



# LAND ACQUISITION (NATIVE TITLE) AMENDMENT ACT 1994

No. 87 of 1994

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**ELIZABETHAE II REGINAE**

A.D. 1994

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**No. 87 of 1994**

**An Act to amend the Land Acquisition Act 1969.**

*[Assented to 15 December 1994]*

The Parliament of South Australia enacts as follows:

**Short title**

1. (1) This Act may be cited as the *Land Acquisition (Native Title) Amendment Act 1994*.

(2) The *Land Acquisition Act 1969* is referred to in this Act as "the principal Act".

**Commencement**

2. This Act will come into operation on a day to be fixed by proclamation.

**Amendment of long title**

3. The long title to the principal Act is repealed and the following long title is substituted:

**An Act about the acquisition of land.**

**Substitution of ss. 3, 4 & 5**

4. Sections 3, 4 and 5 of the principal Act are repealed and the following section is substituted:

**Object of this Act**

3. The object of this Act is to provide for the acquisition of land on just terms.

**Amendment of s. 6—Interpretation**

5. Section 6 of the principal Act is amended—

(a) by striking out the definition of "authorised undertaking" and substituting the following definition:

"Authority" means the person authorised by the special Act to acquire land;;

(b) by inserting after the definition of "compensation" the following definitions:

"Court" means the Land and Valuation Court;

"ERD Court" means the *Environment, Resources and Development Court* constituted under the *Environment, Resources and Development Court Act 1993*;

(c) by striking out the definition of "interest" and substituting the following definition:

"interest" in land means—

(a) a legal or equitable estate or interest in the land; or

(b) an easement, right, power, or privilege in, under, over, affecting, or in connection with, the land; or

(c) native title in the land;;

(d) by inserting after the definition of "land" the following definitions:

"native title", "native title holder" and "native title land"—see *Native Title (South Australia) Act 1994*;

"Registrar" means—

(a) for all interests in land except native title—the Registrar-General;

(b) for native title—the Registrar of the ERD Court;

"registered representative" of native title holders—see *Native Title (South Australia) Act 1994*;

"special Act" means the Act authorising the compulsory acquisition of land;;

(e) by striking out the definitions of "the Authority", "the Court", "the Registrar", "the special Act" and "undertaking";

(f) by inserting after its present contents (now to be designated as subsection (1)) the following:

(2) An explanatory note to a provision of this Act forms part of the provision to which it relates.

#### **Amendment of s. 7—Application**

6. Section 7 of the principal Act is amended—

(a) by striking out from subsection (1) "authorised undertaking that involves the acquisition of land" and substituting "acquisition of land authorised by a special Act";

(b) by inserting after subsection (1) the following subsection:

(1a) A special Act that authorises the compulsory acquisition of land will be taken to authorise the acquisition of land as defined by this Act.;

- (c) by striking out from subsection (2) "every Act by which any such undertaking is authorised" and substituting "every special Act authorising the acquisition of land".

#### **Amendment of s. 10—Notice of intention to acquire land**

##### **7. Section 10 of the principal Act is amended—**

- (a) by striking out subsections (1) and (2) and substituting the following subsections:

(1) If the Authority proposes to acquire land (other than native title), the Authority must give a notice of intention to acquire the land to each person who has an interest in the land, or such of those persons as, after diligent inquiry, become known to the Authority.

(2) If the Authority proposes to acquire native title in land, the Authority must—

- (a) if there is a registered representative of native title holders—give notice of intention to acquire the land to the registered representative and the relevant representative Aboriginal body; or
- (b) if there is no registered representative of the native title holders—give notice of intention to acquire the land to all persons who hold, or may hold, native title in the land,<sup>1</sup> and give a copy of the notice to the Registrar of the ERD Court.

<sup>1</sup> For method of service see Part 5 *Native Title (South Australia) Act 1994*;

- (b) by striking out subsection (4) and substituting the following subsections:

(4) If the Authority changes the boundaries of the land it proposes to acquire in any respect, the Authority must immediately serve a notice of amendment to the notice of intention to acquire the land on the same persons and in the same way as the notice of intention to acquire.

(5) A notice of intention to acquire land does not bind the Authority to acquire the subject land.

#### **Substitution of s. 11**

##### **8. Section 11 of the principal Act is repealed and the following section is substituted:**

#### **Explanation of acquisition scheme may be required**

11. (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, require the Authority, by written notice—

- (a) to give an explanation of the reasons for acquisition of the land; and
- (b) to provide reasonable details of any statutory scheme in accordance with which the land is to be acquired.

(2) For the purposes of this section—

- (a) the registered representative of claimants to, or holders of, native title in land is taken to have an interest in that land; and

- (b) the relevant representative Aboriginal body is taken to have an interest in native title land.

(3) The Authority may furnish the explanation and details by letter, or by making available models, plans, specifications or other relevant materials relating to the statutory land acquisition scheme.

#### Substitution of s. 12

9. Section 12 of the principal Act is repealed and the following section is substituted:

##### Right to object

12. (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—

- (a) request the Authority not to proceed with the acquisition of the subject land; or
- (b) request an alteration in the boundaries of the subject land; or
- (c) request that a particular part of the subject land be not acquired, or that further land be acquired.

(2) For the purposes of this section—

- (a) the registered representative of claimants to, or holders of, native title in land is taken to have an interest in that land; and
- (b) the relevant representative Aboriginal body is taken to have an interest in native title land.

(3) A request may be made under subsection (1)—

- (a) on the ground that acquisition of the land or carrying out the purposes for which the acquisition is proposed would—
- (i) seriously impair an area of scenic beauty; or
- (ii) destroy, damage or interfere with an Aboriginal site within the meaning of the *Aboriginal Heritage Act 1988*; or
- (iii) destroy or impair a site of architectural, historic or scientific interest; or
- (iv) prejudice the conservation of flora or fauna that should be conserved in the public interest; or
- (v) prejudice some other public interest; or
- (b) on some other ground stated in the request.

(4) The Authority must consider any request made to it under this section and must, within 14 days after receipt of the request, serve notice in writing on the person by whom the request was made, indicating whether it accedes to, or refuses, the request.

**Amendment of s. 15—Acquisition by agreement, etc.**

10. Section 15 of the principal Act is amended by striking out subsections (3) to (7) and substituting the following subsections:

(3) If the Authority decides not to proceed with the acquisition of land, it must give notice of the decision to the same persons and in the same way as the notice of intention to acquire (but notice need not be given to a person who no longer holds an interest in the land).

(4) If the Authority does not acquire land within 12 months after notice of intention to acquire the land was given, or within a longer period agreed between the Authority and the interested parties or decided by the Court, it will be presumed that the Authority has decided not to proceed with the acquisition and the land cannot then be acquired by the Authority unless a further notice of intention to acquire the land is given.

(5) If the Authority decides, or is presumed to have decided, not to proceed with the acquisition of land, a person interested in the land may, within three months after notice of the decision is given, or the decision is presumed to have been made, by written notice to the Authority, claim compensation.

(6) If, three months after notice is given under subsection (5), the Authority and the claimant are not agreed on whether the claimant is entitled to compensation, or the amount of the compensation, either party may refer the matter to the Court for determination.

(7) On reference of a matter under subsection (6), the Court may determine whether the claimant has an interest in the subject land and, if so, the amount of compensation that should be paid for—

- (a) disturbance to the use or enjoyment of the land resulting from the proposed acquisition; and
- (b) costs and expenses reasonably incurred by the claimant in consequence of the proposed acquisition.

**Amendment of s. 16—Notice of acquisition**

11. Section 16 of the principal Act is amended—

(a) by striking out subsections (1) and (2) and substituting the following subsections:

(1) When three months have elapsed, but 12 months have not yet elapsed, from the last occasion on which notice of intention to acquire was given to a person, the Authority may publish a notice of acquisition in the *Gazette*.

(1a) If the notice of acquisition relates to native title land, the notice of acquisition must contain an explanation of what may happen if no claim for compensation is made by a person claiming native title in the land within two months after the date of publication of the notice of acquisition.<sup>1</sup>

(2) On publication of the notice of acquisition—

- (a) the land vests in the Authority to the extent of the interest specified in the notice; and
- (b) a mortgage, charge, encumbrance, trust or other interest affecting the land (except native title) is, to the extent it affects the land subject to the acquisition, discharged; and
- (c) if a residual interest remains after the acquisition, the interest is modified to the extent required by the acquisition.;

<sup>1</sup> See section 23D.

(b) by inserting after subsection (3) the following subsections:

(3a) The acquisition of land under this section does not, in itself, extinguish native title in the land but—

- (a) if the purpose of the acquisition is stated in the notice of acquisition and that purpose is inconsistent with the continued existence of native title in the land, native title is extinguished when the Authority begins to put that purpose into effect; and
- (b) in other cases, native title is extinguished when the Authority exercises rights obtained by the acquisition of the land in a way that is inconsistent with the continued existence of native title.<sup>1</sup>

(3b) If a notice of acquisition states the purpose of the acquisition and that the stated purpose is inconsistent with the continued existence of native title in the land, it will be presumed, in the absence of proof to the contrary that the purpose of acquisition is as stated in the notice and that the implementation of that purpose is inconsistent with the continued existence of native title in the land.;

<sup>1</sup> See sections 23(3) and 238 of the *Native Title Act 1993* (Cwth).

(c) by striking out subsection (5) and substituting the following subsections:

(5) The Authority must give notice of the acquisition—

- (a) to the same persons and in the same way as the notice of intention to acquire the land (but notice need not be given to a person who no longer holds an interest in the land); and
- (b) by publication of the notice of acquisition in a newspaper circulating generally throughout the State.



(6) If the acquisition may result in the extinguishment of the native title of persons who have not yet been registered under the law of the Commonwealth or the State as holders of, or claimants to, native title in land, general notice of the acquisition must be given to all persons who hold or may hold native title in the land<sup>1</sup> and the notice must include a statement of the special rights of native title holders to claim compensation under this Act.

<sup>1</sup> For method of service see Part 5 *Native Title (South Australia) Act 1994*.

#### **Amendment of s. 17—Modification of instruments of title**

12. Section 17 of the principal Act is amended by inserting after its present contents (now to be designated as subsection (1)) the following subsection:

(2) If a notice of acquisition of native title land is published, the Authority must give a copy of the notice of acquisition to any authority that maintains a register of native title under the law of the State or the Commonwealth.

#### **Substitution of heading**

13. The heading immediately preceding section 18 of the principal Act is repealed and the following heading is substituted:

### **PART 4 NEGOTIATION AND COMPENSATION**

#### **Substitution of ss. 18 to 23**

14. Sections 18 to 23 of the principal Act are repealed and the following sections and headings are substituted:

### **DIVISION 1—ACQUISITION OF NATIVE TITLE LAND FOR PRIVATE PURPOSE**

#### **Application of Division**

18. This Division applies if an Authority proposes to acquire native title land for the purpose of conferring proprietary rights or interests on a person other than the Crown or an instrumentality of the Crown.

#### **Negotiation about acquisition of native title land**

19. (1) The Authority must, before publishing a notice of acquisition of the land, negotiate in good faith with the native title parties in an attempt to reach agreement about the acquisition of the land.

#### *Explanatory note—*

The native title parties are the persons who are, at the end of the period of two months from when notice is given under subsection (1), registered under the law of the State or the Commonwealth as holders of, or claimants to, native title in the land. The negotiations are to be conducted with the registered representatives of those persons.

(2) However, negotiation is not required under subsection (1) if, at the end of two months from when notice of intention to acquire the land is first given to persons who hold or may hold native title in the land, there are no native title parties.

(3) If any of the negotiating parties requests the ERD Court to do so, the Court must mediate among the parties to assist in obtaining their agreement.

**Application for determination if no agreement**

**20.** (1) If agreement is not reached between the Authority and the native title parties within six months after notice of intention to acquire the land is given, any party may apply to the ERD Court for a resolution of the matter.

(2) On an application under this section, the ERD Court may determine whether the Authority may acquire the land and, if so, the conditions on which the acquisition is to proceed (but compensation is not to be determined at this stage).<sup>1</sup>

(3) The ERD Court must make its determination on an application under this section within six months from when the application is made unless there are special reasons why it cannot do so.

<sup>1</sup> Compensation is determined under Division 2 of Part 4.

**Criteria for making determination**

**21.** (1) In making its determination, the ERD Court must take into account the following:

- (a) the effect of the proposed acquisition, and any proposed or expected development of the land after its acquisition, on—
  - (i) native title in the land; and
  - (ii) the way of life, culture and traditions of any of the native title parties; and
  - (iii) the development of the social, cultural and economic structures of any of those parties; and
  - (iv) the freedom of access by any of those parties to the land concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land in accordance with their traditions; and
  - (v) any area or site, on the land concerned, of particular significance to the native title parties in accordance with their traditions; and
  - (vi) the natural environment of the land concerned;
- (b) any assessment of the effect of the proposed acquisition, or any proposed or expected development of the land after its acquisition, on the natural environment of the land concerned—
  - (i) made by a court or tribunal; or
  - (ii) made, or commissioned, by the Crown in any capacity or by a statutory authority;
- (c) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of the land concerned;

- (d) the economic or other significance of the proposed acquisition, or any proposed or expected development of the land after its acquisition, to Australia and to the State;
- (e) any public interest in the acquisition, or any proposed or expected development of the land after its acquisition, proceeding;
- (f) any other matter the ERD Court considers relevant.

(2) This section does not affect the operation of another law of the State or the Commonwealth for the preservation or protection of areas or sites of particular significance to Aboriginal people.

#### **Overruling of determinations**

22. (1) If the Minister considers it to be in the interests of the State to overrule a determination of the ERD Court under this Division, the Minister may, by notice in writing given to the ERD Court and the parties to the proceedings before the Court, overrule the determination and substitute another determination that might have been made by the Court.

(2) The Minister cannot overrule a determination if more than two months have elapsed from the date of the determination.

### **DIVISION 2—COMPENSATION**

#### **Negotiation of compensation**

23. (1) The Authority must negotiate in good faith with interested persons about the compensation payable for the acquisition of land under this Act.

(2) The interested persons are the persons who have or had, or claim to have or to have had, an interest in the subject land that is divested or diminished by the acquisition or the enjoyment of which is adversely affected by the acquisition.

(3) If a party to the negotiations holds or held, or claims to hold or to have held, native title in the land, and either the party or the Authority requests the ERD Court to do so, the Court must mediate between the parties to assist in obtaining their agreement on the matters at issue between them.

(4) The Authority may offer, and must consider any request made by a party to the negotiations for, non-monetary compensation.<sup>1</sup>

<sup>1</sup> *Example*—The non-monetary compensation might take the form of a transfer of land, the provision of goods or services, or the carrying out of work for the re-instatement or improvement of land remaining in the claimant's ownership after the acquisition.

#### **Offer of compensation and payment into court**

23A. (1) When the Authority gives notice of the acquisition of land, it must make an offer to the person or persons whom it believes to be entitled to compensation for the acquisition, stating the amount of compensation the Authority is prepared to pay.

(2) The offer must (where appropriate) differentiate between, and quantify, the component of compensation representing the value of the acquired land and the component referable to disturbance or other compensable matters.

(3) The Authority must, within seven days after making an offer of compensation, pay the amount offered into the Court.

(4) Until compensation paid into Court under this section is applied by order of the Court, the money must be invested by the proper officer of the Court in an authorised trustee investment (bearing interest that compounds at intervals of one month or less) and the interest and other accretions accruing on the investment—

(a) must be paid to—

- (i) the person who would, but for the acquisition of the land, have been entitled to the rents and profits of the land; or
- (ii) a body constituted under the law of the State or the Commonwealth as trustee for the claimants to whom the compensation is offered; or

(b) must be dealt with in some other manner specified by the Court.

#### **Agreement**

**23B.** (1) If agreement is reached between the negotiating parties, the Authority must file a copy of the agreement in the Court.

(2) If the Authority makes an offer of compensation to a claimant and the claimant does not, by notice to the Authority, dispute the adequacy of the offer, the claimant is taken to have agreed to accept the offer in full satisfaction of the claim.

#### **Reference of matters into court**

**23C.** (1) If agreement between the Authority and a claimant on the question whether the claimant has or had an interest in the subject land, or on the amount of compensation, is not reached within two months, the Authority or the claimant may refer the question into Court.

(2) On the reference of a matter to the Court, the Court may make the orders necessary to resolve the matters at issue between the parties.

(3) In particular—

- (a) if there is a dispute about whether the claimant is interested in the subject land, or the nature of the claimant's interest—the Court may declare whether the claimant has an interest in the subject land and, if so, the nature of the interest; and
- (b) the Court may make orders for compensation that the Court finds to be justified on the claim; and
- (c) the Court may make other orders that may be just in the circumstances of the case.

#### **Resolution of question of native title compensation in certain cases**

**23D.** (1) If native title land is acquired under this Act, and at the end of a period of two months from publication of the notice of acquisition in the *Gazette*, the Authority has not been notified of a claim for compensation from any person claiming native title in the land, the Authority may apply to the Court for an order under this section.

- (2) On an application under this section, the Court may—
- (a) declare that the land was not, at the time of acquisition, subject to native title; or
  - (b) fix the amount of compensation payable for acquisition of the land and order that the compensation be held in trust—
    - (i) to be paid, as directed by the Court, to persons who, within six years after the date of the order, establish to the Court's satisfaction that they held native title in the subject land immediately before its acquisition; or
    - (ii) if no claim to the compensation is established within that period—to be repaid to the Authority.

**Amendment of s. 25—Principles of compensation**

15. Section 25 of the principal Act is amended—

(a) by striking out subparagraph (c) of paragraph (h) and substituting the following subparagraph:

(c) any proposed or expected development of the land after its acquisition; and;

(b) by striking out from paragraph (j) "the execution of the authorised undertaking" and substituting "development of the land after its acquisition".

(c) by inserting after its present contents (now to be designated as subsection (1)) the following subsection:

(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.<sup>1</sup>

<sup>1</sup> Compare section 51(1) of the *Native Title Act 1993* (Cwth).

**Amendment of s. 26A—Establishment of Committee**

16. Section 26A of the principal Act is amended by striking out subsection (2) and substituting the following subsection:

- (2) The Committee consists of five members appointed by the Governor of whom—
- (a) one (the chairperson) must be a person nominated by the Minister for Family and Community Services; and
  - (b) one must be a person with expertise in Aboriginal housing nominated by the Minister for Aboriginal Affairs; and

- (c) one must be a person nominated by the Treasurer; and
- (d) one must be a person nominated by the Minister for Transport; and
- (e) one must be a person nominated by the Minister for the Environment and Natural Resources.

**Amendment of s. 26G—Application to Committee**

17. Section 26G of the principal Act is amended by striking out subsections (1) and (2) and substituting the following subsections:

(1) If land constituting or including a place of residence is, or is to be, acquired under this Act, this section applies to the acquisition of the land.

(2) A person who, when the notice of intention to acquire the land was given, genuinely used the land as a place of residence is entitled to make an application for assistance under this section before, or within three months after, the acquisition of the land.

**Amendment of s. 27—Powers of entry**

18. Section 27 of the principal Act is amended by striking out subsection (2) and substituting the following subsection:

(2) Before the Authority enters land under subsection (1), the Authority must—

- (a) in the case of native title land—give notice as required by this Part and comply with any other applicable requirements of this Part;<sup>1</sup> or
- (b) in any other case—give the occupier, or if there is no occupier, the owner, at least seven days' notice of the entry and the nature of the work to be carried out on the land.

<sup>1</sup> See section 28A.

**Amendment of s. 28—Temporary occupation**

19. Section 28 of the principal Act is amended—

- (a) by striking out from subsection (1) "the purpose of an authorised undertaking" and substituting "purposes authorised by an Act";
- (b) by striking out from subsection (1)(e) "the purpose of the undertaking" and substituting "those purposes";
- (c) by striking out subsection (2) and substituting the following subsection:

(2) Before the Authority enters into temporary occupation of land under subsection (1), the Authority must—

- 
- (a) in the case of native title land—give notice as required by this Part and comply with any other applicable requirements of this Part;<sup>1</sup> or
- (b) in any other case—give the occupier, or if there is no occupier, the owner, at least seven days' notice of the entry and the nature of the work to be carried out on the land.

<sup>1</sup> See section 28A.;

- (d) by striking out from subsection (5)(a) "five hundred yards" and substituting "500 metres";
- (e) by striking out paragraph (c) of subsection (5) and substituting the following paragraph:
- (c) is not within 500 metres of a place genuinely used as a place of residence.

#### Insertion of s. 28A

20. The following section is inserted after section 28 of the principal Act:

#### **Exercise of powers under this Part in relation to native title land**

28A. (1) Before the Authority, or a person authorised by the Authority, enters native title land to exercise a power conferred by this Part, the Authority must give written notice of the intended entry and the nature of the work to be carried out on the land to all who hold or may hold native title in the land.<sup>1</sup>

(2) The notice must be given—

- (a) if the intended exercise of powers involves the removal of minerals from the land, or substantial interference with the land or its use or enjoyment—at least two months before entry;
- (b) in other cases—at least seven days before entry.

(3) If the intended exercise of powers will involve the removal of minerals from the land, or substantial interference with the land or its use or enjoyment, the Authority must negotiate in good faith with the native title parties in an attempt to reach agreement on the conditions on which the Authority may enter and use the land.

#### *Explanatory note—*

The native title parties are the persons who are, at the end of the period of two months from when notice is given under subsection (1), registered under the law of the State or the Commonwealth as holders of, or claimants to, native title in the land. The negotiations are to be conducted with the registered representatives of those persons.

(4) However, negotiation is not required under subsection (3) if, at the end of two months from when notice is given under subsection (1), there are no native title parties.

(5) If any of the negotiating parties requests the ERD Court to do so, the Court must mediate among the parties to assist in obtaining their agreement.

(6) If agreement is not reached between the Authority and the native title parties within six months after notice is given under subsection (1), either party may apply to the ERD Court for a resolution of the matters in dispute.

(7) On an application under this section, the ERD Court may decide whether the Authority may enter the land and, if so, determine the conditions on which the Authority may enter the land and exercise powers conferred by this Part.

(8) A determination under subsection (7) is enforceable in the same way as an agreement.

<sup>1</sup> For method of service see Part 5 *Native Title (South Australia) Act 1994*.

**Amendment of s. 30—Powers of inspection**

21. Section 30 of the principal Act is amended by striking out from subsection (1) "the purposes of an authorised undertaking" and substituting "purposes authorised by an Act".

**Amendment of s. 31—Giving of notice and other documents**

22. Section 31 of the principal Act is amended by striking out subsections (1) and (2) and substituting the following subsection:

(1) A notice or other document is validly given to, or served on, a person under this Act if—

(a) served personally or by post on the person; or

(b) if the identity or whereabouts of the person is not known to the Authority—

(i) by publication of the contents of the notice or document in a newspaper circulating generally throughout the State; or

(ii) by affixing the notice or document in a prominent position on the land to which it relates.<sup>1</sup>

<sup>1</sup> For method of service on persons who hold or may hold native title in land see Part 5 *Native Title (South Australia) Act 1994*.

**Repeal of s. 34**

23. Section 34 of the principal Act is repealed.

**Amendment of s. 35—Authority may dispose of surplus land**

24. Section 35 of the principal Act is amended by striking out "the purposes of an authorised undertaking" and substituting "purposes authorised by an Act".

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

ROMA MITCHELL Governor