may, and must if directed by the Tribunal or the Court on the application of the claimant, grant a loan (with or without interest) of such amount as the claimant may reasonably require, in addition to the compensation payable, to enable the claimant to purchase such reasonably comparable accommodation.
- (2) Any loan granted under sub-section (1) must not exceed an amount equal to the difference between the market value of the interest of the claimant which is acquired, as assessed for compensation under this Part, and the amount prescribed under sub-section (1).
  - (3) If interest is payable on any loan granted under sub-section (1), the rate of that interest must not exceed the rate determined under section 52.
  - (4) Any loan granted under sub-section (1) is subject to the following terms and conditions—
    - (a) the loan must be secured by a mortgage of the interest in land purchased by the claimant to provide comparable accommodation;
    - (b) the loan is repayable if the interest is sold or if the claimant or the claimant's spouse cease to use the land as a principal place of residence or if the claimant and the claimant's spouse have both died;
    - (c) such other terms and conditions as are agreed upon between the Authority and the claimant, or, failing agreement, as are determined by the Tribunal or the Court on the application of either party."

Also of interest is s 30 Land Acquisition Act 1993 (Tas).

Lands Acquisition Act 1978 (NT): Schedule 2, r 9

- "(1) If the claimant, during the period commencing on the date on which the notice of proposal was served and ending on the date of acquisition -
- (a) occupied the acquired land as his principal place of residence; and
  - (b) held an estate in fee simple, a life estate or a leasehold interest in the acquired land,
- the amount of compensation otherwise payable under this Schedule may be increased by the amount which the Tribunal considers will reasonably compensate the claimant for intangible disadvantages resulting from the acquisition.
- (2) In assessing the amount payable under subrule (1), the Tribunal shall have regard to -
- (a) the interest of the claimant in the land;
  - (b) the length of time during which the claimant resided on the land;
  - (c) the inconvenience likely to be caused to the claimant by reason of his removal from the acquired land;
  - (d) the period after the acquisition of the land during which the claimant has been, or will be, allowed to remain in possession of the land;
  - (e) the period during which the claimant would have been likely to continue to reside on the land; and
  - (f) any other matter which is, in the Tribunal's opinion, relevant to the circumstances of the claimant."

## Resettlement

The only Australian statute that recognises difficulties owners may have in resettlement, and which allows compensation is the Lands Acquisition Act 1978 (NSW):

See ss 50 & 63.

## Severance

If an authority takes part of an owner's land leaving him with a section that is uneconomic or he/she does not want to keep, there may be a provision whereby the owner can compel the acquiring authority to take the whole of the land. For example, s 12(1)(c) Land Acquisition Act 1969 (SA):

### "12. Right to object

- (1) A person who has an interest in the subject land may within 30 days after notice of intention to acquire the land is given or, if an explanation of the reasons for the acquisition is required, within 30 days after the explanation was provided, by written notice-...
  - (c) request that a particular part of the subject land be not acquired, or that further land be acquired."

Another example is contained in s13 Acquisition of Land Act 1967 (Qld):

### "13. Owner may require small parcel of severed land to be taken

- (1) If a constructing authority proposes to take part of any land and the taking of such part will leave a parcel which, the constructing authority and the owner of the land required to be taken agree in writing, will by reason of its small size or shape be of no practical use or value to the owner of such land, the constructing authority shall take the whole of the land.
- (2) If, by reason of the fact that a boundary of land proposed to be taken (the 'primary land') will sever the principal building erected on the land from which the primary land will be severed and of the circumstances of the case relevant thereto, it appears to the Governor in Council that it is desirable that the constructing authority should take additional land approved by the Governor in Council (the 'additional land') being the whole or part of the land from which the primary land will be severed the additional land may be taken as prescribed by this Act and the taking of the additional land shall be deemed to be for a purpose incidental to the carrying out of the purpose for which the primary land is to be taken.
- (3) A constructing authority may sell or otherwise deal with additional land taken by it pursuant to subsection (1) or (2) in such manner as it thinks fit and the power hereby conferred shall not be subject to the provisions of any other Act which purport to restrict or regulate the exercise by the constructing authority of its power to sell or otherwise deal with land or to the provisions of section 41."

If there is not a way to compel acquisition, some statutes allow compensation for severance:

For example see ss 55 & 58 Land Acquisition (Just Terms Compensation) Act 1991 (NSW):

**"55. Relevant matters to be considered in determining amount of compensation**

In determining the amount of compensation to which a person is entitled, regard must be had to the following matters only (as assessed in accordance with this Division): ...

- (c) any loss attributable to severance;

**"58. Loss attributable to severance**

In this Act:

"loss attributable to severance" of land means the amount of any reduction in the market value of any other land of the person entitled to compensation which is caused by that other land being severed from other land of that person. "

*iii whether powers of compulsory acquisition exist and if so, the criteria under which such provisions can be invoked including whether the powers can be delegated and to whom;*

Yes, these powers do exist. See the Lands Acquisition Act 1989 (Cth) s 16. Land can be taken compulsorily. Details of the process are set out in (i) above.

*iv whether separate provisions exist for the acquisition of land by agreement and, if so, whether the compensation provisions are set in legislation and are the same as for the compulsory acquisition of land. Include any ability to delegate the powers of acquisition;*

Provisions exist to acquire land by agreement.

Lands Acquisition Act 1989 (Cth)

**"19 Steps in acquisition by agreement**

- (1) The principal steps in an acquisition by agreement are:
  - (a) the making of a pre-acquisition declaration under Part V;
  - (b) any reconsideration or review of the pre-acquisition declaration under Part V;
  - (c) the authorisation of the acquisition under section 40;
  - (d) the making of the agreement under Part VI; and
  - (e) the taking of actions required by the agreement to complete the acquisition.
- (2) The making of a pre-acquisition declaration is not required if:
  - (a) the relevant interest is available in the market within the meaning of section 40;
  - (b) the interest to be acquired is owned by another acquiring authority; or
  - (c) a certificate has been given under section 24."

**"40 Acquisition by agreement**

- (1) The Minister may authorise the acquisition by agreement of an interest in land, other than land in a public park, by an acquiring authority for a public purpose.
- (2) The acquiring authority may then enter into an agreement for the acquisition of the interest if:
  - (a) a pre-acquisition declaration in relation to the acquisition has become absolute and is in force;
  - (b) the Minister has given a certificate under section 24 in respect of the acquisition;
  - (c) the interest is available in the market; or
  - (d) the interest is owned by the Commonwealth or a Commonwealth authority.
- (3) The Minister shall cause to be laid before each House of the Parliament, within 15 sitting days of that House after the agreement is entered into, a statement describing:

- (a) the interest;
  - (b) the situation of the land;
  - (c) the price at which the interest is being, or has been, acquired; and
  - (d) the public purpose for which the interest is being, or has been, acquired.
- (4) Failure to comply with subsection (3) in relation to an acquisition does not invalidate the acquisition.
- (5) The interest shall be taken to be available in the market if:
- (a) the interest is currently advertised as being available for sale or lease;
  - (b) the interest is currently listed with a real estate agent, property manager or other person performing similar services as being available for sale or lease;
  - (c) the owner of the interest has offered it to the acquiring authority in response to a publicly advertised request by the acquiring authority and the owner's offer has not been withdrawn; or
  - (d) the Minister has certified under subsection (6) that the acquisition of the interest by agreement by the acquiring authority would be a standard commercial transaction.
- (6) If the Minister is satisfied that the acquisition of an interest in land by an acquiring authority would amount to a normal commercial transaction between parties dealing with each other on equal terms, the Minister may give a certificate stating that the acquisition of the interest by the acquiring authority would be a standard commercial transaction."

s 5(2) Land Acquisition (Just Terms Compensation) Act 1991 (NSW) provides:

**"5. Acquisition of land to which Act applies...**

- (2) This Act does not apply to any such acquisition if the land is available for public sale and the land is acquired by agreement. "

*v whether a definition of "public work" or "public purpose" is provided and whether there is any differentiation between "essential" work and "non essential" work;*

S. 6(1) Lands Acquisition Act 1989 (Cth) defines public purpose:

"public purpose means a purpose in respect of which the Parliament has power to make laws and includes, in relation to land in a Territory, any purpose in relation to the Territory."

Under s 40(1) Lands Acquisition Act 1989, the Commonwealth may acquire land for a public purpose. If land must be acquired by compulsory process by s 41(2)(b) the declaration must specify the 'public purpose' for which the land is being acquired. When the Minister is considering the acquisition under s 22(1) the Minister must make a declaration accordingly. By s 22(2) the declaration shall identify the 'public purpose'. Therefore, the Minister decides what is a public purpose. (Sections 22, 40, 41 set out below).

**"22 Declaration that land is suitable for acquisition**

- (1) The Minister may declare in writing that the Minister is considering the acquisition by an acquiring authority of an interest in land (other than a mortgage interest) for a public purpose.
- (2) The declaration shall identify the acquiring authority, the land, the interest in the land and the public purpose.
- (3) Except where the interest is a restriction on the use of land, the Minister shall include in the declaration:

- (a) a statement that the land appears to the Minister to be suitable for use, or for development for use, for a public purpose; and
  - (b) a statement setting out:
    - (i) particulars of the use to which the land will be put or for which it will be developed; and
    - (ii) the reasons why the land appears to be suitable for that use or for development for that use.
- (4) Where the interest is a restriction on the use of land, the Minister shall include in the declaration:
- (a) a statement that it appears to the Minister to be appropriate for the acquiring authority to be given, for a public purpose, the benefit of the restriction on the use of the land; and
  - (b) a statement:
    - (i) explaining the nature of the restriction; and
    - (ii) setting out the reasons why it is appropriate for the acquiring authority to be given the benefit of the restriction.
- (5) The Minister may include in the declaration a statement that the proposed use of the land, or the proposed restriction on the use of the land, as the case may be, is connected with the implementation of a policy particulars of which are set out in the declaration.
- (6) If the Minister includes in the declaration a statement under subsection (5), the Minister may also include a statement:
- (a) that it is essential, for the implementation of the policy referred to in the statement under subsection (5), that the interest in the land be acquired; and
  - (b) that the declaration is, for that reason, not subject to review by the Administrative Appeals Tribunal.
- (7) The Minister shall give a copy of the declaration to each person whom the Minister believes, after diligent inquiry, to be a person affected by the declaration, together with:
- (a) a sketch showing the location of the land to which the declaration relates; and
  - (b) a statement setting out a summary of the principal rights conferred by this Act on persons whose interests in land are affected by a pre-acquisition declaration.
- (8) If documents referred to in subsection (7) are required to be given to 2 or more persons, the Minister shall, as far as practicable, ensure that the documents are given to the persons at or about the same time.
- (9) The declaration ceases to be in force if:
- (a) the interest is acquired under this Act;
  - (b) the declaration is revoked; or
  - (c) the declaration ceases to have effect because of section 25 or subsection 44(2) or 46(3).
- (10) For the purposes of this Act, a person shall be taken to be affected by the declaration if, and only if:
- (a) the person is an owner of the interest in land specified in the declaration (in this subsection called the declaration interest); or
  - (b) the person is an owner of some other interest in land that, if the declaration interest were acquired by compulsory process, would be in whole or in part divested, extinguished or diminished because of paragraph 41(4)(b).
- (11) For the purposes of this Act, an interest in land shall be taken to be affected by the declaration if, and only if:
- (a) the interest is the same as, includes or is included in, the interest in land specified in the declaration (in this subsection called the declaration interest); or
  - (b) the interest is some other interest in land that, if the declaration interest were acquired by compulsory process, would be in whole or in part divested, extinguished or diminished because of paragraph 41(4)(b).

**"40 Acquisition by agreement**

- (1) The Minister may authorise the acquisition by agreement of an interest in land, other than land in a public park, by an acquiring authority for a public purpose.

- (2) The acquiring authority may then enter into an agreement for the acquisition of the interest if:
  - (a) a pre-acquisition declaration in relation to the acquisition has become absolute and is in force;
  - (b) the Minister has given a certificate under section 24 in respect of the acquisition;
  - (c) the interest is available in the market; or
  - (d) the interest is owned by the Commonwealth or a Commonwealth authority.
- (3) The Minister shall cause to be laid before each House of the Parliament, within 15 sitting days of that House after the agreement is entered into, a statement describing:
  - (a) the interest;
  - (b) the situation of the land;
  - (c) the price at which the interest is being, or has been, acquired; and
  - (d) the public purpose for which the interest is being, or has been, acquired.
- (4) Failure to comply with subsection (3) in relation to an acquisition does not invalidate the acquisition.
- (5) The interest shall be taken to be available in the market if:
  - (a) the interest is currently advertised as being available for sale or lease;
  - (b) the interest is currently listed with a real estate agent, property manager or other person performing similar services as being available for sale or lease;
  - (c) the owner of the interest has offered it to the acquiring authority in response to a publicly advertised request by the acquiring authority and the owner's offer has not been withdrawn; or
  - (d) the Minister has certified under subsection (6) that the acquisition of the interest by agreement by the acquiring authority would be a standard commercial transaction.
- (6) If the Minister is satisfied that the acquisition of an interest in land by an acquiring authority would amount to a normal commercial transaction between parties dealing with each other on equal terms, the Minister may give a certificate stating that the acquisition of the interest by the acquiring authority would be a standard commercial transaction."

**"41 Acquisition by compulsory process**

- (1) If, in relation to the acquisition of an interest in land by an acquiring authority:
  - (a) a pre-acquisition declaration has become absolute and is in force; or
  - (b) a certificate has been given under section 24;
 the Minister may, subject to section 42, declare, in writing, that the interest is acquired by the acquiring authority by compulsory process.
- (2) The declaration shall:
  - (a) identify the land concerned; and
  - (b) specify the public purpose for which the interest is being acquired.
- (3) A copy of the declaration shall be published in the Gazette and, if practicable, in a newspaper circulating in the district in which the land is situated.
- (4) On the publication in the Gazette of a copy of the declaration, the interest is, by force of this Act:
  - (a) vested in the acquiring authority; and
  - (b) freed and discharged from all other interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.
- (5) Where, because of paragraph (4)(b), another interest in the land is, in whole or in part, divested, extinguished or diminished, that other interest shall, to that extent, be taken, for the purposes of this Act (except section 46), to have been acquired by compulsory process.
- (6) For the purposes of this Act, a person shall be taken to be affected by the declaration if:
  - (a) the person is an owner of the interest identified in the declaration; or
  - (b) the person is an owner of some other interest in the land that, because of paragraph (4)(b), is divested, extinguished or diminished."

The term public purpose does not appear in all the current land acquisition statutes in force in the states and territories.

S. 2 Land Acquisition and Public Works Act 1902 (WA) defines "public work":

""Public work" and "work" mean and include -

- (1) Every work which the Crown, or the Governor, or the Government of Western Australia, or any Minister of the Crown, or any local authority is authorized to undertake under this or any other Act.
- (2) Any railway authorized by special Act or any work whatsoever authorized by any Act.
- (3) Tramways.
- (4) Any works for or in connection with the supply of water to, or for or in connection with the sewerage of, any city, town, or district, including all reticulations.
- (5) Buildings for the occupation of either or both of the Houses of Parliament or for public offices.
- (6) Hospitals within the meaning given to that term by section 2 of the Hospitals and Health Services Act 1927, medical clinics, hostels and institutions including residences for staff, court-houses, gaols, watch-houses, lock-ups, police barracks, or quarters.
- (7) Observatory.
- (8) Public schools or any other schools authorized to be established wholly or in part at the public cost by any Act in force for the time being, universities, colleges, technical and other educational institutions, including residences or hostels for teachers or students, and play-grounds.
- (9) Public libraries, mechanics' or miners' institutes, agricultural halls, or schools of art.
- (10) Wharves, ferries, piers, jetties and bridges.
- (11) Parks or gardens or grounds for public recreation or places for bathing, and for the reclamation of land for or in connection therewith.
- (12) Public cemeteries.
- (13) Public wells or works for the conservation of water.
- (14) The protection and preservation of any cave or place of scientific or historical interest.
- (14A) The protection and preservation of indigenous flora and fauna.
- (15) The establishment of public abattoirs.
- (16) Harbours and ports, including the provision of storage, handling and wharfage areas and other facilities normally ancillary to the conduct of shipping operations, break-waters, leading marks, navigational aids, docks, slips, the alteration or improvement of channels, waterways and rivers, the protection of foreshores and banks, the provision of new channels and related works, including the landing and disposal of silt.
- (17) Quarries or works for procuring stone, gravel, earth, or any other material required for the construction of, or any purpose connected with any public work as aforesaid.
- (17A) The procuring from land (other than Crown Lands and public reserves) of timber, stone, gravel, earth and any other material required by or for the State for or in connection with the carrying on of any industrial or other undertaking or activity which is being carried on by or for the State under any law authorizing the same.
- (17B) Buildings and structures required for fire brigade purposes.
- (17C) The establishment and the extension by the Governor of sites for towns.
- (17D) The establishment and the extension by the Governor of agricultural research stations.
- (18) Drainage works in connection with any city, town, or district, and the improvement of rivers, watercourses, lakes, or inlets, including deepening, widening, straightening or otherwise altering, and disposal of silt.
- (19) Any building or structure of whatsoever kind which, in the opinion of the Governor, is necessary for any public purpose.
- (20) Any road, stock route, viaduct, or canal.
- (21) Any work incidental to any of the aforesaid works.
- (22) Any land required for or in connection with any work as aforesaid.
- (23) Any survey in connection with any proposed public work ."

The term "public work" does not have a set meaning in all statutes, and takes its meaning from the statute in which it appears.

*vi the mechanism for recording the transfer of ownership to the state;*

See the Land Acquisition Act 1989 (Cth), s 47 as to taking possession and s 51 as to the registration of a declaration gazetted under s 41. The declaration is lodged with the registrar of titles and operates as a transfer. See also s 41(4) as to notes which may be made on the title. Where the acquisition is by agreement an ordinary conveyance will occur. Similar provisions apply in respect of the states. The title is indefeasible even if the instrument giving rise to the registration is later shown to be void.

**"47 Entry into possession by acquiring authority**

- (1) Where:
  - (a) an interest in land is acquired by an acquiring authority by compulsory process; and
  - (b) the interest entitles the authority to possession of the land;a person occupying the land on the date of acquisition is entitled, subject to this section, to remain in occupation of the land or of such part of the land as the person specifies, by notice in writing given to the Minister, for the period of 6 months or for a longer period fixed by agreement between the Minister and the person.
- (2) If the Minister is satisfied that it is essential that the acquiring authority enter into possession of the land or part of the land urgently, the Minister may give to the occupier written notice:
  - (a) stating his or her reasons for being so satisfied; and
  - (b) fixing the date on which the person is to vacate the land or part of the land, as the case may be.
- (3) The person to whom the notice is given ceases to be entitled to remain in occupation of the land, or the part of the land, as the case may be, on the date fixed by the notice.
- (4) The terms and conditions (including any amount payable in respect of occupation on and after the date of acquisition) on which the person remains in occupation of the land are the terms and conditions agreed upon by the Minister and the person or, if they cannot agree, the terms and conditions as determined by the Minister and set out in a notice given to the occupier.
- (5) A notice under subsection (2) or (4) shall set out the reasons for the Minister's decision.
- (6) Application may be made to the Administrative Appeals Tribunal for review of a decision of the Minister under subsection (4).
- (7) Where a right conferred by subsection (1) expires, nothing in this section precludes the making of an agreement between the occupier and the acquiring authority regarding the further occupation of the land by the occupier.

**"48 Notification of compulsory acquisition declarations**

The Minister shall, within 14 days after the publication in the *Gazette* of a declaration under section 41, cause to be given to each person whom the Minister believes, after diligent inquiry, to be a person affected (within the meaning of subsection 41(6)) by the declaration the following documents:

- (a) a copy of the declaration;
- (b) a notice:
  - (i) stating that the person appears to be entitled to compensation in respect of the acquisition; and
  - (ii) setting out such other information with respect to the operation of this Act as the Minister considers appropriate;

- (c) a compensation claim form.

**"49 Effect of acquisition of mortgage interest on rights of mortgagee**

Where a mortgage interest is acquired by compulsory process, the mortgagee retains, in respect of so much of the mortgage debt as is not discharged by section 68, any rights and remedies that the mortgagee may have:

- (a) against the mortgagor; or
- (b) in respect of any interest in land that is still subject to the mortgage.

**"50 Correction of compulsory acquisition declarations**

- (1) The Minister may, by notice published in the *Gazette*, vary a declaration under subsection 41(1) for the purpose of correcting a clerical error, or an obvious mistake, in the declaration.
- (2) Where the Minister varies a declaration, the following provisions have effect:
  - (a) if a copy of the declaration has been published in the *Gazette*, or in a newspaper, this Part has effect as if the copy published had been a copy of the declaration as varied;
  - (b) the Minister shall cause a copy of the declaration, clearly showing the variation, to be given to:
    - (i) each person to whom a copy of the original declaration was given in accordance with section 48; and
    - (ii) any other person whom the Minister has reason to believe to be a person affected (within the meaning of subsection 41(6)) by the declaration as varied.

**"51 Registration of compulsory acquisition declarations**

- (1) As soon as practicable, and, in any event, within 28 days, after the publication in the *Gazette* of a copy of a declaration under subsection 41(1) or of a notice varying such a declaration, the Secretary to the Attorney-General's Department or a person authorised under subsection 55E(4) of the *Judiciary Act 1903* shall cause to be lodged with the Registrar-General, Registrar of Titles or other proper officer of the State or Territory in which the relevant land is situated a memorandum setting out particulars of the declaration, or of the variation, as the case may be.
- (2) The officer with whom memorandum is lodged may:
  - (a) deal with and give effect to the declaration as if it were a grant, conveyance, or transfer of the acquired interest to the acquiring authority duly executed under the law in force in the State or Territory; and
  - (b) make such entries in the records kept by the officer as are necessary having regard to the effect of subsection 41(4)."

**vii what interest in land may be acquired;**

**Lands Acquisition Act 1989 (Cth)**

**"Section 6:**

"interest", in relation to land (including overseas land), means:

- (a) any legal or equitable estate or interest in the land;
- (b) a restriction on the use of the land, whether or not annexed to other land; or
- (c) any other right (including a right under an option and a right of redemption), charge, power or privilege over or in connection with the land or an interest in the land;

and includes the interest of the Commonwealth, a State or a Territory in Crown land.

**"17 Nature of interests that may be acquired**

- (1) The interests that may be acquired under this Act are:

- (a) a legal or equitable estate or interest in land; and
  - (b) any other right (including a right under an option and a right of redemption), charge, power or privilege over, or in connection with, land or an interest in land.
- (2) Those interests include:
- (a) an interest of the Commonwealth, a State or a Territory in Crown land;
  - (b) an interest that did not previously exist in relation to particular land;
  - (c) an easement in gross; and
  - (d) a restriction on the use of the land, whether or not annexed to particular land. "

There are no significant differences from this in the State Legislation, except in the Land Administration Act 1997 (WA):

**"s151(1):**

""interest" means any legal or equitable estate or interest in land, including —

- (a) native title rights and interests;
- (b) interests or rights created under any written law; and
- (c) the rights of a management body under a management order;"

Importantly the types of interest which may be acquired include native title.

***viii whether there are any distinctions between the use of acquisition powers by federal or state agencies;***

Yes, there is both federal and state legislation which whilst similar in intent is not identical.

***ix whether acquisition of aboriginal lands is dealt with in a different manner in any of the above respects. Include whether the compensation provisions contemplate a "valuation of or compensation for" spiritual or other special values that aboriginal peoples may have in respect of land.***

The position in respect of the acquisition of and compensation for aboriginal lands has been substantially altered by the Commonwealth via the Native Title Act 1993 as well as the decision of High Court of Australia in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

In the past it had been held that various actions by the Crown including compulsory acquisition extinguished native title. Native title was seen as a mere occupation right and not as an encumbrance on the Crown's root title. As with other jurisdictions such as the United States and Canada it was not uncommon to take large tracts of land thus extinguishing native rights. In some cases there would be no compensation paid.

In *Mabo* the High Court denounced the doctrine of *terra nullius* which was described as being an "unjust and discriminatory doctrine...[that]...can no longer be accepted". However there are still some concerns at this decision which upheld the right of the Crown to extinguish native title. This is related to the doctrine of plenary power whereby the state is able to exercise its power over indigenous people and their property. This doctrine has been judicially applied in the United States.

The decision in *Mabo* led to the Native Title Act in 1993. The Act was motivated in part by the enormous cost of litigation which had arisen in respect of native land rights. Another compelling reason was that following the recognition of native title by the Courts it was feared that many Crown grants would be illegal because of their effect on native title contrary to the Racial Discrimination Act and also the Constitution. Native title holders were thus required to be afforded the same protections as all other title holders.

In many respects the Act, rather than supplying extra protections, operates more with a view to securing the protections for native title holders that other land owners enjoy. The Commonwealth was able to make such laws as it enjoyed constitutional power to make laws in respect of indigenous people. Importantly legislation passed by Western Australia seeking to implement a native title regime less secure than that imposed by the Native Title Act 1993 was struck down by the Commonwealth as being inconsistent with the Native Title Act.

The key objects of the Act are:

**"An Act about native title in relation to land or waters, and for related purposes**

**Preamble**

This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through:

- (a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and
- (b) the acceptance of the Universal Declaration of Human Rights; and
- (c) the enactment of legislation such as the *Racial Discrimination Act 1975* and the *Human Rights and Equal Opportunity Commission Act 1986*.

The High Court has:

(a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and

(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and

(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and

(b) proposals for the use of such land for economic purposes.

It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians."

The objects of the Act are clearly defined.

### "3 Objects

#### *Main objects*

The main objects of this Act are:

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title."

Paragraph (b) is of particular importance and means that the extinguishment of native title is now controlled by the Act. These are known as future Acts. There are provisions for determining when native title exists. Compensation is required for adverse acts. The Act validates certain past Acts as indicated in paragraph (d). In particular construction of public works and vesting of land under legislation which confers a right of exclusive possession operates to extinguish native title. Where a past act is validated by the Native Title Act compensation procedures apply.

Paragraph (c) is similar in some respects to New Zealand's Waitangi Tribunal regime. It mandates the investigation and determination of land claims.

### "4 Overview of Act

#### *Recognition and protection of native title*

- (1) This Act recognises and protects native title. It provides that native title cannot be extinguished contrary to the Act.

#### *Topics covered*

- (2) Essentially, this Act covers the following topics:
  - (a) acts affecting native title (see subsections (3) to (6));
  - (b) determining whether native title exists and compensation for acts affecting native title (see subsection (7)).

*Kinds of acts affecting native title*

- (3) There are basically 2 kinds of acts affecting native title:
- (a) ***past acts*** (mainly acts done before this Act's commencement on 1 January 1994 that were invalid because of native title); and
  - (b) ***future acts*** (mainly acts done after this Act's commencement that either validly affect native title or are invalid because of native title).

*Consequences of past acts and future acts*

- (4) For past acts and future acts, this Act deals with the following matters:
- (a) their validity;
  - (b) their effect on native title;
  - (c) compensation for the acts.

*Intermediate period acts*

- (5) However, for certain acts (called ***intermediate period acts***) done mainly before the judgment of the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1, that would be invalid because they fail to pass any of the future act tests in Division 3 of Part 2, or for any other reason because of native title, this Act provides for similar consequences to past acts.

*Confirmation of extinguishment of native title*

- (6) This Act also confirms that many acts done before the High Court's judgment, that were either valid, or have been validated under the past act or intermediate period act provisions, will have extinguished native title. If the acts are ***previous exclusive possession acts*** (see section 23B), the extinguishment is complete; if the acts are ***previous non-exclusive possession acts*** (see section 23F), the extinguishment is to the extent of any inconsistency.

The Act empowers the Federal Court to make native title determinations and establishes the Native Title Tribunal.

**"Role of Federal Court and National Native Title Tribunal**

- (7) This Act also:
- (a) provides for the Federal Court to make determinations of native title and compensation; and
  - (b) establishes a National Native Title Tribunal with power to:
    - (i) make determinations about whether certain future acts can be done and whether certain agreements concerning native title are to be covered by the Act; and
    - (ii) provide assistance or undertake mediation in other matters relating to native title; and
  - (c) deals with other matters such as the keeping of registers and the role of representative Aboriginal/Torres Strait Islander bodies.

## **Division 1—Recognition and protection of native title**

### **10 Recognition and protection of native title**

Native title is recognised, and protected, in accordance with this Act.

### **11 Extinguishment of native title**

- (1) Native title is not able to be extinguished contrary to this Act.

*Effect of subsection (1)*

- (2) An act that consists of the making, amendment or repeal of legislation on or after 1 July 1993 by the Commonwealth, a State or a Territory is only able to extinguish native title:
- (a) in accordance with Division 2B (which deals with confirmation of past extinguishment of native title) or Division 3 (which deals with future acts etc. and native title) of Part 2; or
  - (b) by validating past acts, or intermediate period acts, in relation to the native title.

### **13 Approved determinations of native title**

*Applications to Federal Court*

- (1) An application may be made to the Federal Court under Part 3:
- (a) for a determination of native title in relation to an area for which there is no approved determination of native title; or
  - (b) to revoke or vary an approved determination of native title on the grounds set out in subsection (5).

*Native title determinations by Federal Court when determining compensation entitlements*

- (2) If:
- (a) the Federal Court is making a determination of compensation in accordance with Division 5; and
  - (b) an approved determination of native title has not previously been made in relation to the whole or part of the area concerned;
- the Federal Court must also make a current determination of native title in relation to the whole or the part of the area, that is to say, a determination of native title as at the time at which the determination of compensation is being made.

**Note:** Under subsection 62(3), if no native title determination application has previously been made in relation to the area to which a compensation application relates, the compensation application must be accompanied by the affidavit, and contain the information, that would be required for a native title determination application for the area.

*Approved determinations of native title*

- (3) Subject to subsection (4), each of the following is an **approved determination of native title**:

- (a) a determination of native title made on an application under paragraph (1)(a) or in accordance with subsection (2);
- (b) an order, judgment or other decision of a recognised State/Territory body that involves a determination of native title in relation to an area within the jurisdictional limits of the State or Territory.

*Variation or revocation of determinations*

- (4) If an approved determination of native title is varied or revoked on the grounds set out in subsection (5) by:
  - (a) the Federal Court, in determining an application under Part 3; or
  - (b) a recognised State/Territory body in an order, judgment or other decision;then:
  - (c) in the case of a variation—the determination as varied becomes an ***approved determination of native title*** in place of the original; and
  - (d) in the case of a revocation—the determination is no longer an approved determination of native title.

*Grounds for variation or revocation*

- (5) For the purposes of subsection (4), the grounds for variation or revocation of an approved determination of native title are:
  - (a) that events have taken place since the determination was made that have caused the determination no longer to be correct; or
  - (b) that the interests of justice require the variation or revocation of the determination.

*Review or appeal*

- (6) If:
  - (a) a determination of the Federal Court; or
  - (b) an order, judgment or other decision of a recognised State/Territory body;is subject to any review or appeal, this section refers to the determination, order, judgment or decision as affected by the review or appeal, when finally determined.

*High Court determinations*

- (7) A determination of native title by the High Court is an ***approved determination of native title.***"

The provisions relating to the validation of past Acts of the Crown in respect of native title are set out below. Acts which may be validated include the construction of public works and the vesting of land or waters under legislation which confers an exclusive right of possession. This means that prior takings for public works of native land may be validated under Act.

**"Division 2—Validation of past acts**  
Subdivision AA—Overview of Division

**13A Overview of Division**

- (1) In summary, this Division validates, or allows States and Territories to validate, certain acts that:
  - (a) took place before 1 January 1994; and
  - (b) would otherwise be invalid because of native title.This Division also covers certain acts done after that day consisting of an extension or renewal etc. of an act done before that day.
- (2) The acts validated are called *past acts*; they are defined in section 228.
- (3) This Division also sets out the effect of such validation on native title. The effect varies depending on the nature of the act. For this purpose, different categories of past act are defined by sections 229 to 232.

The Act sets out in some detail the kinds of act which are classed as past acts within the meaning of the Native Title Act.

**"228 Past act**

*Definition*

- (1) This section defines *past act*.

*Acts before 1 July 1993 or 1 January 1994*
- (2) Subject to subsection (10), if:
  - (a) either:
    - (i) at any time before 1 July 1993 when native title existed in relation to particular land or waters, an act consisting of the making, amendment or repeal of legislation took place; or
    - (ii) at any time before 1 January 1994 when native title existed in relation to particular land or waters, any other act took place; and
  - (b) apart from this Act, the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist;the act is a *past act* in relation to the land or waters.

*Options exercised on or after 1 January 1994 etc.*
- (3) Subject to subsection (10), an act that takes place on or after 1 January 1994 is a *past act* if:

- (a) it would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and
- (b) it takes place:
  - (i) in exercise of a legally enforceable right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994; or
  - (ii) in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made; and
- (c) the act is not the making, amendment or repeal of legislation.

*Extensions, renewals etc.*

- (4) Subject to subsections (6) and (10), an act (the **later act**) that takes place on or after 1 January 1994 is a **past act** if:
  - (a) the later act would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and
  - (b) an act (the **earlier act**) that is a past act because of any subsection of this section (including because of another application of this subsection) took place before the later act; and
  - (c) the earlier act created interests in a person and the later act creates interests in:
    - (i) the same person; or
    - (ii) another person who has acquired the interests of the first person (by assignment, succession or otherwise);
 in relation to the whole or part of the land or waters to which the earlier act relates; and
  - (d) the interests created by the later act take effect before or immediately after the interests created by the earlier act cease to have effect; and
  - (e) the interests created by the later act permit activities of a similar kind to those permitted by the earlier act.

*Examples of similar and dissimilar acts for the purposes of paragraph (4)(e)*

- (5) The following are examples for the purposes of paragraph (4)(e):
  - (a) the grant of a lease that permits mining only for a particular mineral followed by the grant of a lease that permits similar mining for another mineral is an example of a case where interests created by an earlier act permit activities that are of a similar kind to those permitted by a later act;
  - (b) the grant of a lease that permits only grazing followed by the grant of a lease that permits mining is an example of a case where interests created by an earlier act permit activities that are not of a similar kind to those permitted by a later act.

*Cases excluded from subsection (4)*

- (6) Subsection (4) does not apply if:
- (a) the earlier act was the creation of a non-proprietary interest in relation to land or waters and the later act is the creation of a proprietary interest in land or waters; or
  - (b) the earlier act was the creation of a proprietary interest in land or waters and the later act is the creation of a larger proprietary interest in land or waters; or
  - (c) if the earlier act contains a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders—the later act does not contain the same reservation or condition; or
  - (d) the earlier act or the later act is the making, amendment or repeal of legislation.

*Example of earlier and later acts for the purposes of paragraph (6)(a)*

- (7) For the purposes of paragraph (6)(a), the issue of a licence followed by the grant of a lease is an example of an earlier act that is the creation of a non-proprietary interest in relation to land and a later act that is the creation of a proprietary interest in land.

*Example of earlier and later acts for the purposes of paragraph (6)(b)*

- (8) For the purposes of paragraph (6)(b), the grant of a lease followed by the grant of a freehold estate is an example of an earlier act that is the creation of a proprietary interest in land and a later act that is the creation of a larger proprietary interest in land.

*Other extensions, and developments, of earlier acts*

- (9) Subject to subsection (10), an act (the **later act**) that takes place on or after 1 January 1994 is a **past act** if:
- (a) the later act would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and
  - (b) an act (the **earlier act**) that is a past act because of any subsection of this section took place before the later act; and
  - (c) the earlier act contained or conferred a reservation, condition, permission or authority under which the whole or part of the land or waters to which the earlier act related was to be used at a later time for a particular purpose (for example, a reservation for forestry purposes); and
  - (d) the later act is done in good faith under or in accordance with the reservation, condition, permission or authority (for example, the issue in good faith of a licence to take timber under a reservation for forestry purposes); and
  - (e) the later act is not the making, amendment or repeal of legislation.

*Excluded acts*

- (10) An act is not a **past act** if it is:
- (a) the *Queensland Coast Islands Declaratory Act 1985* of Queensland; or
  - (b) any other act declared by the regulations to be an excluded act for the purposes of this paragraph.

## 229 Category A past act

### *Section defines expression*

- (1) This section defines the expression ***category A past act***.

### *Grant of certain freehold estates*

- (2) A past act consisting of the grant of a freehold estate is a ***category A past act*** if:
- (a) either:
    - (i) the grant was made before 1 January 1994 and the estate existed on 1 January 1994; or
    - (ii) the grant was made on or after 1 January 1994 and it is a past act because subsection 228(3) (which deals with such things as the exercise of options) or 228(9) (which deals with other extensions etc. of earlier acts) applies; and
  - (b) the grant is not:
    - (i) a grant by the Crown in any capacity to the Crown, or to a statutory authority of the Crown, in any capacity; or
    - (ii) a grant made by or under legislation that grants freehold estates only to or for the benefit of Aboriginal peoples or Torres Strait Islanders; or
    - (iii) a grant of a prescribed kind to or for the benefit of Aboriginal peoples or Torres Strait Islanders.

### *Grant of certain leases*

- (3) A past act consisting of the grant of:
- (a) a commercial lease, an agricultural lease, a pastoral lease or a residential lease; or
  - (b) what is taken by subsection 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection;
- is a ***category A past act*** if:
- (c) either:
    - (i) the grant was made before 1 January 1994 and the lease was in force on 1 January 1994; or
    - (ii) the grant was made on or after 1 January 1994 and it is a past act because subsection 228(3) or (9) applies; and
  - (d) the grant is not:
    - (i) a grant by the Crown in any capacity to the Crown, or to a statutory authority of the Crown, in any capacity; or
    - (ii) a grant made by or under legislation that grants leases only to or for the benefit of Aboriginal peoples or Torres Strait Islanders; or
    - (iii) a grant of a prescribed kind to or for the benefit of Aboriginal peoples or Torres Strait Islanders; or
    - (iv) a grant over land or waters that, on 1 January 1994, are Aboriginal/Torres Strait Islander land or waters."

Of particular relevance is subsection(4).

*"Construction of public works*

(4) A past act consisting of the construction or establishment of any public work is a **category A past act** if:

- (a) the work commenced to be constructed or established before 1 January 1994 and the construction or establishment had not been completed by that day; or
- (b) the work was constructed or established before 1 January 1994 and still existed on that day; or
- (c) the work was constructed or established on or after 1 January 1994 and the construction or establishment is a past act because subsection 228(9) applies.

**230 Category B past act**

A **category B past act** is a past act consisting of the grant of a lease where

- (a) the grant is not a category A past act; and
- (b) the lease is not a mining lease; and
- (c) either:....

**231 Category C past act**

A **category C past act** is a past act consisting of the grant of a mining lease.

**232 Category D past act**

A **category D past act** is any past act that is not a category A past act, a category B past act or a category C past act.

Subdivision A—Acts attributable to the Commonwealth

**14 Validation of Commonwealth acts**

- (1) If a past act is an act attributable to the Commonwealth, the act is valid, and is taken always to have been valid.

*Effect of validation of law*

- (2) To avoid any doubt, if a past act validated by subsection (1) is the making, amendment or repeal of legislation, subsection (1) does not validate:
  - (a) the grant or issue of any lease, licence, permit or authority; or
  - (b) the creation of any interest in relation to land or waters;under any legislation concerned, unless the grant, issue or creation is itself a past act attributable to the Commonwealth.

Section 15 is of considerable interest in respect of validation of past acts including acquisition for public works.

**"15 Effect of validation on native title**

- (1) If a past act is an act attributable to the Commonwealth:

- (a) if it is a category A past act other than one to which subsection 229(4) (which deals with public works) applies—the act extinguishes the native title concerned; and
- (b) if it is a category A past act to which subsection 229(4) applies:
  - (i) in any case—the act extinguishes the native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
  - (ii) if paragraph 229(4)(a) applies—the extinguishment is taken to have happened on 1 January 1994; and
- (c) if it is a category B past act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests concerned—the act extinguishes the native title to the extent of the inconsistency; and
- (d) if it is a category C past act or a category D past act—the non-extinguishment principle applies to the act.

Note: This subsection does not apply to the act if section 23C or 23G applies to the act.

- (2) The extinguishment effected by this section does not by itself confer any right to eject or remove any Aboriginal persons who reside on or who exercise access over land or waters covered by a pastoral lease the grant, re-grant or extension of which is validated by section 14.

#### **16 Preservation of beneficial reservations and conditions**

If:

- (a) the act attributable to the Commonwealth contains a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders; or
- (b) the doing of the act would affect rights or interests (other than native title rights and interests) of Aboriginal peoples or Torres Strait Islanders (whether arising under legislation, at common law or in equity and whether or not rights of usage);

nothing in section 15 affects that reservation or condition or those rights or interests."

The Act gives an entitlement to compensation depending upon the nature of the past act.

#### **"17 Entitlement to compensation**

##### *Extinguishment case*

- (1) If the act attributable to the Commonwealth is a category A past act or a category B past act, the native title holders are entitled to compensation for the act.

##### *Non-extinguishment case*

- (2) If it is any other past act, the native title holders are entitled to compensation for the act if:

- (a) the native title concerned is to some extent in relation to an onshore place and the act could not have been validly done on the assumption that the native title holders instead held ordinary title to:
  - (i) any land concerned; and
  - (ii) the land adjoining, or surrounding, any waters concerned; or
- (b) the native title concerned is to some extent in relation to an offshore place; or
- (c) the native title concerned relates either to land or to waters and the similar compensable interest test is satisfied in relation to the act.

*Compensation for partial effect of act*

- (3) If the entitlement arises only because one, but not both, of paragraphs (2)(a) and (b) are satisfied, it is only an entitlement for the effect of the act on the native title in relation to the onshore place, or the offshore place, mentioned in the relevant paragraph.

*Who pays compensation*

- (4) The compensation is payable by the Commonwealth."

Just terms invalidity arises where the Act done was inconsistent with the cost.

**"18 Where just terms invalidity**

*Section applies if acquisition of property other than on just terms*

- (1) This section applies if the invalidity (disregarding section 14) of a past act attributable to the Commonwealth results from a paragraph 51(xxxi) acquisition of property by the Commonwealth from any person having been made otherwise than on paragraph 51(xxxi) just terms.

*Entitlement to compensation*

- (2) The person is entitled to compensation from the Commonwealth for the acquisition in accordance with Division 5 and, if that compensation does not ensure that the acquisition is made on paragraph 51(xxxi) just terms, to such additional compensation from the Commonwealth as is necessary to ensure that it is.

Subdivision B—Acts attributable to a State or Territory

**"19 State/Territory acts may be validated**

- (1) If a law of a State or Territory contains provisions to the same effect as sections 15 and 16, the law of the State or Territory may provide that past acts attributable to the State or Territory are valid, and are taken always to have been valid.

*Effect of validation of law*

- (2) To avoid any doubt, if a past act validated by subsection (1) is the making, amendment or repeal of legislation, subsection (1) does not validate:
  - (a) the grant or issue of any lease, licence, permit or authority; or

- (b) the creation of any interest in relation to land or waters;  
under any legislation concerned, unless the grant, issue or creation is itself a past act attributable to the State or Territory.

## **"20 Entitlement to compensation**

### *Compensation where validation*

- (1) If a law of a State or Territory validates a past act attributable to the State or Territory in accordance with section 19, the native title holders are entitled to compensation if they would be so entitled under subsection 17(1) or (2) on the assumption that section 17 applied to acts attributable to the State or Territory.

### *Compensation where no validation*

- (2) Native title holders are entitled to compensation for the past act attributable to a State or Territory that, at the time when the claim for compensation is determined, has not been validated by the State or Territory in accordance with section 19.

### *Recovery of compensation*

- (3) The native title holders may recover the compensation from the State or Territory.

### *States or Territories may create compensation entitlement*

- (4) This section does not prevent a law of a State or Territory from creating an entitlement to compensation for a past act or for the validation of a past act.

Note: Paragraph 49(b) deals with the situation where there are multiple rights to compensation under Commonwealth, State and Territory laws.

## **"Division 2A—Validation of intermediate period acts etc.**

### Subdivision A—Overview of Division

## **"21 Overview of Division**

- (1) In summary, this Division validates, or allows States and Territories to validate, certain acts that:
  - (a) took place on or after 1 January 1994 but on or before 23 December 1996;  
and
  - (b) would otherwise be invalid to any extent because they fail to pass any of the future act tests in Division 3 of Part 2 or for any other reason because of native title.
- (2) The acts are called *intermediate period acts*; they are defined in section 232A.
- (3) For this validation to apply, before the act was done, there must have been:
  - (a) a grant of a freehold estate or a lease (other than a mining lease); or
  - (b) a public work;over any of the land or waters concerned.
- (4) The Division also sets out the effect of such validation on native title. The effect varies depending on the nature of the act. For this purpose, different categories of intermediate period act are defined by sections 232B to 232E.

- (5) The structure of the Division is very similar to that of Division 2 (which deals with validation of past acts).

Subdivision B—Acts attributable to the Commonwealth

**"22A Validation of Commonwealth acts**

If an intermediate period act is an act attributable to the Commonwealth, the act is valid, and is taken always to have been valid.

**"22B Effect of validation on native title**

Subject to subsection 24EBA(6), if an intermediate period act is an act attributable to the Commonwealth:

- (a) if it is a category A intermediate period act to which subsection 232B(2), (3) or (4) (which deal with things such as the grant or vesting of freehold estates and certain leases) applies—the act extinguishes all native title in relation to the land or waters concerned; and
- (b) if it is a category A intermediate period act to which subsection 232B(7) (which deals with public works) applies:
  - (i) the act extinguishes the native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
  - (ii) the extinguishment is taken to have happened when the construction or establishment began; and
- (c) if it is a category B intermediate period act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests concerned—the act extinguishes the native title to the extent of the inconsistency; and
- (d) if it is a category C intermediate period act or a category D intermediate period act—the non-extinguishment principle applies to the act.

Note: This section does not apply to the act if section 23C or 23G applies to the act.

**"22C Preservation of beneficial reservations and conditions**

If:

- (a) an intermediate period act attributable to the Commonwealth contains a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders; or
  - (b) the doing of an intermediate period act attributable to the Commonwealth would affect rights or interests (other than native title rights and interests) of Aboriginal peoples or Torres Strait Islanders (whether arising under legislation, at common law or in equity and whether or not rights of usage);
- nothing in section 22B affects that reservation or condition or those rights or interests.

**"22D Entitlement to compensation**

- (1) If an intermediate period act is an act attributable to the Commonwealth, the native title holders are entitled to compensation for the act.

*Who pays compensation*

- (2) The compensation is payable by the Commonwealth.

**"22E Where “just terms” invalidity**

*Section applies if acquisition of property other than on just terms*

- (1) This section applies if the invalidity (disregarding section 22A) of an intermediate period act attributable to the Commonwealth results from a paragraph 51(xxxi) acquisition of property by the Commonwealth from any person having been made otherwise than on paragraph 51(xxxi) just terms.

*Entitlement to compensation*

- (2) The person is entitled to compensation from the Commonwealth for the acquisition in accordance with Division 5 and, if that compensation does not ensure that the acquisition is made on paragraph 51(xxxi) just terms, to such additional compensation from the Commonwealth as is necessary to ensure that it is.

**"22EA Requirement to notify: mining rights**

- (1) If:
- (a) an act that is attributable to the Commonwealth consists of:
    - (i) the creation of a right to mine; or
    - (ii) the variation of such a right to extend the area to which it relates; or
    - (iii) the extension of the period for which such a right has effect, other than under an option or right of extension or renewal created by the lease, contract or other thing whose grant or making created the right to mine; and
  - (b) the act took place at any time during the period from the beginning of 1 January 1994 until the end of 23 December 1996; and
  - (c) at any time before the act was done, either:
    - (i) a grant of a freehold estate or a lease was made covering any of the land or waters affected by the act; or
    - (ii) a public work was constructed or established on any of the land or waters affected by the act;
- the Commonwealth must, before the end of 6 months after this section commences:
- (d) give notice containing the details set out in subsection (2) to any registered native title body corporate, any registered native title claimant and any representative Aboriginal/Torres Strait Islander body, in relation to any of the land or waters affected by the act; and
  - (e) notify the public in the determined way of the details set out in subsection (2).

*Details*

- (2) The details are:
- (a) the date on which the act was done; and
  - (b) the kind of mining involved; and
  - (c) sufficient information to enable the area affected by the act to be identified; and
  - (d) information about the way in which further details about the act may be obtained.

Subdivision C—Acts attributable to a State or Territory

**"22F State/Territory acts may be validated**

If a law of a State or Territory contains provisions to the same effect as sections 22B and 22C, the law of the State or Territory may provide that intermediate period acts attributable to the State or Territory are valid, and are taken always to have been valid.

**"22G Entitlement to compensation**

*Compensation where validation*

- (1) If a law of a State or Territory validates an intermediate period act attributable to the State or Territory in accordance with section 22F, the native title holders are entitled to compensation.

*Recovery of compensation*

- (2) The native title holders may recover the compensation from the State or Territory.

*States or Territories may create compensation entitlement*

- (3) This section does not prevent a law of a State or Territory from creating an entitlement to compensation for an intermediate period act or for the validation of an intermediate period act.

Note: Paragraph 49(b) deals with the situation where there are multiple rights to compensation under Commonwealth, State and Territory laws.

**"22H Requirement to notify: mining rights**

- (1) If:
- (a) an act that is attributable to a State or Territory consists of:
    - (i) the creation of a right to mine; or
    - (ii) the variation of such a right to extend the area to which it relates; or
    - (iii) the extension of the period for which such a right has effect, other than under an option or right of extension or renewal created by the lease, contract or other thing whose grant or making created the right to mine; and
  - (b) the act took place at any time during the period from the beginning of 1 January 1994 until the end of 23 December 1996; and
  - (c) at any time before the act was done, either:

- (i) a grant of a freehold estate or a lease was made covering any of the land or waters affected by the act; or
- (ii) a public work was constructed or established on any of the land or waters affected by the act;

the State or Territory must, before the end of 6 months after the commencement of the law of the State or Territory that validates intermediate period acts attributable to the State or Territory in accordance with section 22F:

- (d) give notice containing the details set out in subsection (2) to any registered native title body corporate, any registered native title claimant and any representative Aboriginal/Torres Strait Islander body, in relation to any of the land or waters affected by the act; and
- (e) notify the public in the determined way of the details set out in subsection (2).

*Details*

- (2) The details are:
  - (a) the date on which the act was done; and
  - (b) the kind of mining involved; and
  - (c) sufficient information to enable the area affected by the act to be identified; and
  - (d) information about the way in which further details about the act may be obtained.

**"Division 2AA—Validation of transfers under New South Wales land rights legislation**

**"22I Overview of Division**

In summary, this Division allows New South Wales to validate certain transfers under the *Aboriginal Land Rights Act 1983* of that State.

**"22J Validation of transfers**

If:

- (a) future acts consist of the transfer of lands under section 36 of the *Aboriginal Land Rights Act 1983* of New South Wales; and
- (b) the claims for the lands were made before 28 November 1994; and
- (c) the acts took place before or take place after the commencement of this section; and
- (d) the acts are not intermediate period acts; and
- (e) the acts are invalid to any extent because of Division 3 of Part 2 or for any other reason, but would be valid to that extent if native title did not exist in relation to the lands;

a law of New South Wales may provide that the acts are valid, and are taken always to have been valid.

**"22K Effect of validation on native title**

The non-extinguishment principle applies to the acts.

## "22L Entitlement to compensation

### *Compensation where validation*

- (1) If a law of New South Wales validates the acts, the native title holders concerned are entitled to compensation.

### *Recovery of compensation*

- (2) The native title holders may recover the compensation from New South Wales.

### *Compensation to take into account rights etc. conferred by transferee*

- (3) The compensation is to take into account all rights, interests and other benefits conferred, in relation to the lands, on the native title holders by, or by virtue of membership of, the Aboriginal Land Council (within the meaning of the *Aboriginal Land Rights Act 1983* of New South Wales) to which the lands are transferred or by which the lands are held.

### *NSW may create compensation entitlement*

- (4) This section does not prevent a law of New South Wales from creating an entitlement to compensation for the acts or for their validation.

Note: Paragraph 49(b) deals with the situation where there are multiple rights to compensation under Commonwealth and State legislation.

## "Division 2B—Confirmation of past extinguishment of native title by certain valid or validated acts

### "23A Overview of Division

- (1) In summary, this Division provides that certain acts attributable to the Commonwealth that were done on or before 23 December 1996 will have completely or partially extinguished native title.
- (2) If the acts were *previous exclusive possession acts* (involving the grant or vesting of things such as freehold estates or leases that conferred exclusive possession, or the construction or establishment of public works), the acts will have completely extinguished native title.
- (3) If the acts were *previous non-exclusive possession acts* (involving grants of non-exclusive agricultural leases or non-exclusive pastoral leases), they will have extinguished native title to the extent of any inconsistency.
- (4) This Division also allows States and Territories to legislate, in respect of certain acts attributable to them, to extinguish native title in the same way as is done under this Division for Commonwealth acts.

### "23B Previous exclusive possession act

- (1) This section defines *previous exclusive possession act*.  
*Grant of freehold estates or certain leases etc. on or before 23.12.1996*
- (2) An act is a *previous exclusive possession act* if:

- (a) it is valid (including because of Division 2 or 2A of Part 2); and
  - Note: As at the commencement of this section, acts such as grants before 1 January 1994 that were invalid because of native title have been validated by or under Division 2.
- (b) it took place on or before 23 December 1996; and
- (c) it consists of the grant or vesting of any of the following:
  - (i) a Scheduled interest (see section 249C);
  - (ii) a freehold estate;
  - (iii) a commercial lease that is neither an agricultural lease nor a pastoral lease;
  - (iv) an exclusive agricultural lease (see section 247A) or an exclusive pastoral lease (see section 248A);
  - (v) a residential lease;
  - (vi) a community purposes lease (see section 249A);
  - (vii) what is taken by subsection 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to “1 January 1994” were instead a reference to “24 December 1996”;
  - (viii) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

*Vesting of certain land or waters to be covered by paragraph (2)(c)*

- (3) If:
  - (a) by or under legislation of a State or a Territory, particular land or waters are vested in any person; and
  - (b) a right of exclusive possession of the land or waters is expressly or impliedly conferred on the person by or under the legislation;
 the vesting is taken for the purposes of paragraph (2)(c) to be the vesting of a freehold estate over the land or waters."

Public works constitute previous exclusive possession acts.

*"Construction of public works commencing on or before 23.12.1996*

- (7) An act is a ***previous exclusive possession act*** if:
  - (a) it is valid (including because of Division 2 or 2A); and
  - (b) it consists of the construction or establishment of any public work that commenced to be constructed or established on or before 23 December 1996.

*Exclusion of acts benefiting Aboriginal peoples or Torres Strait Islanders*

- (9) An act is not a ***previous exclusive possession act*** if it is:
  - (a) the grant or vesting of any thing that is made or done by or under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or

- (b) the grant or vesting of any thing expressly for the benefit of, or to or in a person to hold on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
- (c) the grant or vesting of any thing over particular land or waters, if at the time a thing covered by paragraph (a) or (b) is in effect in relation to the land or waters.

Note: The expression *Aboriginal peoples* is defined in section 253.

*Exclusion of national parks etc.*

- (9A) An act is not a *previous exclusive possession act* if the grant or vesting concerned involves the establishment of an area, such as a national, State or Territory park, for the purpose of preserving the natural environment of the area.

*Exclusion of acts where legislation provides for non-extinguishment*

- (9B) An act is not a *previous exclusive possession act* if it is done by or under legislation that expressly provides that the act does not extinguish native title.

*Exclusion of Crown to Crown grants etc.*

- (9C) If an act is the grant or vesting of an interest in relation to land or waters to or in the Crown in any capacity or a statutory authority, the act is not a *previous exclusive possession act*:

- (a) unless, apart from this Act, the grant or vesting extinguishes native title in relation to the land or waters; or
- (b) if the grant or vesting does not, apart from this Act, extinguish native title in relation to the land or waters—unless and until the land or waters are (whether before or after 23 December 1996) used to any extent in a way that, apart from this Act, extinguishes native title in relation to the land or waters.

*Exclusion by regulation*

- (10) The regulations may provide that an act is not a *previous exclusive possession act*.

*Effect of exclusions*

- (11) To avoid doubt, the fact that an act is, because of any of the previous subsections, not a previous exclusive possession act does not imply that the act is not valid."

The Act confirms extinguishment of native title following an exclusive possession acts in respect of public works.

**"23C Confirmation of extinguishment of native title by previous exclusive possession acts of Commonwealth**

*Acts other than public works*

- (1) If an act is a previous exclusive possession act under subsection 23B(2) (including because of subsection 23B(3)) and is attributable to the Commonwealth:

- (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned; and

- (b) the extinguishment is taken to have happened when the act was done.

*Public works*

- (2) If an act is a previous exclusive possession act under subsection 23B(7) (which deals with public works) and is attributable to the Commonwealth:
- (a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
- (b) the extinguishment is taken to have happened when the construction or establishment of the public work began.

*Other extinguishment provisions do not apply*

- (3) If this section applies to the act, sections 15 and 22B do not apply to the act.

**"23D Preservation of beneficial reservations and conditions**

If:

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

nothing in section 23C affects that reservation or condition or those rights or interests.

**"23DA Confirmation of validity of use of certain land held by Crown etc.**

To avoid doubt, if the act is a previous exclusive possession act because of paragraph 23B(9C)(b) (which deals with grants to the Crown etc.), the use of the land or waters concerned as mentioned in that paragraph is valid.

**"23E Confirmation of extinguishment of native title by previous exclusive possession acts of State or Territory**

If a law of a State or Territory contains a provision to the same effect as section 23D or 23DA, the law of the State or Territory may make provision to the same effect as section 23C in respect of all or any previous exclusive possession acts attributable to the State or Territory.

**"23F Previous non-exclusive possession act**

- (1) This section defines *previous non-exclusive possession act*.

*Acts on or before 23.12.96*

- (2) An act is a *previous non-exclusive possession act* if:

- (a) it is valid (including because of Division 2 or 2A of Part 2); and
  - Note: As at the commencement of this section, acts such as grants before 1 January 1994 that were invalid because of native title have been validated by or under Division 2.
- (b) it takes place on or before 23 December 1996; and
- (c) it consists of the grant of a non-exclusive agricultural lease (see section 247B) or a non-exclusive pastoral lease (see section 248B).

*Acts after 23.12.96*

- (3) An act is also a ***previous non-exclusive possession act*** if:
  - (a) it takes place after 23 December 1996; and
  - (b) it would be a previous non-exclusive possession act under subsection (2) if that subsection were not limited in its application to acts taking place on or before 23 December 1996; and
  - (c) it takes place:
    - (i) in exercise of a legally enforceable right created by any act done on or before 23 December 1996; or
    - (ii) in good faith in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made.

*Exclusion by regulation*

- (4) The regulations may provide that an act is not a ***previous non-exclusive possession act***.

**"23G Confirmation of partial extinguishment of native title by previous non-exclusive possession acts of Commonwealth"**

- (1) Subject to subsection (2), if a previous non-exclusive possession act (see section 23F) is attributable to the Commonwealth:
  - (a) to the extent that the act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned, the rights and interests granted, and the doing of any activity in giving effect to them, prevail over the native title rights and interests but do not extinguish them; and
  - (b) to the extent that the act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned:
    - (i) if, apart from this Act, the act extinguishes the native title rights and interests—the native title rights and interests are extinguished; and
    - (ii) in any other case—the native title rights and interests are suspended while the lease concerned, or the lease as renewed, re-made, re-granted or extended, is in force; and
  - (c) any extinguishment under this subsection is taken to have happened when the act was done.

*Exclusion of certain acts*

- (2) If the act is the grant of a pastoral lease or an agricultural lease to which paragraph 15(1)(a) applies, this section does not apply to the act.

*Effect on sections 15 and 22B*

- (3) If this section applies to the act, sections 15 and 22B do not apply to the act.

**"23H Preservation of beneficial reservations and conditions**

If:

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

nothing in section 23G affects that reservation or condition or those rights or interests.

**"23HA Notification**

In the case of a previous non-exclusive possession act to which subparagraph 23F(3)(c)(ii) applies:

- (a) notice must be given, in the way determined in writing by the Commonwealth Minister, to any representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the land or waters that will be affected by the act about the doing or proposed doing of the act, or acts of that class, in relation to the land or waters concerned; and
- (b) they must be given an opportunity to comment on the act or class of acts.

**"23I Confirmation of partial extinguishment of native title by previous non-exclusive possession acts of State or Territory**

If a law of a State or Territory contains provisions to the same effect as sections 23H and 23HA, the law of the State or Territory may make provision to the same effect as section 23G in respect of all or any previous non-exclusive possession acts attributable to the State or Territory."

Extinguishment gives rise to a right of compensation.

**"23J Compensation**

*Entitlement*

- (1) The native title holders are entitled to compensation in accordance with Division 5 for any extinguishment under this Division of their native title rights and interests by

an act, but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under this Act.

*Commonwealth acts*

- (2) If the act is attributable to the Commonwealth, the compensation is payable by the Commonwealth.

*State and Territory acts*

- (3) If the act is attributable to a State or Territory, the compensation is payable by the State or Territory.

**"23JA Attribution of certain acts**

If:

- (a) a previous exclusive possession act or a previous non-exclusive possession act took place before the establishment of a particular State, the Jervis Bay Territory, the Australian Capital Territory or the Northern Territory; and  
(b) the act affected land or waters that, when this section commences, form part of the State or Territory;

then, for the purposes of this Division, the act is taken to be attributable to:

- (c) the State; or  
(d) if the Territory is the Jervis Bay Territory—the Commonwealth; or  
(e) if the Territory is the Australian Capital Territory or the Northern Territory—that Territory.

Note: The meaning given to the expression *attributable* by section 239 will apply for the purposes of this Division to all other previous exclusive and non-exclusive possession acts."

The Native Title Act classifies future acts as either invalid or valid in so far as they effect native title. An act effects native title if it extinguishes it or is otherwise inconsistent with the continued existence, enjoyment or exercise of native title. This obviously includes compulsory acquisition. The Act provides that such acts are valid only if permitted under the provisions of division 3.

**"Division 3—Future acts etc. and native title**

Subdivision A—Preliminary

**"24AA Overview**

*Future acts*

- (1) This Division deals mainly with future acts, which are defined in section 233. Acts that do not affect native title are not *future acts*; therefore this Division does not deal with them (see section 227 for the meaning of acts that *affect* native title).

*Validity of future acts*

- (2) Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not.

*Validity under indigenous land use agreements*

- (3) A future act will be valid if the parties to certain agreements (called indigenous land use agreements—see Subdivisions B, C and D) consent to the act being done. A future act (other than an intermediate period act) that has already been done invalidly may also be validated as a result of such agreements.

*Other bases for validity*

- (4) A future act will also be valid to the extent covered by any of the following:
- (a) section 24FA (future acts where procedures indicate absence of native title);
  - (b) section 24GB (acts permitting primary production on non-exclusive agricultural or pastoral leases);
  - (c) section 24GD (acts permitting off-farm activities directly connected to primary production activities);
  - (d) section 24GE (granting rights to third parties etc. on non-exclusive agricultural or pastoral leases);
  - (e) section 24HA (management of water and airspace);
  - (f) section 24IA (acts involving renewals and extensions etc. of acts);
  - (g) section 24JA (acts involving reservations, leases etc.);
  - (h) section 24KA (acts involving facilities for services to the public);
  - (i) section 24LA (low impact future acts);
  - (j) section 24MD (acts that pass the freehold test—but see subsection (5));
  - (k) section 24NA (acts affecting offshore places).

*Right to negotiate*

- (5) In the case of certain acts covered by section 24IC (permissible lease etc. renewals) or section 24MD (acts that pass the freehold test), for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P (which provides a “right to negotiate”).

*Extinguishment/non-extinguishment; procedural rights and compensation*

- (6) This Division provides that, in general, valid future acts are subject to the non-extinguishment principle. The Division also deals with procedural rights and compensation for the acts.

*Activities etc. prevail over native title*

- (7) To avoid doubt, section 44H provides that a valid lease, licence, permit or authority, and any activity done under it, prevail over any native title rights and interests and their exercise.

*Statutory access rights*

- (8) This Division confers access rights in respect of non-exclusive agricultural and non-exclusive pastoral leases on certain persons covered by registered native title claims (see Subdivision Q).

**"226 Act**

*Section affects meaning of **act** in references relating to native title*

- (1) This section affects the meaning of **act** in references to an act affecting native title and in other references in relation to native title.

*Certain acts included*

- (2) An **act** includes any of the following acts:
- (a) the making, amendment or repeal of any legislation;
  - (b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;
  - (c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;
  - (d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;
  - (e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;
  - (f) an act having any effect at common law or in equity.

*Acts by any person*

- (3) An **act** may be done by the Crown in any of its capacities or by any other person.

**"227 Act affecting native title**

An act **affects** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise."

An important element of the valid future Act regime is notification. This means that where a body seeks to affect native land the native title parties must be notified for comment.

Where compulsory acquisition is proposed the native parties must be consulted about how best to minimise the effect of the proposal. There is a right to object and to seek compensation. There is also a right to an independent hearing on the decision.

**"24MD Treatment of acts that pass the freehold test**

*Validation of act*

- (1) If this Subdivision applies to a future act, then, subject to Subdivision P (which deals with the right to negotiate), the act is valid.

*Extinguishment of native title by compulsory acquisition*

- (2) If:
- (a) the act is the compulsory acquisition of the whole or part of any native title rights and interests under a law of the Commonwealth, a State or a Territory that permits both:
    - (i) the compulsory acquisition by the Commonwealth, the State or the Territory of native title rights and interests; and
    - (ii) the compulsory acquisition by the Commonwealth, the State or the Territory of non-native title rights and interests in relation to land or waters; and
  - (b) the whole, or the equivalent part, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests; and
  - (ba) the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired;
- then:
- (c) the compulsory acquisition extinguishes the whole or the part of the native title rights and interests; and
  - (d) if compensation on just terms is provided under a law of the Commonwealth, a State or a Territory to the native title holders for the compulsory acquisition, and they request that the whole or part of any such compensation should be in a form other than money, the person providing the compensation must:
    - (i) consider the request; and
    - (ii) negotiate in good faith in relation to the request; and
  - (e) if compensation on just terms is not provided under a law of the Commonwealth, a State or Territory to the native title holders for the compulsory acquisition, they are entitled to compensation for the acquisition in accordance with Division 5.

Note 1: Subdivision P (which deals with the right to negotiate) applies to some acquisitions.

Note 2: This subsection only deals with the case where native title rights and interests are compulsorily acquired. It is also possible for native title rights and interests to be acquired voluntarily by means of an indigenous land use agreement or an agreement covered by subsection (2A). In such cases, non-native title rights and interests could be acquired either compulsorily or by some other means (e.g. voluntarily).

*Extinguishment of native title by surrender in course of right to negotiate process*

- (2A) If:
- (a) notice of a proposed compulsory acquisition of native title rights and interests is given in accordance with section 29 or with an equivalent alternative provision applicable under section 43 or 43A; and

- (b) an agreement arose out of negotiations in relation to the proposed compulsory acquisition of the native title rights and interests; and
  - (c) the agreement includes a statement to the effect that an act consisting of the surrender of the whole or part of the native title rights and interests is intended to extinguish the whole or the part of the native title rights and interests;
- then:
- (d) the surrender extinguishes the whole or the part of the native title rights and interests; and
  - (e) no native title holder who is entitled to any benefit provided under the agreement is entitled to any compensation for the act under this Act, other than compensation provided for in the agreement; and
  - (f) any other native title holder is entitled to compensation for the act in accordance with Division 5.

*Non-extinguishment and compensation*

- (3) In the case of any future act to which this Subdivision applies that is not covered by subsection (2) or (2A):
  - (a) the non-extinguishment principle applies to the act; and
  - (b) if the following conditions are satisfied:
    - (i) the similar compensable interest test is satisfied in relation to the act; and
    - (ii) the law mentioned in section 240 (which defines *similar compensable interest test*) does not provide for compensation to the native title holders for the act;

the native title holders are entitled to compensation for the act in accordance with Division 5.

*Who pays compensation*

- (4) The native title holders may recover the compensation from:
  - (a) if the act is attributable to the Commonwealth:
    - (i) if a law of the Commonwealth provides that a person other than the Crown in right of the Commonwealth is liable to pay the compensation—that person; or
    - (ii) if not—the Crown in right of the Commonwealth; or
  - (b) if the act is attributable to a State or Territory:
    - (i) if a law of the State or Territory provides that a person other than the Crown in any capacity is liable to pay the compensation—that person; or
    - (ii) if not—the Crown in right of the State or Territory.

*Exception for certain lessees*

- (5) If:
  - (a) the act is the compulsory acquisition of the whole or part of any native title rights and interests; and
  - (b) the land or waters concerned are to any extent the subject of a non-exclusive agricultural lease or a non-exclusive pastoral lease;

then, despite subsection (4):

- (c) the native title holders are not entitled to recover the compensation from the lessee; and
- (d) if the act is attributable to the Commonwealth—the native title holders may recover the compensation from the Crown in right of the Commonwealth; and
- (e) if the act is attributable to a State or Territory—the native title holders may recover the compensation from the Crown in right of the State or Territory.

*Consequences of certain acts*

- (6) In the case of any future act to which this Subdivision applies, other than:
  - (a) an act to which Subdivision P (which deals with the right to negotiate) applies; or
  - (b) an act determined under section 26A to be an approved exploration etc. act; or
  - (c) an act determined under section 26B to be an approved gold or tin mining act; or
  - (d) an act covered by section 26C (which deals with opal or gem mining);the consequences in subsections (6A) and (6B) apply.

*Procedural rights*

- (6A) The native title holders, and any registered native title claimants in relation to the land or waters concerned, have the same procedural rights as they would have in relation to the act on the assumption that they instead held ordinary title to any land concerned and to the land adjoining, or surrounding, any waters concerned.

*Other consequences*

- (6B) If the act is:
  - (a) the compulsory acquisition of native title rights and interests for the purpose of conferring rights or interests in relation to the land or waters concerned on persons other than the Commonwealth, the State or the Territory to which the act is attributable; or
  - (b) the creation or variation of a right to mine for the sole purpose of the construction of an infrastructure facility (see section 253) associated with mining;

Note: The acts covered by paragraphs (a) and (b) are not covered by Subdivision P: see subsection (6) and paragraph 26(1)(c).

the following consequences also apply:

- (c) the Commonwealth, the State or the Territory to which the act is attributable must notify each of the following:
  - (i) any registered native title claimant (a *claimant*) in relation to the land or waters; and
  - (ii) any native title body corporate (a *body corporate*), in relation to the land or waters; and
  - (iii) any representative Aboriginal/Torres Strait Islander body in relation to the land or waters;that the act is to be done; and

- (d) any claimant or body corporate may object, within 2 months after the notification, to the doing of the act so far as it affects their registered native title rights and interests; and
- (e) either:
  - (i) in a paragraph (a) case—the Commonwealth, the State or the Territory; or
  - (ii) in a paragraph (b) case—the person who requested or applied for the doing of the act;
 must consult any claimants, and bodies corporate, who object, about ways of minimising the act’s impact on registered native title rights and interests in relation to the land or waters, and, if relevant, any access to the land or waters or the way in which any thing authorised by the act might be done; and
- (f) if any claimant or body corporate objects, as mentioned in paragraph (d), to the doing of the act and so requests, the Commonwealth, the State or the Territory must ensure that the objection is heard by an independent person or body; and
- (g) if the independent person or body hearing any objection as mentioned in paragraph (f) 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 Commonwealth, 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 Commonwealth, the State or the Territory not to comply with the determination.

*Meaning of **determination***

(6C) In paragraph (6B)(g):

**determination** includes recommendation.

**in the interests of** the Commonwealth, the State or the Territory includes:

- (a) for the social or economic benefit of the Commonwealth, 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 Commonwealth, the State or the Territory.

*Satisfying the right to be notified*

(7) If:

- (a) because of subsection (6A) or any law of the Commonwealth, a State or a Territory, the native title holders have a procedural right that requires another person to notify them of the act; and
- (b) there has been no approved determination of the native title;

then one way in which the person may give the required notification is by notifying, in the way determined in writing by the Commonwealth Minister for the purposes of this subsection, the following that the act is to take place:

- (c) any representative Aboriginal/Torres Strait Islander bodies for the area concerned;
- (d) any registered native title claimants in relation to land or waters in the area concerned.

*Satisfying other procedural rights*

- (8) If:
  - (a) because of subsection (6A) or any law of the Commonwealth, a State or a Territory, the native title holders have a procedural right that requires another person to do any thing in relation to the native title holders; and
  - (b) there has been no approved determination of the native title;
 then one way in which the person may give effect to the requirement is:
  - (c) by doing the thing in relation to any registered native title claimant in relation to land or waters in the area concerned; or
  - (d) if there are no such registered native title claimants—by ensuring that any representative Aboriginal/Torres Strait Islander bodies for the area concerned have an opportunity to comment on the doing of the act."

The Native Title Act provides compensation provisions in respect of future acts.

**"Compensation payable in accordance with Division**

Compensation payable under Division 2, 2A, 2B, 3 or 4 in relation to an act is only payable in accordance with this Division.

**"49 No multiple compensation for essentially same act**

Despite anything in Division 2, 2A, 2B, 3 or 4:

- (a) compensation is only payable under this Act once for acts that are essentially the same; and
- (b) the court, person or body determining compensation in accordance with this Division must take into account any compensation awarded under a law of a State or Territory, or under another Commonwealth law, for essentially the same act.

**"50 Bodies that may determine compensation**

*Division exhaustive*

- (1) A determination of the compensation may only be made in accordance with this Division.

Note: Such compensation is generally for acts that are validated or valid. Native title holders would ordinarily be entitled to compensation or damages for invalid acts under the general law. The Federal Court may be able to award such compensation or damages in proceedings in relation to the invalidity of the act: see subsection 213(2).

*Applications to Federal Court*

- (2) An application may be made to the Federal Court under Part 3 for a determination of the compensation.

*Jurisdiction to hear appeals, to review etc. not affected*

- (3) Nothing in this Division affects:
  - (a) any jurisdiction of a court, person or body to hear appeals against, to review or otherwise to affect, a determination of compensation made in accordance with this Division; or
  - (b) the jurisdiction of the High Court.

## **"51 Criteria for determining compensation**

*Just compensation*

- (1) Subject to subsection (3), the entitlement to compensation under Division 2, 2A, 2B, 3 or 4 is an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests."

The Act contains important provisions relating to compensation under compulsory acquisition law.

*Acquisition under compulsory acquisition law*

- (2) If the act is the compulsory acquisition of all or any of the native title rights and interests of the native title holders, the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria for determining compensation set out in the law under which the compulsory acquisition takes place.

*Compensation where similar compensable interest test satisfied*

- (3) If:
  - (a) the act is not the compulsory acquisition of all or any of the native title rights and interests; and
  - (b) the similar compensable interest test is satisfied in relation to the act; the court, person or body making the determination of compensation must, subject to subsections (5) to (8), in doing so apply any principles or criteria for determining compensation (whether or not on just terms) set out in the law mentioned in section 240 (which defines *similar compensable interest test*).

*Compensation not covered by subsection (2) or (3)*

- (4) If:
  - (a) neither subsection (2) nor (3) applies; and
  - (b) there is a compulsory acquisition law for the Commonwealth (if the act giving rise to the entitlement is attributable to the Commonwealth) or for the State or Territory to which the act is attributable;  
the court, person or body making the determination of compensation on just terms may, subject to subsections (5) to (8), in doing so have regard to any principles or criteria set out in that law for determining compensation.

*Monetary compensation*

- (5) Subject to subsection (6), the compensation may only consist of the payment of money.

*Requests for non-monetary compensation*

- (6) If the person claiming to be entitled to the compensation requests that the whole or part of the compensation should consist of the transfer of property or the provision of goods or services, the court, person or body:
- (a) must consider the request; and
  - (b) may, instead of determining the whole or any part of the compensation, recommend that the person liable to give the compensation should, within a specified period, transfer property or provide goods or services in accordance with the recommendation.

*Where recommendation not complied with*

- (7) If the person does not transfer the property or provide the goods or services in accordance with the recommendation, the person claiming to be entitled to the compensation may request the court, person or body to determine instead that the whole or the part of the compensation concerned is to consist of the payment of money.

*Where recommendation complied with*

- (8) If the person does transfer the property or provide the goods or services in accordance with the recommendation, the transfer of the property or provision of the goods or services constitutes full compensation for the act, and the entitlement to it is taken to have been determined in accordance with this Division."

Under the statute compensation does not appear to be available for anything beyond that which would be available to the holder of an ordinary fee. There is no provision for compensation for special or spiritual values. The Native Title Act is more about providing protection to a disadvantaged people than providing new heads of compensation. It is unclear whether such forms of compensation might be available at common law.

**"51A Limit on compensation**

*Compensation limited by reference to freehold estate*

- (1) The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.

*This section is subject to section 53*

- (2) This section has effect subject to section 53 (which deals with the requirement to provide "just terms" compensation).

## "52 Payment held in trust under *right to negotiate* procedures

### *When section applies*

- (1) This section applies if an amount (the **trust amount**) in respect of an act is being held in trust in accordance with paragraph 36C(5)(b), subsection 41(3) or paragraph 42(5)(b) and any of the following happens:
  - (a) an approved determination of native title is made to the effect that there is no native title in relation to the area concerned immediately before the act takes place;
  - (b) the Government party informs the trustee in writing that it is not going to do the act;
  - (c) the following requirements are satisfied:
    - (i) an approved determination of native title is made to the effect that the native title parties concerned are (disregarding any holding of the native title in trust under Division 6) the native title holders in relation to the area affected by the act; and
    - (ii) the registered native title body corporate advises the trustee that it wishes to accept the trust amount instead of any compensation to which the native title holders may be entitled under Division 3 for the act; and
    - (iii) the person who paid the trust amount advises the trustee that the person agrees to the registered native title body corporate accepting the trust amount instead of any compensation to which the native title holders may be entitled under Division 3 for the act;
  - (d) a determination is made, on a claim for compensation in respect of the act:
    - (i) in accordance with this Division; or
    - (ii) on just terms under a compulsory acquisition law; that a person is entitled to compensation, or that no compensation is payable to any person;
  - (e) none of paragraphs (a), (b), (c) and (d) applies and the Federal Court decides, on application by any person, that it would be just and equitable in all the circumstances to pay the trust amount to that person or another person.

### *Paragraph (1)(a) or (b) case*

- (2) In a paragraph (1)(a) or (b) case, the trustee must:
  - (a) repay the trust amount to the person who paid it to the trustee; or
  - (b) if that person no longer exists—apply to the Federal Court for a direction as to the payment of the trust amount.

### *Paragraph (1)(c) case*

- (3) In a paragraph (1)(c) case:
  - (a) the trustee must pay the trust amount to the body corporate; and
  - (b) subject to section 53, there is no entitlement to compensation under Division 3 for the act.

### *Paragraph (1)(d) case where monetary compensation*

- (4) In a paragraph (1)(d) case where the determination is that a person is entitled to an amount of monetary compensation:

- (a) if the trust amount is the same as the amount determined—the trustee must pay the trust amount to the person; or
- (b) if the trust amount is less than the amount determined—the trustee must pay the trust amount to the person and the Government party must pay the shortfall to the person; or
- (c) if the trust amount is more than the amount determined—the trustee must:
  - (i) pay the person so much of the trust amount as equals the amount determined; and
  - (ii) refund the excess to the person who paid the trust amount to the trustee or, if that person no longer exists, apply to the Federal Court for a direction as to its payment.

*Paragraph (1)(d) case where non-monetary compensation*

- (5) In a paragraph (1)(d) case where the transfer of property or the provision of goods or services constitutes some or all of the compensation, the trustee must apply to the Federal Court for a direction as to the payment of the trust amount.

*Paragraph (1)(d) case where no compensation*

- (6) In a paragraph (1)(d) case where the determination is that no compensation is payable or to be given to any person, the trustee must repay the trust amount to the person who paid it to the trustee or, if that person no longer exists, apply to the Federal Court for a direction as to its payment.

*Paragraph (1)(e) case*

- (7) In a paragraph (1)(e) case, the trustee must pay the trust amount in accordance with the decision of the Federal Court mentioned in that paragraph.

**"53 Just terms compensation**

*Entitlement to just terms compensation*

- (1) Where, apart from this section:
  - (a) the doing of any future act; or
  - (b) the application of any of the provisions of this Act in any particular case; would result in a paragraph 51(xxxi) acquisition of property of a person other than on paragraph 51(xxxi) just terms, the person is entitled to such compensation, or compensation in addition to any otherwise provided by this Act, from:
    - (c) if the compensation is in respect of a future act attributable to a State or a Territory—the State or Territory; or
    - (d) in any other case—the Commonwealth;
 as is necessary to ensure that the acquisition is made on paragraph 51(xxxi) just terms.

*Federal Court's jurisdiction*

- (2) The Federal Court has jurisdiction with respect to matters arising under subsection (1) and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court.

## **"54 Commonwealth compensation payable from CRF**

### *Amounts payable from CRF*

- (1) The following amounts are payable out of the Consolidated Revenue Fund:
  - (a) amounts of compensation payable by the Commonwealth in accordance with this Division;
  - (b) amounts to be spent by the Commonwealth in acquiring property or providing goods or services in order to comply with a recommendation under paragraph 51(6)(b) (which deals with requests for non-monetary compensation).

### *Appropriation*

- (2) The Consolidated Revenue Fund is appropriated for the purposes of paying the amounts.

## **b) Disposal provisions.**

The land acquisition statutes generally empower the authority to dispose of land which has been acquired. Some statutes expressly permit the authority to use the land for a different purpose from that for which it was acquired.

*i the general principles adopted when land held for a public purpose is no longer required for that purpose (or any other public purpose);*

Lands Acquisition Act 1989 (Cth) ss 117-123

### **"117. Disposals to be in accordance with Part**

- (1) An acquiring authority shall not dispose of an interest in land otherwise than in accordance with this Part unless:
  - (a) because of subsection 5(2) or (3), this Act does not apply in relation to the disposal;
  - (b) the regulations provide that this Act does not apply in relation to the disposal, by the acquiring authority, of interests in land in specified circumstances and the disposal is a disposal in those circumstances;
  - (c) the disposal is authorised by a law of the Commonwealth (including a law passed or made after the commencement of this Act) and that law, or another law of the Commonwealth, expressly provides that the first-mentioned law has effect despite anything contained in this Act;
  - (d) the disposal is effected by a law of the Commonwealth; or
  - (e) the disposal results from the exercise by the acquiring authority of powers conferred by a mortgage, charge or other similar security over the interest.
- (2) In spite of paragraph 48(1)(b) of the Acts Interpretation Act 1901, regulations made for the purpose of paragraph (1)(b) of this section may provide that the regulations shall take effect on a date to be fixed by the Minister by notice published in the Gazette.
- (3) The Minister shall not fix a date for the purpose of subsection (2) that is earlier than:
  - (a) the last day on which a notice could be given under subsection 48(4) of the Acts Interpretation Act 1901 in relation to the regulations; or
  - (b) if such a notice is given, the latest day on which the regulations could be disallowed by a House of the Parliament in which such a notice has been given.

### **"118. Vesting of interests in Commonwealth authorities**

In spite of anything else in this Part or Part IV, the Minister may, if he or she thinks it appropriate to do so, direct that an interest in land vested in the Commonwealth be transferred to a particular Commonwealth authority.

**"119. Disposal of interests in land**

- (1) An interest in land vested in an acquiring authority may be disposed of under the written authority of the Minister.
- (2) A person dealing with an acquiring authority is not concerned to inquire whether this Part has been complied with, and the vesting in a person of an interest in land is not affected by any contravention of this Part.

**"120. Disposal may be made subject to reservation of interest**

The disposal of an interest in land by an acquiring authority may be made subject to the reservation to the acquiring authority of a specified interest in the land, including, for example:

- (a) an easement in gross over the land; or
- (b) a restriction on the use of the land, the benefit of which is not annexed to other land."

The Australian disposal regime appears clearer than New Zealand's 40 regime and its difficult to apply exemptions. 121(1)(b) seems clear in intent for example. Note also s 121(9) which saves a disposal from invalidity where there has been a failure to comply with s 121.

**"121. Interest in land to be offered first to former owner**

- (1) Where:
  - (a) an acquiring authority acquired an interest in land by the vesting of the interest in the acquiring authority by paragraph 41(4)(a) of this Act or paragraph 10(4)(a) of the Lands Acquisition Act 1955;
  - (b) the acquiring authority has not made substantial improvements to the land;
  - (c) the Minister proposes to authorise the disposal of the interest; and
  - (d) if authorised, the disposal would be likely to occur before the end of 7 years after the acquisition of the interest by the acquiring authority;the Minister shall, in authorising the disposal, have regard to the general principle that the interest should, if practicable, be first offered for sale to the former owner at the market value of the interest at the time the offer is made.
- (2) An offer shall be made by the Minister by written notice given to the former owner and shall specify the amount that, in the opinion of the Minister, represents the market value of the interest at the time of the offer.
- (3) The acquiring authority shall not dispose of the interest to a person other than the former owner within 28 days after the day on which the offer is made.
- (4) If, within that period of 28 days, the former owner gives to the Minister notice that he or she wishes to purchase the interest from the acquiring authority, the authority shall not dispose of the interest to a person other than the former owner within 2 months after the notice is given.
- (5) The former owner may apply to the Administrative Appeals Tribunal for review of the Minister's decision as to the amount specified in the offer as the market value of the interest.
- (6) The Administrative Appeals Tribunal Act 1975 applies to the former owner's application.
- (7) If the former owner makes an application to the Administrative Appeals Tribunal, the acquiring authority shall not dispose of the interest to a person other than the former owner:
  - (a) until the end of 14 days after the decision of the Tribunal on the application comes into operation; or

- (b) if, within that period of 14 days, the owner gives the Minister written notice of his or her wish to purchase the interest from the Commonwealth at the market value determined by the Tribunal, until the end of 2 months after the decision of the Tribunal comes into operation.
- (8) The Minister may, by notice in writing given to the former owner, extend the period of 2 months referred to in paragraph (7)(b).
- (9) The validity of the disposal of an interest in land is not affected by a failure to comply with this section.
- (10) In this section:  
former owner, in relation to an interest in land, means:
  - (a) if the interest was acquired by the acquiring authority from only one person and that person is still alive or, in the case of a corporation, is still in existence—that person; and
  - (b) in any other case—such persons (if any) as the Minister, having regard to the interests that existed in the land immediately before the acquisition, considers to be fairly entitled to the benefit of subsection (1).
 market value has the same meaning as in section 56.

**"122. Dedication for public purpose**

- (1) The Governor-General may, by Proclamation:
  - (a) set apart for, or dedicate to, a public purpose land vested in the Commonwealth, or in an officer or person on behalf of the Commonwealth; or
  - (b) revoke or vary the setting apart for, or dedication to, a public purpose of land vested in the Commonwealth, whether set apart or dedicated under this section or otherwise.
- (2) Land set apart for, or dedicated to, a public purpose under subsection (1) may be vested in trustees upon trust to carry out the purpose for which it is set apart or dedicated.
- (3) If the setting apart, or dedication, of land is revoked or varied, any grant, conveyance or transfer of the land to trustees shall be deemed to be revoked, or varied in the like manner, as the case requires, and the trustees shall, when required by the Attorney-General to do so, deliver to the Attorney-General, or to a person specified by the Attorney-General, all documents of title relating to the land for cancellation or amendment accordingly.
- (4) The powers conferred by this section are in addition to, and not in derogation of, the powers conferred by any other law of the Commonwealth or of a Territory.

**"123. Expungement of easements [see Note 2]**

- (1) Where:
  - (a) an acquiring authority owns an interest in land, being an easement; and
  - (b) the Minister is satisfied that it is appropriate to extinguish the easement;
 the Minister may, by notice published in the Gazette, extinguish the easement.
- (2) A notice shall identify the easement and the acquiring authority.
- (3) As soon as practicable, and, in any event, within 28 days, after an easement is extinguished under subsection (1), the Secretary to the Attorney-General's Department or a person authorised under subsection 55E(4) of the Judiciary Act 1903 shall cause to be lodged with the Registrar-General, Registrar of Titles or other proper officer of the State or Territory in which the land is situated a copy of the notice extinguishing the easement.
- (4) The officer with whom the copy of the notice is lodged may make such entries in the records kept by the officer as are necessary having regard to the effect of subsection (1)."

Note that not all of the State legislation contains offer-back provisions, and State legislation may differ in timeframe and other requirements of the offer-back.

*ii whether provisions (similar to the statutory offer contained in section 40 of the Public Works Act 1981) exist to return surplus land to the person from whom it was acquired for the public purpose. Where such provisions exist, on what terms and conditions is such an offer made*

See above.

*iii any mechanism for returning land to successors of former owners where the former owner has died and whether this is restricted to immediate successors*

No relevant information.

*iv whether provisions exist to reunite the surplus land with the original title notwithstanding current land ownership*

No relevant information

*v where “offer back” type provisions do exist, whether there is any time limit after which an offer is not required, i.e. is the right of the former owner to receive an offer extinguished after a certain time period following acquisition*

See above. The time limit is 7 years in respect of the Commonwealth Act. In Victoria the period is 18 months. (See s 109 Land Compensation Act 1986 (Vic)).

*vi the degree of contestability of the disposal process required when disposing of surplus land*

No relevant information

*vii whether surplus land acquired for a public work is exempt from normal subdivisional requirements on disposal;*

It seems that compliance with normal requirements is mandatory. I have found no exemption.

*viii whether former aboriginal land is dealt with in a different manner.*

I have found no disposal restrictions that relate to aboriginal land other than the general framework of the Native Land Act 1993. Any Act which effects native title is controlled by the Act. In certain circumstances a disposal might fall within the provisions of that act if the land in question was native land within the meaning of the Act and the action that the disposing body sought to take was inconsistent with or extinguished native title. See the extensive coverage of provisions above.

**c) Analysing what provisions exist for private providers (e.g. utility companies) of public services as against core and local government.**

I have found no separate regime for private providers.

**d) Analysing any compliance and enforcement provisions that exist to ensure acquisition and disposal requirements are adhered to.**

No special provisions exist. The exercise of statutory discretion in respect of compulsory acquisition is subject to judicial review in the ordinary manner. There is limited recourse to the administrative review tribunal as to price. See discussions above.

**e) Analysing the form of legislation and related legislation i.e. is the legislation enabling or prescriptive. Are the provisions for acquisition and disposal prescribed or left to the discretion of the decision maker, are the provisions contained in one piece of legislation or spread over a number of separate Acts depending on the nature of the work.**

Provisions authorising an authority to exercise powers of compulsory acquisition are contained in special Acts. The mechanics for acquisition are codified in umbrella procedural acts like the Lands Acquisition Act.

**f) Analysing any general provisions or exclusions in public works legislation relating to aboriginal peoples vis a vis treaties, or agreements between a government and an aboriginal people.**

The Native Title Act 1993 operates to heavily restrict acts which extinguish or are inconsistent with native title. See the discussion above.

Parties may enter into Indigenous Land use agreements in respect of valid future acts. These are independently negotiated and can be registered. Such agreements provide a method whereby a body proposing to utilise native land may reach an agreement as to use without going through the main statutory procedures of the Act. However such an agreement is binding only between the parties and may not afford native title holders the same protection as adopting the statutory procedures.

"Subdivision B—Indigenous land use agreements (body corporate agreements)

**"24BA Indigenous land use agreements (body corporate agreements)**

An agreement meeting the requirements of sections 24BB to 24BE is an *indigenous land use agreement*.

Note: Subdivisions C and D provide for other kinds of indigenous land use agreements.

**"24BB Coverage of body corporate agreements**

The agreement must be about one or more of the following matters in relation to an area:

- (a) the doing, or the doing subject to conditions (which may be about procedural matters), of particular future acts, or future acts included in classes;
  - (aa) particular future acts (other than intermediate period acts), or future acts (other than intermediate period acts) included in classes, that have already been done;
- Note: Intermediate period acts are or can be validated only under Division 2A.
- (ab) changing the effects, that are provided for by section 22B or by a law of a State or Territory that contains provisions to the same effect, of an intermediate period act or of intermediate period acts included in classes;
  - (b) withdrawing, amending, varying or doing any other thing in relation to an application under Division 1 of Part 3 in relation to land or waters in the area;
  - (c) the relationship between native title rights and interests and other rights and interests in relation to the area;
  - (d) the manner of exercise of any native title rights and interests or other rights and interests in relation to the area;
  - (e) extinguishing native title rights and interests in relation to land or waters in the area by the surrender of those rights and interests to the Commonwealth, a State or a Territory;
  - (ea) compensation for any past act, intermediate period act or future act;
  - (f) any other matter concerning native title rights and interests in relation to the area.

Note 1: If the agreement involves consent to the doing of a future act or class of future act, or the doing of a future act or class of future act subject to conditions, it must include a statement to that effect: see paragraph 24EB(1)(b).

Note 2: If a future act covered by such a statement would otherwise be subject to the “right to negotiate” provisions in Subdivision P, the agreement must also include a statement that those provisions are not intended to apply: see paragraph 24EB(1)(c).

Note 3: If the agreement involves the extinguishment of native title by surrender, it must include a statement to that effect: see paragraph 24EB(1)(d).

**"24BC Body corporate agreements only where bodies corporate for whole area**

The agreement must not be made unless there are registered native title bodies corporate in relation to all of the area.

**"24BD Parties to body corporate agreements**

*Registered native title bodies corporate*

- (1) All of the registered native title bodies corporate in relation to the area must be parties to the agreement.

*Governments*

- (2) If the agreement makes provision for the extinguishment of native title rights and interests by surrendering them to the Commonwealth, a State or a Territory as mentioned in paragraph 24BB(e), the Commonwealth, State or Territory must be a

party to the agreement. If the agreement does not make such provision, the Commonwealth, a State or a Territory may still be a party.

*Others*

- (3) Any other person or persons may be parties.

*Procedure where no representative body party*

- (4) If there are any representative Aboriginal/Torres Strait Islander bodies for any of the area and none of them is proposed to be a party to the agreement, the registered native title body corporate, before entering into the agreement:
- (a) must inform at least one of the representative Aboriginal/Torres Strait Islander bodies of its intention to enter into the agreement; and
  - (b) may consult any such representative Aboriginal/Torres Strait Islander bodies about the agreement.

**"24BE Consideration and conditions**

- (1) The agreement may be given for any consideration, and subject to any conditions, agreed by the parties (other than consideration or conditions that contravene any law).

*Consideration may be freehold grant or other interests*

- (2) Without limiting subsection (1), the consideration may be the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise.

**"24BF Assistance to make body corporate agreements**

Persons wishing to make the agreement may request assistance from the NNTT or a recognised State/Territory body in negotiating the agreement.

**"24BG Application for registration of body corporate agreements**

*Application*

- (1) Any party to the agreement may, if all of the other parties agree, apply in writing to the Registrar for the agreement to be registered on the Register of Indigenous Land Use Agreements.

*Things accompanying application*

- (2) The application must be accompanied by a copy of the agreement and any other prescribed documents or information.

**"24BH Notice of body corporate agreements**

- (1) The Registrar must:
- (a) give notice of the agreement, in accordance with subsection (2), to any of the following who are not parties to the agreement:
    - (i) the Commonwealth Minister;

- (ii) if the agreement covers an area within the jurisdictional limits of a State or Territory—the State Minister or the Territory Minister for the State or Territory;
  - (iii) any representative Aboriginal/Torres Strait Islander body for the area covered by the agreement;
  - (iv) any local government body for the area covered by the agreement;
  - (v) any other person whom the Registrar, having regard to the nature of the agreement, considers appropriate; and
- (b) notify the public in the determined way of the agreement in accordance with subsection (2).

*Content of notice*

- (2) The notice under paragraph (1)(a) or (b) must:
- (a) describe the area covered by the agreement; and
  - (b) state the name of each party to the agreement and the address at which the party can be contacted; and
  - (c) set out any statements included in the agreement that are of a kind mentioned in paragraph 24EB(1)(b), (c) or (d).

**"24BI Registration of body corporate agreements**

- (1) Subject to this section, the Registrar must register the agreement on the Register of Indigenous Land Use Agreements.
- (2) The Registrar must not register the agreement if any of the parties to the agreement advises the Registrar, within 1 month after the Registrar gives notice under section 24BH, that the party does not wish the agreement to be registered on the Register.
- (3) The Registrar must not register the agreement if:
- (a) a representative Aboriginal/Torres Strait Islander body for any of the area advises the Registrar, within 1 month after the Registrar gives notice under section 24BH, that the requirements of paragraph 24BD(4)(a) were not complied with in relation to the agreement; and
  - (b) the Registrar is satisfied that the requirements were not complied with.

Subdivision C—Indigenous land use agreements (area agreements)

**"24CA Indigenous land use agreements (area agreements)**

An agreement meeting the requirements of sections 24CB to 24CE is an *indigenous land use agreement*.

Note: Subdivisions B and D provide for other kinds of indigenous land use agreements.

**"24CB Coverage of area agreements**

The agreement must be about one or more of the following matters in relation to an area:

- (a) the doing, or the doing subject to conditions (which may be about procedural matters), of particular future acts, or future acts included in classes;

- (aa) particular future acts (other than intermediate period acts), or future acts (other than intermediate period acts) included in classes, that have already been done;
  - Note: Intermediate period acts are or can be validated only under Division 2A.
- (ab) changing the effects, that are provided for by section 22B or by a law of a State or Territory that contains provisions to the same effect, of an intermediate period act or of intermediate period acts included in classes;
- (b) withdrawing, amending, varying or doing any other thing in relation to an application under Division 1 of Part 3 in relation to land or waters in the area;
- (c) the relationship between native title rights and interests and other rights and interests in relation to the area;
- (d) the manner of exercise of any native title rights and interests or other rights and interests in relation to the area;
- (e) extinguishing native title rights and interests in relation to land or waters in the area by the surrender of those rights and interests to the Commonwealth, a State or a Territory;
- (ea) compensation for any past act, intermediate period act or future act;
- (f) any other matter concerning native title rights and interests in relation to the area;
- (g) any matter concerning rights conferred by Subdivision Q (which gives certain persons covered by registered native title claims rights of access to non-exclusive agricultural and pastoral leases).

Note 1: If the agreement involves consent to the doing of a future act or class of future act, or the doing of a future act or class of future act subject to conditions, it must include a statement to that effect: see paragraph 24EB(1)(b).

Note 2: If a future act covered by such a statement would otherwise be subject to the “right to negotiate” provisions in Subdivision P, the agreement must also include a statement that those provisions are not intended to apply: see paragraph 24EB(1)(c).

Note 3: If the agreement involves the extinguishment of native title by surrender, it must include a statement to that effect: see paragraph 24EB(1)(d).

#### **"24CC Requirement that no bodies corporate for whole of area**

The agreement must not be made if there are registered native title bodies corporate in relation to all of the area.

Note: If there are registered native title bodies corporate for all of the area, an agreement under Subdivision B may be made.

#### **"24CD Parties to area agreements**

*Native title group to be parties*

- (1) All persons in the native title group (see subsection (2) or (3)) in relation to the area must be parties to the agreement.

*Native title group where registered claimant or body corporate*

- (2) If there is a registered native title claimant, or a registered native title body corporate, in relation to any of the land or waters in the area, the ***native title group*** consists of:
- (a) all registered native title claimants in relation to land or waters in the area; and
    - Note 1: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of ***registered native title claimant*** in section 253.
    - Note 2: The agreement will bind all members of the native title claim group concerned: see paragraph 24EA(1)(b).
  - (b) all registered native title bodies corporate in relation to land or waters in the area; and
  - (c) if, for any part (the ***non-claimed/determined part***) of the land or waters in the area, there is neither a registered native title claimant nor a registered native title body corporate—one or more of the following:
    - (i) any person who claims to hold native title in relation to land or waters in the non-claimed/determined part;
    - (ii) any representative Aboriginal/Torres Strait Islander body for the non-claimed/determined part.

*Native title group where no registered claimant or body corporate*

- (3) If subsection (2) does not apply, the ***native title group*** consists of one or more of the following:
- (a) any person who claims to hold native title in relation to land or waters in the area;
  - (b) any representative Aboriginal/Torres Strait Islander body for the area.

*Other native title parties*

- (4) If the native title group is covered by subsection (2), one or more of the following may also be parties to the agreement:
- (a) any other person who claims to hold native title in relation to land or waters in the area;
  - (b) any representative Aboriginal/Torres Strait Islander body for the area.

*Government parties*

- (5) If the agreement makes provision for the extinguishment of native title rights and interests by surrendering them to the Commonwealth, a State or Territory as mentioned in paragraph 24CB(e), the Commonwealth, State or Territory must be a party to the agreement. If the agreement does not make such provision, the Commonwealth, a State or a Territory may still be a party.

*Other parties*

- (6) Any other person may be a party to the agreement.

*Procedure where no representative body party*

- (7) If there are any representative Aboriginal/Torres Strait Islander bodies for any of the area and none of them is proposed to be a party to the agreement, a person in the native title group, before entering into the agreement:
- (a) must inform at least one of the representative Aboriginal/Torres Strait Islander bodies of its intention to enter into the agreement; and
  - (b) may consult any such representative Aboriginal/Torres Strait Islander bodies about the agreement.

Note: The registration of agreements that are certified by a representative Aboriginal/Torres Strait Islander body is facilitated under section 24CK.

**"24CE Consideration and conditions**

- (1) The agreement may be given for any consideration, and subject to any conditions, agreed by the parties (other than consideration or conditions that contravene any law).

*Consideration may be freehold grant or other interests*

- (2) Without limiting subsection (1), the consideration may be the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise.

**"24CF Assistance to make area agreements**

Persons wishing to make the agreement may request assistance from the NNTT or a recognised State/Territory body in negotiating the agreement.

**"24CG Application for registration of area agreements [see Note 2]**

*Application*

- (1) Any party to the agreement may, if all of the other parties agree, apply in writing to the Registrar for the agreement to be registered on the Register of Indigenous Land Use Agreements.

*Things accompanying application*

- (2) The application must be accompanied by a copy of the agreement and any other prescribed documents or information.

*Certificate or statement to accompany application in certain cases*

- (3) Also, the application must either:
- (a) have been certified by all representative Aboriginal/Torres Strait Islander bodies for the area in performing their functions under paragraph 202(4)(e) in relation to the area; or
  - (b) include a statement to the effect that the following requirements have been met:
    - (i) all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to

ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified;

- (ii) all of the persons so identified have authorised the making of the agreement;

Note: The word *authorise* is defined in section 251A.

together with a further statement briefly setting out the grounds on which the Registrar should be satisfied that the requirements are met.

**"24CH Notice of area agreements etc.** [*see* Note 2]

- (1) The Registrar must:
  - (a) give notice of the agreement, in accordance with subsection (2), to any of the following who are not parties to the agreement:
    - (i) the Commonwealth Minister;
    - (ii) if the agreement covers an area within the jurisdictional limits of a State or Territory—the State Minister or the Territory Minister for the State or Territory;
    - (iii) any representative Aboriginal/Torres Strait Islander body for the area covered by the agreement;
    - (iv) any local government body for the area covered by the agreement;
    - (v) any other person whom the Registrar, having regard to the nature of the agreement, considers appropriate; and
  - (b) notify the public in the determined way of the agreement in accordance with subsection (2).

*Content of notice*

- (2) The notice under paragraph (1)(a) or (b) must:
  - (a) describe the area covered by the agreement; and
  - (b) state the name of each party to the agreement and the address at which the party can be contacted; and
  - (c) set out any statements included in the agreement that are of a kind mentioned in paragraph 24EB(1)(b),(c) or (d); and
  - (d) include a statement that, within the period (the *notice period*) of 3 months after the notification day (see subsection (3)):
    - (i) if the application was certified by representative Aboriginal/Torres Strait Islander bodies for the area (see paragraph 24CG(3)(a))—any person claiming to hold native title in relation to any of the land or waters in the area covered by the agreement may object, in writing to the Registrar, against registration of the agreement on the ground that the requirements of paragraphs 202(8)(a) and (b) were not satisfied in relation to the certification; or
    - (ii) if the application contained a statement as mentioned in paragraph 24CG(3)(b) to the effect that certain requirements have been met (in summary, relating to identifying native title holders and ensuring that they have authorised the making of the agreement)—any person claiming to hold native title in relation to land or waters in the area

covered by the agreement may wish, in response to the notice, to make a native title determination application or equivalent application under a law of a State or Territory.

*Notice to specify day*

- (3) The notice under paragraph (1)(a) or (b) must specify a day as the **notification day** for the agreement. Each such notice in relation to the agreement must specify the same day.

*Which days may be specified*

- (4) That day must be a day by which, in the Registrar's opinion, it is reasonable to assume that all notices under paragraph (1)(a) or (b) in relation to the agreement will have been received by, or will otherwise have come to the attention of, the persons who must be notified under those paragraphs.

**"24CI Objections against registration** [*see* Note 2]

*Making objections*

- (1) If the application was certified by representative Aboriginal/Torres Strait Islander bodies for the area (see paragraph 24CG(3)(a)), any person claiming to hold native title in relation to any of the land or waters in the area covered by the agreement may object, in writing to the Registrar, against registration of the agreement on the ground that the requirements of paragraphs 202(8)(a) and (b) were not satisfied in relation to the certification.

*Assistance in withdrawing objection*

- (2) If an objection is made within the notice period, the parties to the agreement may request assistance from the NNTT or a recognised State/Territory body in negotiating with the person making the objection with a view to having the objection withdrawn.

**"24CJ Decision about registration**

The Registrar must, after the end of the notice period, decide whether or not to register an agreement covered by an application under this Subdivision on the Register of Indigenous Land Use Agreements. However, in a case where section 24CL is to be applied, the Registrar must not do so until all persons covered by paragraph (2)(b) of that section are known.

**"24CK Registration of area agreements certified by representative bodies** [*see* Note 2]

*Registration only if conditions satisfied*

- (1) If the application for registration of the agreement was certified by representative Aboriginal/Torres Strait Islander bodies for the area (see paragraph 24CG(3)(a)) and the conditions in this section are satisfied, the Registrar must register the agreement. If the conditions are not satisfied, the Registrar must not register the agreement.

*First condition*

- (2) The first condition is that:
- (a) no objection under section 24CI against registration of the agreement was made within the notice period; or
  - (b) one or more objections under section 24CI against registration of the agreement were made within the notice period, but they have all been withdrawn; or
  - (c) one or more objections under section 24CI against registration of the agreement were made within the notice period, all of them have not been withdrawn, but none of the persons making them has satisfied the Registrar that the requirements of paragraphs 202(8)(a) and (b) were not satisfied in relation to the certification of the application by any of the representative Aboriginal/Torres Strait Islander bodies concerned.

*Second condition*

- (3) The second condition is that if, when the Registrar proposes to register the agreement, there is a registered native title body corporate in relation to any land or waters in the area covered by the agreement, that body corporate is a party to the agreement.

*Matters to be taken into account*

- (4) In deciding whether he or she is satisfied as mentioned in paragraph (2)(c), the Registrar must take into account any information given in relation to the matter by:
- (a) the persons making the objections mentioned in that paragraph; and
  - (b) the representative Aboriginal/Torres Strait Islander bodies that certified the application;
- and may, but need not, take into account any other matter or thing.

**"24CL Registration of area agreements not certified by representative Aboriginal/Torres Strait Islander bodies**

*Registration only if conditions satisfied*

- (1) If the application for registration of the agreement contained a statement as mentioned in paragraph 24CG(3)(b) to the effect that certain requirements have been met (in summary, relating to identifying native title holders and ensuring that they have authorised the making of the agreement), and the conditions in subsections (2) and (3) of this section are satisfied, the Registrar must register the agreement. If the conditions are not satisfied, the Registrar must not register the agreement.

*First condition*

- (2) The first condition is that the following persons are parties to the agreement:
- (a) any person who is, at the end of the notice period, a registered native title claimant or a registered native title body corporate in relation to any of the land or waters in the area covered by the agreement; and

- (b) any person who, after the end of the notice period, becomes a registered native title claimant in relation to any of the land or waters in the area covered by the agreement, where the application containing the claim was made before the end of the notice period and:
- (i) the claim is accepted by the Registrar for registration under subsection 190A(6) or is (otherwise than on appeal or review) found to satisfy conditions equivalent to those set out in sections 190B and 190C under a law of a State or Territory; or
  - (ii) the claim is accepted by the Registrar for registration as a result of an application under subsection 190D(2), where the application was made not more than 28 days after the notice under subsection 190D(1) was given; or
  - (iii) the claim is found to satisfy conditions equivalent to those set out in sections 190B and 190C under a provision of a law of a State or Territory to similar effect as section 190D, and the application under that provision was made within a time period corresponding to that set out in subparagraph (ii) of this paragraph.

*Second condition*

- (3) The second condition is that the Registrar considers that the requirements in paragraph 24CG(3)(b) (in summary, relating to identifying native title holders and ensuring that they have authorised the making of the agreement) have been met.

*Matters to be taken into account*

- (4) In deciding whether the requirements have been met, the Registrar must take into account:
- (a) the statements in the application; and
  - (b) any information the Registrar is given on the matter by any representative Aboriginal/Torres Strait Islander body or by any other body or person;
- and may, but need not, take into account any other matter or thing.

Subdivision D—Indigenous land use agreements (alternative procedure agreements)

**"24DA Indigenous land use agreements (alternative procedure agreements)**

An agreement meeting the requirements of sections 24DB to 24DF is an *indigenous land use agreement*.

Note: Subdivisions B and C provide for other kinds of indigenous land use agreements.

**"24DB Coverage of alternative procedure agreements**

The agreement must be about one or more of the following matters in relation to an area:

- (a) the doing, or the doing subject to conditions (which may be about procedural matters), of particular future acts, or future acts included in classes;
- (aa) particular future acts (other than intermediate period acts), or future acts (other than intermediate period acts) included in classes, that have already been done;

Note: Intermediate period acts are or can be validated only under Division 2A.

- (b) withdrawing, amending, varying or doing any other thing in relation to an application under Division 1 of Part 3 in relation to land or waters in the area;
- (c) the relationship between native title rights and interests and other rights and interests in relation to the area;
- (d) the manner of exercise of any native title rights and interests or other rights and interests in relation to the area;
- (e) providing a framework for the making of other agreements about matters relating to native title rights and interests;
- (ea) compensation for any past act, intermediate period act or future act;
- (f) any other matter concerning native title rights and interests in relation to the area;
- (g) any matter concerning rights conferred by Subdivision Q (which gives certain persons covered by registered native title claims rights of access to non-exclusive agricultural and pastoral leases).

Note 1: If the agreement involves consent to the doing of a future act or class of future act, or the doing of a future act or class of future act subject to conditions, it must include a statement to that effect: see paragraph 24EB(1)(b).

Note 2: If a future act covered by such a statement would otherwise be subject to the "right to negotiate" provisions in Subdivision P, the agreement must also include a statement that those provisions are not intended to apply: see paragraph 24EB(1)(c).

#### **"24DC No extinguishment of native title**

The agreement must not provide for the extinguishment of any native title rights or interests.

Note: The non-extinguishment principle will apply to any future acts consented to in the agreement: see subsection 24EB(3).

#### **"24DD Bodies corporate and representative bodies etc.**

*No bodies corporate for whole of area*

- (1) The agreement must not be made if there are registered native title bodies corporate in relation to all of the land and waters in the area.

Note: If there are registered native title bodies corporate for all of the area, an agreement under Subdivision B may be made.

*Body corporate or representative body for area*

- (2) There must be at least one registered native title body corporate in relation to land or waters in the area or at least one representative Aboriginal/Torres Strait Islander body for the area.

#### **"24DE Parties to alternative procedure agreements**

*Native title group and relevant governments to be parties*

- (1) All persons in the native title group (see subsection (2)) in relation to the area must be parties to the agreement, as must every relevant government (see subsection (3)).

*Native title group*

- (2) The **native title group** consists of:
- (a) all registered native title bodies corporate in relation to land or waters in the area; and
  - (b) all representative Aboriginal/Torres Strait Islander bodies for the area.

*Relevant government*

- (3) Each of the following is a **relevant government**:
- (a) the Commonwealth, if any of the area covered by the agreement is a place outside the jurisdictional limits of the States and Territories;
  - (b) a State or Territory, if any of the area covered by the agreement is within the jurisdictional limits of the State or Territory.

*Other parties*

- (4) Any of the following may also be a party to the agreement:
- (a) any registered native title claimant in relation to land or waters in the area;
    - Note 1: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of **registered native title claimant** in section 253.
    - Note 2: The agreement will bind all members of the native title claim group concerned: see paragraph 24EA(1)(b).
  - (b) any other person who claims to hold native title in relation to land or waters in the area;
  - (c) any other person.

**"24DF Consideration and conditions**

- (1) The agreement may be given for any consideration, and subject to any conditions, agreed by the parties (other than consideration or conditions that contravene any law).

*Consideration may be freehold grant or other interests*

- (2) Without limiting subsection (1), the consideration may be the grant of a freehold estate in any land, or any other interests in relation to land whether statutory or otherwise.

**"24DG Assistance to make alternative procedure agreements**

Persons wishing to make the agreement may request assistance from the NNTT or a recognised State/Territory body in negotiating the agreement.

## "24DH Application for registration of alternative procedure agreements

### *Application*

- (1) Any party to the agreement may, if all of the other parties agree, apply in writing to the Registrar for the agreement to be registered on the Register of Indigenous Land Use Agreements.

### *Things accompanying application*

- (2) The application must be accompanied by a copy of the agreement and any other prescribed documents or information.

## "24DI Notice of alternative procedure agreements

### *Notice to be given*

- (1) The Registrar must:
  - (a) give notice of the agreement, in accordance with subsection (2), to any of the following who are not parties to the agreement:
    - (i) the Commonwealth Minister;
    - (ii) if the agreement covers an area within the jurisdictional limits of a State or Territory—the State Minister or the Territory Minister for the State or Territory;
    - (iii) any local government body for the area covered by the agreement;
    - (iv) any other person whom the Registrar, having regard to the nature of the agreement, considers appropriate; and
  - (b) notify the public in the determined way of the agreement in accordance with subsection (2).

### *Content of notice*

- (2) The notice under paragraph (1)(a) or (b) must:
  - (a) describe the area covered by the agreement; and
  - (b) state the name of each party to the agreement and the address at which the party can be contacted; and
  - (c) set out any statements included in the agreement that are of a kind mentioned in paragraph 24EB(1)(b) or (c); and
  - (d) include a statement that, within the period (the **notice period**) of 3 months after the notification day (see subsection (3)), any person claiming to hold native title in relation to any of the land or waters in the area covered by the agreement may:
    - (i) obtain a copy of the agreement from the Registrar; and
    - (ii) object, in writing to the Registrar, against registration of the agreement on the ground that it would not be fair and reasonable to do so.

### *Notice to specify day*

- (3) The notice must specify a day as the **notification day** for the agreement. Each such notice in relation to the agreement must specify the same day.

*Which days may be specified*

- (4) That day must be a day by which, in the Registrar's opinion, it is reasonable to assume that all notices under paragraph (1)(a) or (b) in relation to the agreement will have been received by, or will otherwise have come to the attention of, the persons who must be notified under those paragraphs.

*Request for copy of agreement*

- (5) If a person claiming to hold native title in relation to any of the land or waters covered by the agreement requests a copy of the agreement, the Registrar must comply with the request.

#### **"24DJ Objections against registration**

*Making objections*

- (1) Any person claiming to hold native title in relation to any of the land or waters in the area covered by the agreement may make an application to the Registrar objecting against registration of the agreement on the ground that it would not be fair and reasonable to register the agreement.

*Assistance in withdrawing objection*

- (2) If an objection is made within the notice period, the parties may request assistance from the NNTT or a recognised State/Territory body in negotiating with the person making the objection with a view to having the objection withdrawn.

#### **"24DK Decision about registration**

The Registrar must, after the end of the notice period, decide whether or not to register the agreement on the Register of Indigenous Land Use Agreements.

#### **"24DL Registration of alternative procedure agreements**

*Registration only if conditions satisfied*

- (1) If a condition in subsection (2) is satisfied, the Registrar must register the agreement. If none of the conditions is satisfied, the Registrar must not register the agreement.

*Conditions*

- (2) The conditions are that:
  - (a) no objection against registration of the agreement was made within the notice period; or
  - (b) one or more objections against registration of the agreement were made within the notice period, but they have all been withdrawn; or
  - (c) one or more objections against registration of the agreement were made during the notice period, all of them have not been withdrawn, but none of the persons making them has satisfied the NNTT or a recognised State/Territory body that it would not be fair and reasonable to register the agreement, having regard to:

- (i) the content of the agreement; and
- (ii) the effect of the agreement on native title rights and interests; and
- (iii) any benefits provided under the agreement to current native title holders (whether or not identified at the time the agreement is made) and their successors, and the way in which those benefits are to be distributed; and
- (iv) any other relevant circumstance.

Note: Sections 77A and 77B deal with applications to the NNTT objecting against registration of the agreement.

#### **"24DM Other registration procedures and conditions**

The regulations may provide for procedures and conditions for the registration of agreements under this Subdivision on the Register of Indigenous Land Use Agreements. Agreements are to be registered if either those procedures and conditions or the ones set out in sections 24DH to 24DL are complied with.

#### Subdivision E—Effect of registration of indigenous land use agreements

#### **"24EA Contractual effect of registered agreement**

- (1) While details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, in addition to any effect that it may have apart from this subsection, as if:
  - (a) it were a contract among the parties to the agreement; and
  - (b) all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be.

Note: Section 199B specifies the details of the agreement that are required to be entered on the Register.

*Only certain persons bound by agreement*

- (2) To avoid doubt, a person is not bound by the agreement unless the person is a party to the agreement or a person to whom paragraph (1)(b) applies.

*Legislation etc. to give effect to agreement not affected*

- (3) If the Commonwealth, a State or a Territory is a party to an indigenous land use agreement whose details are entered in the Register of Indigenous Land Use Agreements, this Act does not prevent the Commonwealth, the State or the Territory doing any legislative or other act to give effect to any of its obligations under the agreement.

#### **"24EB Effect of registration on proposed acts covered by indigenous land use agreements**

[see Note 2]

*Coverage of section*

- (1) The consequences set out in this section apply if:
  - (a) a future act is done; and

- (b) when it is done, there are on the Register of Indigenous Land Use Agreements details of an agreement that includes a statement to the effect that the parties consent to:
  - (i) the doing of the act or class of act in which the act is included; or
  - (ii) the doing of the act, or class of act in which the act is included, subject to conditions; and
- (c) if the act is, apart from this Subdivision, an act to which Subdivision P (which deals with the right to negotiate) applies—the agreement also includes a statement to the effect that Subdivision P is not intended to apply; and
 

Note: The fact that, under the “right to negotiate” provisions in Subdivision P, agreements can be made after notice of an act is given as mentioned in section 29 does not prevent an indigenous land use agreement being made that consents to the doing of the act.
- (d) if the act is the surrender of native title under an agreement covered by Subdivision B or C—the agreement also includes a statement to the effect that the surrender is intended to extinguish the native title rights and interests.

*Validation of act*

- (2) The act is valid to the extent that it affects native title in relation to land or waters in the area covered by the agreement.

*Non-extinguishment principle*

- (3) Unless a statement of the kind mentioned in paragraph (1)(d) in relation to the act is included in the agreement, the non-extinguishment principle applies to the act.

*Restriction on compensation where Subdivision B agreement*

- (4) In the case of an agreement under Subdivision B, the following are not entitled to any compensation for the act under this Act, other than compensation provided for in the agreement:
  - (a) any registered native title body corporate who is a party to the agreement;
  - (b) any common law holder of native title:
    - (i) for whom such a registered native title body corporate holds native title rights and interests on trust; or
    - (ii) of whom such a registered native title body corporate is the agent or representative;

Note: For the definition of **common law holder**, see section 56.

- (c) any native title holder who is entitled to any of the benefits provided under the agreement.

*Restriction on compensation where Subdivision C agreement*

- (5) In the case of an agreement under Subdivision C, the following are not entitled to any compensation for the act under this Act, other than compensation provided for in the agreement:
  - (a) any native title holder who is entitled to any of the benefits provided under the agreement;

- (b) any native title holder who authorised the making of the agreement as mentioned in:
  - (i) if the application was certified by representative Aboriginal/Torres Strait Islander bodies as mentioned in paragraph 24CG(3)(a)—paragraph 202(8)(b); or
  - (ii) if the application included statements as mentioned in paragraph 24CG(3)(b) to the effect that certain requirements have been met (in summary, relating to identifying all native title holders and ensuring that they have authorised the making of the agreement)—that paragraph.

*Restriction on compensation where Subdivision D agreement*

- (6) In the case of an agreement under Subdivision D, no native title holder who is entitled to any of the benefits provided under the agreement is entitled to any compensation for the act under this Act, other than compensation provided for in the agreement.

*Compensation under Division 5*

- (7) If any native title holder in relation to the land or waters covered by the agreement (except one who, because of subsection (4), (5) or (6), is not entitled to compensation other than that provided for in the agreement) would be entitled to compensation under subsection 17(2) for the act on the assumption that it was a past act referred to in that subsection:
  - (a) he or she is entitled, in accordance with Division 5, to compensation for the act; and
  - (b) he or she may recover the compensation from:
    - (i) if subparagraph (ii) does not apply—the Crown in right of the Commonwealth, a State or a Territory (according to whether the act is attributable to the Commonwealth, the State or the Territory); or
    - (ii) any person or persons who, under an agreement in writing with the Commonwealth, the State or the Territory, are liable to pay the compensation.

**"24EBA Effect of registration on previous acts covered by indigenous land use agreements**

*Coverage of section*

- (1) The consequences set out in this section apply if:
  - (a) details are on the Register of Indigenous Land Use Agreements of an agreement that includes a statement to the effect that the parties agree to:
    - (i) the validating of a particular future act (other than an intermediate period act), or future acts (other than intermediate period acts) included in classes, that have already been done invalidly; or

Note: Intermediate period acts are or can be validated only under Division 2A.

  - (ii) the validating, subject to conditions, of a particular future act (other than an intermediate period act), or of future acts (other than intermediate period acts) included in classes, that have already been done invalidly; or

- (iii) changing the effects, that are provided for by section 22B (which relates to native title rights and interests) or by a law of a State or Territory that contains provisions to the same effect, of an intermediate period act or of intermediate period acts included in classes; and
- (b) whichever of the Commonwealth, the State or the Territory to which the act or class of acts is attributable is a party to the agreement; and
- (c) where, whether under the agreement or otherwise, a person other than the Crown in right of the Commonwealth, a State or a Territory is or may become liable to pay compensation in relation to the act or class of acts—that person is a party to the agreement.

*Commonwealth future acts valid*

- (2) If subparagraph (1)(a)(i) or (ii) applies and the future act or class of future acts is attributable to the Commonwealth, the act or class of acts is valid, and is taken always to have been valid.

*State or Territory laws may validate their future acts*

- (3) If subparagraph (1)(a)(i) or (ii) applies and the future act or class of future acts is attributable to a State or Territory, a law of the State or the Territory may provide that the act or class of acts is valid, and is taken always to have been valid. The law may do so by applying to all acts, to classes of acts, or to particular acts, to which subparagraph (1)(a)(i) or (ii) applies in respect of which the requirements of subsection (1) are or become satisfied.

*Non-extinguishment principle applies to future acts*

- (4) If subsection (2) applies or a law makes provision in accordance with subsection (3), the non-extinguishment principle applies to the act or class of acts unless:
  - (a) the act or class of acts is the surrender of native title; and
  - (b) the agreement includes a statement to the effect that the surrender is intended to have extinguished the native title rights and interests.

*Compensation consequences of future acts*

- (5) If subsection (2) applies or a law makes provision in accordance with subsection (3), the consequences set out in subsection 24EB(4), (5) or (6), and the consequences set out in subsection 24EB(7), apply to the act or to each of the acts in the class.

*Changing the effects of validated acts*

- (6) If subparagraph (1)(a)(iii) applies, the effects mentioned in that subparagraph are changed in accordance with the agreement.

**"24EC Agreements unrelated to future acts**

The fact that this Subdivision deals with agreements with native title holders that relate to their native title rights and interests does not imply that the Commonwealth, a State or a Territory cannot:

- (a) make other agreements; or
- (b) legislate in relation to the making of other agreements;

with native title holders that relate to their native title rights and interests (other than agreements consenting to the doing of future acts)."