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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIVE TITLE AMENDMENT (TECHNICAL AMENDMENTS) BILL 2007

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

Abbreviations used in the Explanatory Memorandum

ACA Act	*Aboriginal Councils and Associations Act 1976*
Acts Interpretation Act	*Acts Interpretation Act 1901*
Banking Act	*Banking Act 1959*
CAC Act	*Commonwealth Authorities and Companies Act 1997*
CATSI Act	*Corporations (Aboriginal and Torres Strait Islander) Act 2006*
Committee	Senate Standing Committee on Legal and Constitutional Affairs
Corporations Act	*Corporations Act 2001*
Court	Federal Court of Australia
Federal Court Act	*Federal Court of Australia Act 1976*
ILUA	Indigenous Land Use Agreement
Legislative Instruments Act	*Legislative Instruments Act 2003*
Mining Act	*Mining Act 1971* (SA)
Native Title Act	*Native Title Act 1993*
Native Title Amendment Act	*Native Title Amendment Act 2007*
Notices Determination	Native Title (Notices) Determination 1998
NNTT	National Native Title Tribunal
Opal Mining Act	*Opal Mining Act 1995* (SA)
PBC	Prescribed Body Corporate
PBC Regulations	Native Title (Prescribed Bodies Corporate) Regulations 1999
PBC Report	Report on the Structures and Processes of Prescribed Bodies Corporate
Register of ILUAs	Register of Indigenous Land Use Agreements

Registrar	Native Title Registrar
Representative body	Representative Aboriginal/Torres Strait Islander body
RNTBC	Registered native title body corporate

NATIVE TITLE AMENDMENT (TECHNICAL AMENDMENTS) BILL 2007

Outline

On 7 September 2005, the Attorney-General announced a package of six inter-related reforms to improve the performance of all elements of the native title system. The object of the reforms is to ensure existing native title processes work more effectively and efficiently in securing outcomes for all parties. The primary purpose of this Bill is to implement aspects of three of the six elements of the reform package:

- technical amendments to the *Native Title Act 1993* (Native Title Act) to improve existing processes for native title litigation and negotiation
- measures to improve the effectiveness of representative Aboriginal and Torres Strait Islander bodies (representative bodies), and
- measures to encourage the effective functioning of prescribed bodies corporate (PBCs), the bodies established to manage native title once it is recognised.

Schedule 1 of the Bill would make a large number of minor and technical amendments to the Native Title Act. Most of the amendments would clarify or improve existing provisions of the Native Title Act, although some would provide for new processes.

Schedule 2 of the Bill would amend provisions relating to representative bodies to:

- remove corporate governance obligations imposed on representative bodies where these are already imposed under their incorporation statutes
- improve the process for reviewing decisions by representative bodies not to assist native title claimants and holders, and
- simplify and clarify the process for transferring documents from a former Representative Aboriginal/Torres Strait Islander body (representative body) to its replacement.

Schedule 3 of the Bill would partially implement two recommendations of the Report on the Structures and Processes of Prescribed Bodies Corporate (PBC Report) which was released in October 2006. PBCs will be able to charge third-parties a fee for costs associated with negotiations. If the Registrar of Aboriginal Corporations considers that a fee is unrelated to services to be provided, the fee may not be charged. It will also be possible to prescribe a government-funded body to act as a 'default' PBC in certain circumstances.

Schedule 4 of the Bill would make a number of changes to the Native Title Act which are consequential to the operation of the *Legislative Instruments Act 2003* (Legislative Instruments Act).

Financial impact statement

There is no direct financial impact on Government revenue from this Bill.

NOTES ON CLAUSES

Clause 1: Short title

1. Clause 1 provides for the Act to be cited as the *Native Title Amendment (Technical Amendments) Act 2007*.

Clause 2: Commencement

2. This clause sets out when the various parts of the Bill commence.

Item 1 of the table provides that clauses 1-3 (the short title, commencement and schedule provisions) commence on Royal Assent.

Items 2 and 4 of the table provide that all items in Schedule 1 of the Bill, except items 90 and 91, commence on proclamation. Schedule 1 contains a large number of minor and technical amendments. The delayed commencement of these provisions is designed to ensure all parties are aware of, and take into account, the relevant changes.

If at the end of six months after Royal Assent these provisions have not been proclaimed to commence, they will come into effect the following day.

Item 3 of the table provides that items 90 and 91 of Schedule 1 will commence immediately after Schedule 2 of the *Native Title Amendment Act 2007* (Native Title Amendment Act). The amendments would affect measures in the Native Title Amendment Bill 2006, and so are timed to commence only after passage of that Bill.

Items 5, 7, 8 and 10 of the table provide for most measures in Schedule 2 (representative bodies) and Schedule 3 (PBCs) to commence the day after Royal Assent.

Item 6 of the table provides that item 4 of Schedule 2 of the Bill will commence on 1 July 2007. This will enable item 4 to commence at the same time as a number of other changes to the representative bodies provisions which are provided for in the Native Title Amendment Bill 2006.

Item 9 of the table provides for item 7 of Schedule 3 to commence on 1 July 2008. This is designed to give the Office of the Registrar of Aboriginal Corporations time to develop procedures for implementing the role provided to it by this amendment.

Item 11 of the table provides for Schedule 4 of the Bill to commence at the same time as most of the provisions in Schedule 1 (by proclamation or six months after Royal Assent). Schedule 4 of the Bill contains a number of amendments to the Native Title Act which are consequential to the Legislative Instruments Act.

Clause 3: Schedule(s)

3. This clause makes it clear that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

Schedule 1 – Amendments of the *Native Title Act 1993*

Overview

Schedule 1 of the Bill would make minor and technical amendments to the Native Title Act. The Schedule contains a large number of separate measures. Most of the amendments would clarify or improve existing provisions of the Native Title Act, although some would provide for new processes.

A number of the amendments relate to future act and Indigenous Land Use Agreement (ILUA) processes. For example, amendments would:

- improve the process for notifying ILUAs
- ensure the National Native Title Tribunal (NNTT) provides a report after an inquiry into an objection to registering an alternative procedure ILUA
- include automatic weather stations as facilities for services to the public for the purposes of the future act regime
- enable the combination of two or more existing leases, licences, permits or authorities to be a 'permissible renewal' for the purposes of the future acts regime, and
- enable assistance to be provided by the Native Title Registrar (Registrar) to parties seeking to register an ILUA.

Other amendments will relate to the processes for making and resolving native title claims. For example, amendments would:

- amend application provisions to provide for certain types of information to be provided
- amend notification provisions to ensure appropriate parties are notified of new or amended claims
- streamline the process for replacing the native title applicant in claims
- give the Federal Court of Australia (Court) greater ability to deal with questions about the authorisation of claims which arise during proceedings and ensure native title claimants identify the basis of authorisation for claims
- encourage access by parties to hearings (such as directions hearings) through teleconferences and other facilities, and
- clarify the timeframe in which a respondent may simply withdraw from a proceeding.

Changes will also be made to the obligations of the Registrar in relation to the registration of claims. Amendments would:

- require the timely application of the registration test, particularly where the exercise of procedural rights would flow from registration of a claim

- exempt amended claims from going through the registration test where the amendments would not affect the interests of other parties, such as where the rights and interests being claimed are reduced, and

- provide for *de novo* review of registration decisions by the Registrar (or delegate), in addition to the existing provision for review by the Court.

Other amendments made by this Schedule would:

- restrict the use of information obtained by the NNTT in exercising its assistance function

- clarify the scope of alternative state regimes under section 43

- make clear that a determination for an alternative state regime must be revoked where that regime ceases to have ongoing effect, thereby ensuring resumption of the right to negotiate provisions of the Native Title Act

- implement changes to sections 87 and 87A in line with Recommendation 9 of the report of the Senate Standing Committee on Legal and Constitutional Affairs (Committee) into the Native Title Amendment Bill 2006

- change notification provisions to ensure that native title holders who are yet to set up a PBC are notified of future acts where the PBC would otherwise have been notified

- clarify that certification of a claim or ILUA by a representative body is still valid if that representative body is subsequently derecognised or ceases to exist

- establish a more flexible scheme for payments held under right to negotiate processes, and

- clarify when information is added to, amended or removed from the registers setting out details of native title claims, determinations and ILUAs.

Finally, the Schedule would make amendments to adjust or remove misleading or ambiguous notes and overview provisions, provide for other notes to be included to assist navigation of the Native Title Act, and amend previous drafting errors.

Part 1—Amendments

Native Title Act 1993

Item 1 – Subsection 13(2) (note)

1.1 Item 1 would repeal and replace the explanatory note to subsection 13(2). Section 13 provides for the institution of proceedings for an approved determination

of native title, or revocation or variation of an approved determination. Subsection 13(2) sets out the requirements of the Court in relation to proceedings for compensation where no approved determination of native title has been made.

1.2 A compensation application may be lodged by a registered native title body corporate (RNTBC) or a compensation claim group (see section 61(1)). A PBC only becomes a RNTBC where a determination has been made that native title exists. A compensation claim group may make a compensation application in situations where there is no RNTBC – that is, where no approved determination of native title has been made or where an approved determination has been made that there is no native title.

1.3 The existing note to subsection 13(2) provides that where a claim for compensation is made, and there has previously been no *application* for a determination of native title, the compensation claimants must include certain information in their claim pursuant to subsection 62(3). However, a compensation claim group may make an application under section 62(3) where an application for a determination of native title has been filed, but no approved *determination* of native title has yet been made.

1.4 Item 1 would amend the explanatory note to subsection 13(2) to more accurately reflect the operation of the provisions. It would provide that a compensation application must be accompanied by the additional information required under subsection 62(3) where an approved determination of native title has not previously been made in relation to the area concerned.

Item 2 – Subsection 24AA(3)

1.5 Item 2 would repeal and replace subsection 24AA(3). Section 24AA provides an overview of Division 3 of Part 2 of the Native Title Act, which deals with future acts. Existing subsection 24AA(3) states that where parties to an ILUA consent to a future act being done, that future act will be valid. However, the provisions in Division 3 of Part 2 provide that a future act is not valid until the ILUA has been registered (see sections 24EB and 24EBA). Item 2 would amend the subsection to accurately reflect the provisions in the Division, making clear that a future act will be valid if the parties consent to the act being done *and* the agreement is registered.

Item 3 – After paragraph 24BB(e)

1.6 Item 3 would insert proposed paragraph 24BB(eaa). Division 3 of Part 2 of the Native Title Act provides for three types of ILUAs: body corporate agreements, area agreements and alternative procedure agreements. A body corporate agreement must relate to one or more of the matters set out in section 24BB. Proposed paragraph 24BB(eaa) would expand the matters that a body corporate agreement can cover to include framework agreements. A framework agreement sets the stage for the making of future agreements about matters relating to native title rights and interests. Currently, framework agreements can only be registered as an alternative procedure agreement (see paragraph 24DB(e)).

1.7 Alternative procedure agreements are only available in limited circumstances. This amendment would ensure framework agreements are more widely available to

parties. Item 14 would make a similar amendment to the provisions relating to area agreements.

1.8 While this amendment would enable parties to register the framework agreement as a body corporate agreement, if parties require the individual agreements within the framework agreement to have the force of an ILUA, each agreement will also need to comply with the requirements for ILUAs and be registered on the Register of Indigenous Land Use Agreements (Register of ILUAs).

Item 4 – Section 24BF

1.9 Item 4 is a consequential amendment to the insertion of proposed subsection 24BF(2) under Item 5.

Item 5 – At the end of section 24BF

1.10 Item 5 would insert proposed subsection 24BF(2). Section 24BF currently provides that any person wishing to make a body corporate agreement may seek assistance from the NNTT or a recognised State/Territory body. Where the assistance is provided by the NNTT, proposed subsection 24BF(2) would prohibit the NNTT from using or disclosing information gained during the provision of that assistance unless it first obtains the consent of the person who provided the information.

1.11 The NNTT is only restricted from using information that it has access to solely because it provided assistance in making the body corporate agreement. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but was in fact obtained from the parties during the course of the negotiation. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 24BF. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.12 Proposed subsection 24BF(2) would ensure that information obtained by the NNTT during the course of providing assistance is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT in negotiating a body corporate agreement.

1.13 Items 16, 20, 25, 30, 57, 66, 68, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 6 – At the end of section 24BG

1.14 Item 6 would insert proposed subsection 24BG(3). Section 24BG provides that any party to a body corporate agreement may apply to the Registrar, with the consent of all other parties to the agreement, for the agreement to be registered on the Register of ILUAs. Subsection 24BG(2) provides that certain documents and information must accompany the application. Proposed subsection 24BG(3) would allow the Registrar to assist parties in preparing the registration application and

accompanying materials. Items 17 and 26 would make similar amendments in relation to applications for registration of area agreements and alternative procedure agreements.

Item 7 – Subsection 24BH(1)

1.15 Item 7 would repeal and replace subsection 24BH(1). Section 24BH requires the Registrar to notify various persons about a body corporate agreement before the ILUA is registered and sets out what the notice must contain. Existing paragraph 24BH(1)(b) provides that the Registrar must notify the public of the agreement.

1.16 A body corporate agreement can only be made where there is a RNTBC for the whole of the agreement area. As a PBC only becomes a RNTBC where there has been an approved determination that native title exists, body corporate agreements can only be made where the entire agreement area has been the subject of an approved determination of native title.

1.17 Members of the general public do not have any procedural rights or rights to object to the registration of a body corporate agreement. Provision of notice to the public is expensive, costing approximately $6,000 per notice.

1.18 Proposed subsection 24BH(1) would remove the requirement for the Registrar to give notice of a body corporate agreement to the public. The Registrar will still be required to give notice to relevant Government parties and any representative body for the agreement area, as well as any other person whom the Registrar, having regard to the nature of the agreement, considers appropriate.

Item 8 – Subsection 24BH(2)

1.19 Item 8 is a consequential amendment to the insertion of proposed subsection 24BH(1) under Item 7.

Item 9 – Paragraph 24BH(2)(a)

1.20 Item 9 would repeal and replace paragraph 24BH(2)(a). Section 24BH requires the Registrar to notify various persons about a body corporate agreement before the ILUA is registered and sets out what the notice must contain. Existing paragraph 24BH(2)(a) provides that notice given under subsection 24BH(1) must describe the area covered by the body corporate agreement. This is currently achieved by inclusion of a written description of the area, which can be lengthy and expensive.

1.21 Proposed paragraph 24BH(2)(a) would still require the Registrar to identify the area covered by the agreement but would provide the Registrar with discretion to identify the area covered by the agreement by including a map in the notice. It is expected that the provision of a map will assist people to readily identify the area affected by the ILUA.

1.22 Items 18 and 27 would make similar amendments to the notification requirements for area agreements and alternative procedure agreements.

Item 10 – Paragraph 24BH(2)(c)

1.23 Item 10 would repeal and replace paragraph 24BH(2)(c). Section 24BH requires the Registrar to notify various persons about a body corporate agreement before the ILUA is registered and sets out what the notice must contain. Existing paragraph 24BH(2)(c) requires the Registrar to set out any statements included in the agreement that are of the kind mentioned in paragraphs 24EB(1)(b), (c) or (d).

1.24 Section 24EB provides that future acts carried out in accordance with a registered ILUA and which otherwise comply with the requirements of section 24EB are valid. If the ILUA purports to validate a future act, the ILUA must include a statement to the effect that the parties consent to the doing of the act or class of acts and any condition on which that consent is given (paragraph 24EB(1)(b)). Where the act is one to which Subdivision P applies (which confers the right to negotiate on registered native title claimants) the agreement must state that Subdivision P is not intended to apply (paragraph 24EB(1)(c)). Where the act is the surrender of native title, the agreement must also include a statement to the effect that the surrender is intended to extinguish the native title rights and interests (paragraph 24EB(1)(d)).

1.25 Similarly, the Native Title (Notices) Determination 1998 (Notices Determination) requires notices given under subsection 24BH(1) to include any statement included in the agreement that is of a kind mentioned in paragraph 24EBA(1)(a). Section 24EBA enables ILUAs to validate future acts that have already been done invalidly.

1.26 Proposed subparagraph 24BH(2)(c)(i) would retain the requirement to include statements of the kind mentioned in paragraphs 24EB(1)(b), (c) or (d) and also require the Registrar to include any statements of the kind mentioned in paragraph 24EBA(1)(a). It is appropriate to include both requirements in the Native Title Act, rather than providing separately for paragraph 24EBA(1)(a) statements in the Notices Determination.

1.27 Proposed subparagraph 24BH(2)(c)(ii) would give the Registrar discretion to include a summary of any statements included in the agreement of the kind mentioned in subparagraph 24BH(2)(c)(i), rather than setting the statements out in full. These statements are frequently complex and difficult to understand. This provision will enable the Registrar to include a simpler summary of the statement. The Registrar will be required, where he or she provides a summary, to include information about where further detail about the statements can be obtained to ensure interested people are able to access the statements in full.

1.28 Items 19 and 28 would make similar amendments to the notification requirements for area agreements and alternative procedure agreements.

Item 11 – At the end of section 24BH

1.29 Item 11 would insert proposed subsections 24BH(3), (4) and (5). Section 24BH requires the Registrar to notify various persons about a body corporate agreement before the ILUA is registered and sets out what the notice must contain.

1.30 Notices given in relation to area agreements and alternative procedure agreements require the Registrar to specify a notification day (see subsections 24CH(3) and 24DI(3)). However, there is no similar 'notification day' provision for body corporate agreements. This is most likely because the only persons or bodies able to object to the registration of a body corporate agreement or respond to a notice are the parties to the agreement and, in limited circumstances, the representative body for the agreement area.

1.31 Section 24BI provides that the Registrar must register the agreement unless there is an objection within one month from notice of the agreement being given. Notices are sent to a range of bodies and can conceivably be sent on different dates. As a result, there has been some confusion about when the Registrar gives notice and, hence, when the one month starts to run. This problem is exacerbated by the fact that the parties to the agreement are not required to be notified, despite being the primary persons or bodies able to object to registration of a body corporate agreement.

1.32 Proposed subsection 24BH(3) would provide that each notice under subsection 24BH(1) must specify the same notification day. Proposed subsection 24BH(4) would provide that the notification day must be a day by which the Registrar thinks it reasonable to assume that all persons who are required to be notified under subsection 24BH(1) have received or become aware of the notice. Proposed subsection 24BH(5) would provide that the parties to the agreement must be notified of the notification day.

1.33 These proposed subsections mirror the requirements of notices given in relation to area agreements and alternative procedure agreements. The amendments would clarify the operation of section 24BI by ensuring all relevant persons and bodies are advised when notice is given so as to assist in determining when the objection period ends. Items 12 and 13 would make consequential amendments to section 24BI.

Item 12 – Subsection 24BI(2)

1.34 Item 12 is a consequential amendment to the insertion of proposed subsection 24BH(3) under Item 11. Proposed subsection 24BH(3) will require the Registrar to specify a notification day in notices given in relation to body corporate agreements. The amendment to subsection 24BI(2) would make clear that the period for parties to the agreement to object to the registration of a body corporate agreements ends one month after the notification day.

Item 13 – Subsection 24BI(3)(a)

1.35 Item 13 is a consequential amendment to the insertion of proposed subsection 24BH(3) under Item 11. Proposed subsection 24BH(3) will require the

Registrar to specify a notification day in notices given in relation to body corporate agreements. The amendment to paragraph 24BI(3)(a) would make clear that the period for a representative body to advise the Registrar that certain requirements have not been complied with in relation to the agreement ends one month after the notification day.

Item 14 – After paragraph 24CB(e)

1.36 Item 14 would inserts proposed paragraph 24CB(eaa). Division 3 of Part 2 of the Native Title Act provides for three types of ILUAs: body corporate agreements, area agreements and alternative procedure agreements. An area agreement must relate to one or more of the matters set out in section 24CB. Proposed paragraph 24CB(eaa) would expand the matters that an area agreement can cover to include framework agreements. A framework agreement sets the stage for the making of future agreements about matters relating to native title rights and interests. Currently, framework agreements can only be registered as an alternative procedure agreement (see paragraph 24DB(e)).

1.37 Alternative procedure agreements are only available in limited circumstances. This amendment would ensure framework agreements are more widely available to parties. Item 3 would make a similar amendment to the provisions relating to body corporate agreements.

1.38 While this amendment would enable parties to register the framework agreement as an area agreement, if parties require the individual agreements within the framework agreement to have the force of an ILUA, each agreement will also need to comply with the requirements for ILUAs and be registered on the Register of ILUAs.

Item 15 – Section 24CF

1.39 Item 15 is a consequential amendment to the insertion of proposed subsection 24CF(2) under Item 16.

Item 16 – At the end of section 24CF

1.40 Item 16 would insert proposed subsection 24CF(2). Section 24CF currently provides that any person wishing to make an area agreement may seek assistance from the NNTT or a recognised State/Territory body. Where the assistance is provided by the NNTT, proposed subsection 24CF(2) would prohibit the NNTT from disclosing information gained during the provision of that assistance except with the prior consent of the person who provided the information.

1.41 The NNTT is only restricted from using information that it has access to solely because it provided assistance in making the area agreement. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but was in fact obtained from the parties during the course of the negotiation. The provision would also not restrict the NNTT from using or disclosing information

for the purpose of providing the assistance under section 24CF. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.42 Proposed subsection 24CF(2) would ensure that information obtained by the NNTT during the course of providing assistance is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT in negotiating an area agreement.

1.43 Items 5, 20, 25, 30, 57, 66, 68, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 17– At the end of section 24CG

1.44 Item 17 would insert proposed subsections 24CG(4) and 24CG(5). Section 24CG provides that any party to an area agreement may, with the consent of all other parties, apply to the Registrar for the agreement to be registered on the Register of ILUAs.

1.45 Subsection 24CG(2) provides that certain documents and information must accompany the application. Proposed subsection 24CG(4) would allow the Registrar to assist parties in preparing the registration application and accompanying materials. Items 6 and 26 would make similar amendments in relation to applications for registration of body corporate agreements and alternative procedure agreements.

1.46 Subsection 24CG(3) requires that the application must be certified by all representative bodies in relation to the area or include a statement that all reasonable efforts have been made to identify all persons who hold, or may hold, native title in the area, and that all of the persons who have been identified have authorised the making of the agreement.

1.47 Proposed subsection 24CG(5) would provide that the certification of an application to register the ILUA by a representative body is not affected if, after certification, the recognition of the body as the representative body for the area concerned is withdrawn or otherwise ceases to have effect. This provision is inserted to avoid doubt about the effect of lapse in recognition of the relevant representative body, particularly in circumstances where recognition is withdrawn or ceases to have effect in the time between the application being made and the Registrar registering the agreement. Item 106 would make a similar amendment to provisions relating to the certification of claimant applications.

Item 18 – Paragraph 24CH(2)(a)

1.48 Item 18 would repeal and replace paragraph 24CH(2)(a). Section 24CH requires the Registrar to notify various persons about an area agreement before the ILUA is registered and sets out what the notice must contain. Existing paragraph 24CH(2)(a) provides that notice given under subsection 24CH(1) must describe the area covered by the area agreement. This is currently achieved by inclusion of a written description of the area, which can be lengthy and expensive.

1.49 Proposed paragraph 24CH(2)(a) would still require the Registrar to identify the area covered by the agreement but would provide the Registrar with discretion to identify the area by including a map in the notice. It is expected that the provision of a map will assist people to readily identify the area affected by the ILUA.

1.50 Items 9 and 27 would make similar amendments to the notification requirements for body corporate agreements and alternative procedure agreements.

Item 19 – Paragraph 24CH(2)(c)

1.51 Item 19 would repeal and replace paragraph 24CH(2)(c). Section 24CH requires the Registrar to notify various persons about an area agreement before the ILUA is registered and sets out what the notice must contain. Existing paragraph 24CH(2)(c) requires the Registrar to set out any statements included in the agreement that are of the kind mentioned in paragraphs 24EB(1)(b), (c) or (d).

1.52 Section 24EB provides that future acts carried out in accordance with a registered ILUA and which otherwise comply with the requirements of section 24EB, are valid. If the ILUA purports to validate a future act, the agreement must include a statement to the effect that the parties consent to the doing of the act or class of acts and any condition on which that consent is given (paragraph 24EB(1)(b)). Where the act is one to which Subdivision P applies (which confers the right to negotiation on registered native title claimants) the agreement must state that Subdivision P is not intended to apply (paragraph 24EB(1)(c)). Where the act is the surrender of native title, the agreement must also include a statement to the effect that the surrender is intended to extinguish the native title rights and interests (paragraph 24EB(1)(d)).

1.53 Similarly, the Notices Determination requires notices given under subsection 24CH(1) to include any statement included in the agreement that is of a kind mentioned in paragraph 24EBA(1)(a). Section 24EBA enables ILUAs to validate future acts that have already been done invalidly.

1.54 Proposed subparagraph 24CH(2)(c)(i) would retain the requirement to include statements of the kind mentioned in paragraphs 24EB(1)(b), (c) or (d) and also require the Registrar to include any statements of the kind mentioned in paragraph 24EBA(1)(a). It is appropriate to include both requirements in the Native Title Act, rather than providing separately for paragraph 24EBA(1)(a) statements in the Notices Determination.

1.55 Proposed subparagraph 24CH(2)(c)(ii) would give the Registrar discretion to include a summary of any statements included in the agreement of the kind mentioned in subparagraph 24CH(2)(c)(i), rather than setting the statements out in full. These statements are frequently complex and difficult to understand. This provision will enable the Registrar to include a simpler summary of the statement. The Registrar will be required, where he or she provides a summary, to include information about where further detail about the statements can be obtained to ensure interested people are able to obtain the statements in full.

1.56 Items 10 and 28 would make similar amendments to the notification requirements for body corporate agreements and alternative procedure agreements.

Item 20 – At the end of section 24CI

1.57 Item 20 would insert proposed subsection 24CI(3). Existing subsection 24CI(1) provides that if an application to register an area agreement was certified by representative bodies for the agreement area, any person claiming to hold native title in relation to the agreement area can object to the registration of the agreement. If an objection is made, subsection 24CI(2) enables parties to the agreement to 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. Where the NNTT provides such assistance, proposed subsection 24CI(3) would prohibit the NNTT from disclosing information gained during the provision of that assistance unless they first obtain the consent of the person who provided the information.

1.58 The NNTT is only restricted from using information that it has access to solely because it provided assistance in negotiating the withdrawal of an objection. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but in fact obtained from the parties during the course of providing the assistance. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 24CI. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.59 Proposed subsection 24CI(3) would ensure that information obtained by the NNTT during the course of providing assistance is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT in negotiating to have an objection withdrawn.

1.60 Items 5, 16, 25, 30, 57, 66, 68, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 21 – Subsection 24CK(4)

1.61 Item 21 would amend subsection 24CK(4). This amendment is consequential to the restrictions on the use and disclosure of information obtained by the NNTT in the course of providing assistance.

1.62 Section 24CK sets out the obligations of the Registrar in relation to applications for registration of area agreements that have been certified by a representative body. Section 24CK provides that the Registrar must register an area agreement if certain conditions are satisfied. Section 24CI enables a person to make an objection, in certain circumstances, against the registration of the agreement on the ground that requirements in relation to certification of the application for registration of the agreement were not satisfied. The first condition the Registrar must be satisfied of, under section 24CK, is that no objection was made to the registration of the agreement, or all objections have been withdrawn, or an objection is made and not withdrawn but the Registrar is not satisfied that the requirements for certifying the application were not met (see subsection 24CK(2)). In determining if the objection

should be upheld, existing subsection 24CK(4) provides the Registrar must take into account any information given in relation to the matter by certain persons.

1.63 Item 20 would insert proposed subsection 24CI(3) which would restrict the NNTT from using or disclosing information obtained by the NNTT during the course of providing assistance in negotiating to have an objection withdrawn. Item 21 will amend subsection 24CK(4) by providing that the Registrar is only required to take into account information given by those persons to the Registrar. This will ensure that the Registrar is not required to take into account information obtained by the NNTT during the course of providing assistance in negotiating the withdrawal of an objection.

Item 22 – Subparagraph 24CL(2)(b)(ii)

1.64 Item 22 would amend subparagraph 24CL(2)(b)(ii). This amendment is consequential to amendments made by item 107.

1.65 Section 24CL sets out the obligations of the Registrar in relation to applications for registration of area agreements that have not been certified by a representative body. Section 24CL provides that the Registrar must register an area agreement if certain conditions are satisfied. The first condition is that certain persons must be parties to the agreement. This presently includes any person who, in particular circumstances, becomes a registered native title claimant in relation to any of the agreement area after the end of the notice period where their application was filed before the end of the notice period. Existing subparagraph 24CL(2)(b)(ii) provides that such persons will be required to be parties to the agreement if their claim is accepted by the Registrar for registration as a result of an application under subsection 190D(2) where the application was not made more than 28 days after the notice under subsection 190D(1). Subsection 190D(2) enables a claimant to seek review by the Court of the Registrar's decision not to register a claim.

1.66 Item 107 would repeal section 190D and insert proposed sections 190D, 190E and 190F. Proposed section 190E would provide for internal review of the Registrar's decision not to register a claim. Proposed subsection 190F(1) would provide for review of the registration decision by the Court, as presently provided for by subsection 190D(2).

1.67 Item 22 would amend subparagraph 24CL(2)(b)(ii) to refer to review by the Court under proposed subsection 190F(1). It would also provide that persons who become a registered native title claimant after the notice period as a result of reconsideration of the registration decision under proposed section 190E must be parties to the agreement, provided their application for reconsideration was made within 28 days of notice being given under subsection 190D(1). Section 190E provides that a person has 42 days to seek reconsideration of a registration decision. The Federal Court Rules also provide that a person has 42 days in which to make an application to the Court for review of a registration decision. Consistent with the existing provisions in section 24CL, to obtain the benefit of section 24CL registration of the claim must occur as a result of an application for review or reconsideration made within 28 days. The 28 day period in subparagraph 24CL(2)(b)(ii) enables the registration of area agreements where there has been an adverse registration decision

in a relevant claim but the claimant does not seek review or reconsideration of the decision promptly.

Item 23 – Subparagraph 24CL(2)(b)(iii)

1.68 Item 23 would amend subparagraph 24CL(2)(b)(iii). This amendment is consequential to amendments made by item 107.

1.69 Section 24CL sets out the obligations of the Registrar in relation to applications for registration of area agreements that have not been certified by a representative body. Section 24CL provides that the Registrar must register an area agreement if certain conditions are satisfied. The first condition is that certain persons must be parties to the agreement. This presently includes any person who, in particular circumstances, becomes a registered native title claimant in relation to any of the agreement area after the end of the notice period. Existing subparagraph 24CL(2)(b)(iii) deals with claims accepted for registration following review of a registration decision under a State or Territory provision equivalent to relevant provisions of the Native Title Act.

1.70 Subparagraph 24CL(2)(b)(iii) refers to existing section 190D. Item 107 would repeal section 190D and insert proposed sections 190D, 190E and 190F. Proposed section 190E would provide for internal review of the Registrar's decision not to register a claim. Proposed section 190F would provide for review of the registration decision by the Court, as presently provided for by section 190D.

1.71 Item 23 would amend subparagraph 24CL(2)(b)(iii) to reflect the changes made by item 107 and to also include persons who become a registered native title claimant following reconsideration of a registration decision under an equivalent State or Territory law.

Item 24 – Section 24DG

1.72 Item 24 is a consequential amendment to the addition of proposed subsection 24DG(2) under item 25.

Item 25 – At the end of section 24DG

1.73 Item 25 would insert proposed subsection 24DG(2). Section 24DG currently provides that any person wishing to make an alternative procedure agreement may seek assistance from the NNTT or a recognised State/Territory body. Where the assistance is provided by the NNTT, proposed subsection 24DG(2) would prohibit the NNTT from using or disclosing information gained during the provision of that assistance without first obtaining the consent of the person who provided the information.

1.74 The NNTT is only restricted from using information that it has access to solely because it provided assistance in making the alternative procedure agreement. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but in fact obtained from the parties during the course of

providing the assistance. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 24DG. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.75 Proposed subsection 24DG(2) would ensure that information obtained by the NNTT during the course of providing assistance is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT in negotiating an alternative procedure agreement.

1.76 Items 5, 16, 20, 30, 57, 66, 68, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 26 – At the end of section 24DH

1.77 Item 26 would insert proposed subsection 24DH(3). Section 24DH provides that any party to an alternative procedure agreement may, with the consent of all other parties, apply to the Registrar for the agreement to be registered on the Register of ILUAs.

1.78 Subsection 24DH(2) provides that certain documents and information must accompany the application. Proposed subsection 24DH(3) would allow the Registrar to assist parties in preparing the registration application and accompanying materials. Items 6 and 17 would make similar amendments in relation to applications for registration of body corporate agreements and area agreements.

Item 27 – Paragraph 24DI(2)(a)

1.79 Item 27 would repeal and replace paragraph 24DI(2)(a). Section 24DI requires the Registrar to notify various persons about an alternative procedure agreement before the ILUA is registered and sets out what the notice must contain. Existing paragraph 24DI(2)(a) provides that notice given under subsection 24DI(1) must describe the area covered by the alternative procedure agreement. This is currently achieved by inclusion of a written description of the area, which can be lengthy and expensive.

1.80 Proposed paragraph 24DI(2)(a) would still require the Registrar to identify the area covered by the agreement but would provide the Registrar with discretion to identify the area covered by the agreement by including a map in the notice. It is expected that the provision of a map will assist people to readily identify the area affected by the ILUA.

1.81 Items 9 and 18 would make similar amendments to the notification requirements for body corporate agreements and area agreements.

Item 28 – Paragraph 24DI(2)(c)

1.82 Item 28 would repeal and replace paragraph 24DI(2)(c). Section 24DI requires the Registrar to notify various persons about an alternative procedure

agreement before the ILUA is registered and sets out what the notice must contain. Existing paragraph 24DI(2)(c) requires the Registrar to set out any statements included in the agreement that are of the kind mentioned in paragraphs 24EB(1)(b) or (c).

1.83 Section 24EB provides that future acts carried out in accordance with a registered ILUA, and which otherwise comply with the requirements of section 24EB, are valid. If the ILUA purports to validate a future act, the ILUA must include a statement to the effect that the parties consent to the doing of the act or class of acts and any condition on which that consent is given (paragraph 24EB(1)(b)). Where the act is one to which Subdivision P applies (which confers the right to negotiation on registered native title claimants) the agreement must state that Subdivision P is not intended to apply (paragraph 24EB(1)(c)).

1.84 Similarly, the Notices Determination requires notices given under subsection 24CH(1) to include any statement included in the agreement that is of a kind mentioned in paragraph 24EBA(1)(a). Section 24EBA enables ILUAs to validate future acts that have already been done invalidly.

1.85 Proposed subparagraph 24DI (2)(c)(i) would retain the requirement to include statements of the kind mentioned in paragraphs 24EB(1)(b) or (c) and also require the Registrar to include any statements of the kind mentioned in paragraph 24EBA(1)(a). It is appropriate to include both requirements in the Native Title Act, rather than providing separately for paragraph 24EBA(1)(a) statements in the Notices Determination.

1.86 Proposed subparagraph 24DI(2)(c)(ii) would give the Registrar a discretion to include a summary of any statements included in the agreement of the kind mentioned in subparagraph 24DI(2)(c)(i), rather than setting the statements out in full. These statements are frequently complex and difficult to understand. This provision will give the Registrar discretion to include a simpler summary of the statement. The Registrar will be required, where he or she provides a summary, to include information about where further detail about the statements can be obtained to ensure interested persons are able to access the statements in full.

1.87 Items 10 and 19 would make similar amendments to the notification requirements for body corporate agreements and area agreements.

Item 29 – At the end of subsection 24DJ(1)

1.88 Item 29 would insert an explanatory note below subsection 24DJ(1). Subsection 24DJ(1) provides that any person claiming to hold native title in relation to an area covered by an alternative procedure agreement may object against registration of the agreement on the ground that it would not be fair and reasonable to register the agreement. Section 77A sets out the material and fees that must accompany an application under subsection 24DJ(1). Section 24DJ does not refer to section 77A. The proposed explanatory note will bring the requirements set out in section 77A to the attention of users of the Native Title Act.

Item 30 – At the end of section 24DJ

1.89 Item 30 would insert proposed subsection 24DJ(3). Subsection 24DJ(1) provides that any person claiming to hold native title in relation to an area covered by an alternative procedure agreement may object against registration of the agreement on the ground that it would not be fair and reasonable to register the agreement. Subsection 24DJ(2) provides that parties to the agreement may request assistance from the NNTT or a recognised State/Territory body in negotiating with a person who makes an objection, with a view to having the objection withdrawn. Where the NNTT provides such assistance, proposed subsection 24DJ(3) would prohibit the NNTT from disclosing information gained during the provision of that assistance unless they first obtain the consent of the person who provided the information.

1.90 The NNTT is only restricted from using information that it has access to solely because it provided assistance negotiating the withdrawal of an objection. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but in fact obtained from the parties during the course of the negotiation. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 24DJ. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.91 Proposed subsection 24DJ(3) would ensure that information obtained by the NNTT during the course of providing assistance is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT in negotiating to have an objection withdrawn.

1.92 Items 5, 16, 20, 25, 57, 66, 68, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 31 – Subparagraph 24FE(b)(ii)

1.93 Item 31 would amend subparagraph 24FE(b)(ii). This amendment is consequential to amendments made by item 107.

1.94 Section 24FE defines ‘relevant native title claim’ for the purpose of determining if section 24FA protection arises. Section 24FE provides that there will be a relevant native title claim if, at a certain time, there is a claim on the Register of Native Title Claims made before a specified time that is registered as a result of an application under subsection 190D(2) where the application was not made more than 28 days after the notice under subsection 190D(1). Subsection 190D(2) enables a claimant to seek review by the Court of the Registrar’s decision not to register a claim.

1.95 Item 107 would repeal section 190D and insert proposed sections 190D, 190E and 190F. Proposed section 190E would provide for internal review of the Registrar’s decision not to register a claim. Proposed subsection 190F(1) would provide for review of the registration decision by the Court, as presently provided for by subsection 190D(2).

1.96 Item 31 would amend subparagraph 24FE (b)(ii) to refer to review by the Court under proposed subsection 190F(1). It would also provide that a claim will be a relevant native title claim where a claim is registered as a result of reconsideration of the registration decision under proposed section 190E, if the application for reconsideration was made within 28 days of notice being given under subsection 190D(1).

1.97 Section 190E provides that a person has 42 days to seek reconsideration of a registration decision. The Federal Court Rules also provide that a person has 42 days in which to make an application to the Court for review of a registration decision. Consistent with the existing provisions in section 24FE, to obtain the benefit of section 24FA protection, registration of the claim must occur as a result of an application for review or reconsideration made within 28 days. The 28 day period in subparagraph 24FE(b)(ii) grants section 24FA protection where there has been an adverse registration decision in a relevant claim but the claimant does not seek review or reconsideration of the decision promptly.

Item 32 – Subparagraph 24FE(b)(iii)

1.98 Item 32 would amend subparagraph 24FE(b)(iii). This amendment is consequential to amendments made by item 107.

1.99 Section 24FE defines 'relevant native title claim' for the purpose of determining if section 24FA protection arises. Section 24FE provides that there will be a relevant native title claim if, at a certain time, there is a claim on the Register of Native Title Claims made before a specified time that is registered as a result of review of a registration decision under a State or Territory provision equivalent to relevant provisions of the Native Title Act.

1.100 Subparagraph 24FE(b)(iii) refers to existing section 190D. Item 107 would repeal section 190D and insert proposed sections 190D, 190E and 190F. Proposed section 190E would provide for internal review of the Registrar's decision not to register a claim. Proposed section 190F would provide for review of the registration decision by the Court, as presently provided for by section 190D.

1.101 Item 32 would amend subparagraph 24FE(b)(iii) to reflect the changes made by item 107 and to include, as relevant native title claims, claims which are registered following reconsideration of a registration decision under an equivalent State or Territory law.

Item 33 – After subsection 24IC(2)

1.102 Item 33 would insert proposed subsection 24IC(2A) into section 24IC. Section 24IC deems certain future acts to be a 'permissible lease etc. renewals'. Certain protections arise in relation to grants and authorities in relation to land if the grant occurred before 23 December 1996. Subdivision I of Division 3 of Part 2 of the Native Title Act extends those protections to certain permissible renewals of those grants where the renewal occurs after 23 December 1996.

1.103 Subsection 24IC(2) provides that if multiple leases, licences, permits or authorities are granted in place of a single lease, licence, permit or authority, those multiple grants are taken as a renewal of the original grant, and hence are a permissible renewal under subsection 24IC(1).

1.104 The same protections do not currently apply where multiple grants are replaced by a single grant. Proposed subsection 24IC(2A) would provide that where a single lease, licence, permit or authority is granted in place of multiple leases, licences, permits or authorities, the single grant is a renewal of the original grants. The proposed subsection provides, consistent with existing subsection 24IC(2), that multiple grants that are being renewed by a single grant must satisfy the criteria in paragraphs 24IC(1)(b) to (e). The protection will only apply where the single grant takes place after these amendments come into force (see Item 124 of the application provisions in Part 2 of Schedule 1 of the Bill).

Item 34 – After paragraph 24KA(2)(l)

1.105 Item 34 would insert proposed paragraph 24KA(2)(la). Subdivision K of Division 3 of Part 2 of the Native Title Act validates certain facilities for services to the public, if the subdivision applies. Subdivision K is intended to ensure services for the benefit of the general public can be provided unimpeded by native title.

1.106 Subsection 24KA(2) comprises a list of facilities for services to the public to which the subdivision applies. The list includes, for example, roads, navigation markers, street lighting, communication facilities, as well as any other thing that is similar to one of things listed in subsection 24KA(2).

1.107 Automatic weather stations, presently operated by or on behalf of the Bureau of Meteorology, are provided by the Government for the benefit of the general public. They are particularly important for rural communities. It is presently unclear whether automatic weather stations would fall within subsection 24KA(2). To avoid doubt, item 34 would specifically provide that automatic weather stations are facilities for services to the public for the purpose of Subdivision K.

Item 35 – Paragraph 24KA(8)(b)

1.108 Item 35 would repeal and replace paragraph 24KA(8)(b). Subdivision K of Division 3 of Part 2 of the Native Title Act validates certain facilities for services to the public, if the subdivision applies. Subsection 24KA(7) provides that certain procedural rights apply where an act is done under Subdivision K. Where this would require notice to be given to the native title holders, subsection 24KA(8) facilitates the giving of notice to native title holders in circumstances where there has been no approved determination of native title. This is because where there has been no approved determination of native title there will be uncertainty about whether or not native title exists and, if so, who might hold the native title rights and interests in the relevant area. Where there has been an approved determination of native title, the RNTBC represents all native title holders for the area and will therefore be the appropriate contact.

1.109 Under the Native Title Act, a RNTBC should be determined at the same time as the making of an approved determination that native title exists (section 55). However, in some circumstances there may be a delay in determining a RNTBC following a determination of native title. In these circumstances, the same uncertainty that exists before a determination about the appropriate person or persons to contact to satisfy notification requirements will continue after a determination until such time as the RNTBC is determined.

1.110 Item 35 would repeal and replace paragraph 24KA(8)(b) to provide that the same specific requirements about giving notice that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected. Paragraphs 24CK(8)(c) and 24CK(8)(d), as amended by items 36 and 37, would provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body and any registered native title claimants for the area not covered by a RNTBC.

Item 36 – Paragraph 24KA(8)(c)

1.111 Item 36 would amend paragraph 24KA(8)(c). Item 35 would amend paragraph 24KA(8)(b) to provide that, where there is no RNTBC for the whole of the area affected by the act, notice can be effected by complying with paragraphs 24KA(8)(c) and 24KA(8)(d).

1.112 Item 36 would amend paragraph 24KA(8)(c) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC. Similarly, item 37 would amend paragraph 24KA(8)(d) to provide that notice should also be given to any registered native title claimants for the area not covered by a RNTBC.

Item 37 – Paragraph 24KA(8)(d)

1.113 Item 37 would amend paragraph 24KA(8)(d). Item 35 would amend paragraph 24KA(8)(b) to provide that, where there is no RNTBC for the whole of the area affected by the act, notice can be effected by complying with paragraphs 24KA(8)(c) and 24KA(8)(d).

1.114 Item 37 would amend paragraph 24KA(8)(d) to provide that notice should also be given to any registered native title claimants for the area not covered by a RNTBC. Similarly, item 36 would amend paragraph 24KA(8)(c) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC.

Item 38 – Paragraph 24KA(9)(b)

1.115 Item 38 would repeal and replace paragraph 24KA(9)(b). Subdivision K of Division 3 of Part 2 of the Native Title Act validates certain facilities for services to the public, if the subdivision applies. The subdivision is intended to ensure services for the benefit of the general public can be provided unimpeded by native title.

1.116 Subsection 24KA(7) provides that certain procedural rights apply where an act is done under Subdivision K. Where this would give the native title holders any procedural right that requires another person to do any thing in relation to the native title holders, subsection 24KA(9) facilitates the doing of that thing in circumstances where there has been no approved determination of native title. This is because where there has been no approved determination of native title there will be uncertainty about whether or not native title exists and, if so, who might hold the native title rights and interests in the relevant area. Where there has been an approved determination of native title, the RNTBC represents all native title holders for the area and will therefore be the appropriate contact.

1.117 Under the Native Title Act, a RNTBC should be determined at the same time as the making of an approved determination that native title exists (section 55). However, in some circumstances there may be a delay in determining a RNTBC following a determination of native title. In these circumstances, the same uncertainty that exists before a determination about the appropriate person or persons to contact to satisfy procedural requirements will continue after a determination until such time as the RNTBC is determined.

1.118 Item 38 would repeal and replace paragraph 24KA(9)(b) to provide that the same specific requirements about satisfying procedural requirements that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected. Paragraphs 24CK(9)(c) and 24CK(9)(d), as amended by items 39 and 40, would provide that where there is not a RNTBC for the whole of the affected area, a person may give effect to procedural requirements by doing the thing in relation to any registered native title claimant for the area not covered by the RNTBC or, if there are no registered native claimants, by ensuring the representative body for the area not covered by a RNTBC has an opportunity to comment on the doing of the act.

Item 39 – Paragraph 24KA(9)(c)

1.119 Item 39 would amend paragraph 24KA(9)(c). Item 38 would repeal and replace paragraph 24KA(9)(b) to provide that the same specific requirements about satisfying procedural requirements that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected.

1.120 Item 39 would amend paragraph 24KA(9)(c) to provide that where there is not a RNTBC for the whole of the affected area, the procedural requirements may be given effect by doing the thing in relation to any registered native title claimants for the area not covered by a RNTBC. Similarly, item 40 would amend paragraph 24KA(9)(d) to provide that, if there are no registered native title claimants for the area not covered by a RNTBC, the procedural requirements may be given effect by ensuring any representative bodies for the area have an opportunity to comment on the doing of the act.

Item 40 – Paragraph 24KA(9)(d)

1.121 Item 40 would amend paragraph 24KA(9)(d). Item 38 would repeal and replace paragraph 24KA(9)(b) to provide that the same specific requirements about satisfying procedural requirements that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected.

1.122 Item 40 would amend paragraph 24KA(9)(d) to provide that, if there are no registered native title claimants for the area not covered by a RNTBC, the procedural requirements may be given effect by ensuring any representative bodies for the area have an opportunity to comment on the doing of the act. Similarly, item 39 would amend paragraph 24KA(9)(c) to provide that where there is not a RNTBC for the whole of the affected area, the procedural requirements may be given effect by doing the thing in relation to any registered native title claimants for the area not covered by a RNTBC.

Item 41 – Paragraph 24MD(6B)(b)(note)

1.123 Item 41 would repeal the note following paragraph 24MD(6B)(b). Subdivision M of Division 3 of Part 2 of the Native Title Act provides that certain future acts will be valid if the requirements of Subdivision M, and Subdivision P if applicable, are complied with. Subsection 24MD(6) provides that if the future act is one to which Subdivision M applies, other than, among other things, an act to which Subdivision P applies, the consequences in subsections 24MD(6A) and 24MD(6B) apply. Therefore, subsection 24MD(6B) only applies to acts which are not covered by Subdivision P.

1.124 The explanatory note under paragraph 24MD(6B)(b) provides that the acts covered by paragraphs 24MD(6B)(a) and 24MD(6B)(b) are not covered by Subdivision P. The explanatory note is poorly expressed and does not clearly reflect the operation of the provisions, namely that subsection 24MD(6B) only applies to acts to which Subdivision P does not apply.

1.125 While the explanatory note does not affect the operation of the provisions in the Native Title Act, it may create confusion. Therefore, item 41 would repeal the note.

Item 42 – After subparagraph 24MD(6B)(c)(iii)

1.126 Item 42 would insert proposed subparagraph 24MD(6B)(c)(iv). This amendment is consequential to amendments made by item 101.

1.127 Subdivision M of Division 3 of Part 2 of the Native Title Act provides certain future acts will be valid if Subdivision M is complied with. Subsection 24MD(6B) provides if an act falls within subsection 24MD(6B), certain procedural requirements must be complied with, and gives native title holders, and any registered native title claimants, procedural rights in relation to the act.

1.128 Paragraph 24MD(6B)(c) requires the relevant Government to give notice of the act to any registered native title claimant, any native title body corporate and any

representative body for the area. Paragraph 24MD(6B)(d) confers a right to object to the act on native title claimants if they are a *registered* claimant two months of the giving of the notice.

1.129 Item 101 would amend section 190A to provide that, where a notice is given under paragraph 24MD(6B)(c) and the Registrar has received a claim relating to the area that the notice covers, the Registrar must use his or her best endeavours to consider, or finish considering, the claim for registration within two months after the notice is given. This amendment is designed to encourage prompt consideration of the registration of claims that are subject to paragraph 24MD(6B)(c) notices, to ensure native title claimants obtain procedural rights wherever possible.

1.130 Item 42 is a consequential amendment to the amendment made by item 101. It would provide that, where a notice is given under paragraph 24MD(6B)(c), the Registrar must also be notified. This will ensure the Registrar is aware of claims that are subject to a paragraph 24MD(6B)(c) notice so that these claims can be considered promptly.

Item 43 – Paragraph 24MD(7)(b)

1.131 Item 43 would repeal and replace paragraph 24MD(7)(b). Certain future acts will be valid if the requirements of Subdivision M of Division 3 of Part 2 of the Native Title Act are complied with. Subsection 24MD(6A) provides that native title holders, and any registered native title claimants, will have procedural rights in relation to an act.

1.132 Where this would require notice to be given to the native title holders, subsection 24MD(7) facilitates the giving of notice to native title holders in circumstances where there has been no approved determination of native title. This is because where there has been no approved determination of native title there will be uncertainty about whether or not native title exists and, if so, who might hold the native title rights and interests in the relevant area. Where there has been an approved determination of native title, the RNTBC represents all native title holders for the area and will therefore be the appropriate contact.

1.133 Under the Native Title Act, a RNTBC should be determined at the same time as the making of an approved determination that native title exists (section 55). However, in some circumstances there may be a delay in determining a RNTBC following a determination of native title. In these circumstances, the same uncertainty that exists before a determination about the appropriate person or persons to contact to satisfy notification requirements will continue after a determination until such time as the RNTBC is determined.

1.134 Item 43 would repeal and replace paragraph 24MD(7)(b) to provide that the same specific requirements about giving notice that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected. Paragraphs 24MD(7)(c) and 24MD(7)(d), as amended by items 44 and 45, would provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC and any registered native title claimants for the area not covered by a RNTBC.

Item 44 – Paragraph 24MD(7)(c)

1.135 Item 44 would amend paragraph 24MD(7)(c). Amendments made by item 43 would provide that, where there is no RNTBC for the whole of the area affected by the act, notice can be effected by complying with paragraphs 24MD(7)(c) and 24MD(7)(d).

1.136 Item 44 would amend paragraph 24MD(7)(c) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC. Similarly, item 45 would amend paragraph 24MD(7)(d) to provide that notice should also be given to any registered native title claimants for the area not covered by a RNTBC.

Item 45 – Paragraph 24MD(7)(d)

1.137 Item 45 would amend paragraph 24MD(7)(d). Amendments made by item 43 would provide that, where there is no RNTBC for the whole of the area affected by the act, notice can be effected by complying with paragraphs 24MD(7)(c) and 24MD(7)(d).

1.138 Item 45 would amend paragraph 24MD(7)(d) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to any registered native title claimants for the area not covered by a RNTBC. Similarly, item 44 would amend paragraph 24MD(7)(c) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC.

Item 46 – Paragraph 24MD(8)(b)

1.139 Item 46 would repeal and replace paragraph 24MD(8)(b). Certain future acts will be valid if the requirements of Subdivision M of Division 3 of Part 2 of the Native Title Act are complied with. Subsection 24MD(6A) provides that native title holders, and any registered native title claimants, will have certain procedural rights in relation to an act.

1.140 Where this would give the native title holders any procedural right that requires another person to do any thing in relation to the native title holders, subsection 24MD(8) facilitates the doing of that thing in circumstances where there has been no approved determination of native title. This is because where there has been no approved determination of native title there will be uncertainty about whether or not native title exists and, if so, who might hold the native title rights and interests in the relevant area. Where there has been an approved determination of native title, the RNTBC represents all native title holders for the area and will therefore be the appropriate contact.

1.141 Under the Native Title Act, a RNTBC should be determined at the same time as the making of an approved determination that native title exists (section 55). However, in some circumstances there may be a delay in determining a RNTBC following a determination of native title. In these circumstances, the same uncertainty that exists before a determination about the appropriate person or persons to contact to

satisfy procedural requirements will continue after a determination until such time as the RNTBC is determined.

1.142 Item 46 would repeal and replace paragraph 24MD(8)(b) to provide that the same specific requirements about satisfying procedural requirements that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected. Paragraphs 24MD(8)(c) and 24MD(8)(d), as amended by items 47 and 48, would provide that where there is not a RNTBC for the whole of the affected area, a person may give effect to procedural requirements by doing the thing in relation to any registered native title claimant for the area not covered by the RNTBC or, if there are no registered native claimants, by ensuring the representative body for the area not covered by a RNTBC has an opportunity to comment on the doing of the act.

Item 47 – Paragraph 24MD(8)(c)

1.143 Item 47 would amend paragraph 24MD(8)(c). Item 46 would provide that, where there is no RNTBC for the whole of the area affected by the act, a requirement to do a thing to give effect to procedural requirements may be effected by complying with paragraphs 24MD(8)(c) and 24MD(8)(d).

1.144 Item 47 would amend paragraph 24MD(8)(c) to provide that where there is not a RNTBC for the whole of the affected area, the procedural requirements may be given effect by doing the thing in relation to any registered native title claimants for the area not covered by a RNTBC. Similarly, item 48 would amend paragraph 24MD(8)(d) to provide that, if there are no registered native title claimants, the procedural requirements may be given effect by ensuring any representative bodies for the area have an opportunity to comment on the doing of the act.

Item 48 – Paragraph 24MD(8)(d)

1.145 Item 48 would amend paragraph 24MD(8)(d). Item 46 would provide that, where there is no RNTBC for the whole of the area affected by the act, a requirement to do a thing to give effect to procedural requirements may be effected by complying with paragraphs 24MD(8)(c) and 24MD(8)(d).

1.146 Item 48 would amend paragraph 24MD(8)(d) to provide that, if there are no registered native title claimants for the area not covered by a RNTBC, the procedural requirements may be given effect by ensuring any representative bodies for the area have an opportunity to comment on the doing of the act. Similarly, item 47 would amend paragraph 24MD(8)(c) to provide that where there is not a RNTBC for the whole of the affected area, the procedural requirements may be given effect by doing the thing in relation to any registered native title claimants for the area not covered by a RNTBC.

Item 49 – Paragraph 24NA(9)(b)

1.147 Item 49 would repeal and replace paragraph 24NA(9)(b). Subdivision N validates future acts to the extent they relate to an offshore place, if the requirements

of the subdivision are complied with. Subsection 24NA(8) confers certain procedural rights on native title holders, and any registered native title claimants.

1.148 Where this would require notice to be given to the native title holders, subsection 24NA(9) facilitates the giving of notice to native title holders in circumstances where there has been no approved determination of native title. This is because where there has been no approved determination of native title there will be uncertainty about whether or not native title exists and, if so, who might hold the native title rights and interests in the relevant area. Where there has been an approved determination of native title, the RNTBC represents all native title holders for the area and will therefore be the appropriate contact.

1.149 Under the Native Title Act, a RNTBC should be determined at the same time as the making of an approved determination that native title exists (section 55). However, in some circumstances there may be a delay in determining a RNTBC following a determination of native title. In these circumstances, the same uncertainty that exists before a determination about the appropriate person or persons to contact to satisfy notification requirements will continue after a determination until such time as the RNTBC is determined.

1.150 Item 49 would repeal and replace paragraph 24NA(9)(b) to provide that the same specific requirements about giving notice that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected. Paragraphs 24NA(9)(c) and 24NA(9)(d), as amended by items 50 and 51, would provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC and any registered native title claimants for the area not covered by a RNTBC.

Item 50 – Paragraph 24NA(9)(c)

1.151 Item 50 would amend paragraph 24NA(9)(c). Amendments made by item 49 would provide that, where there is no RNTBC for the whole of the area affected by the act, notice can be effected by complying with paragraphs 24NA(9)(c) and 24NA(9)(d).

1.152 Item 50 would amend paragraph 24NA(9)(c) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC. Similarly, item 51 would amend paragraph 24NA(9)(d) to provide that notice should also be given to any registered native title claimants for the area not covered by a RNTBC.

Item 51 – Paragraph 24NA(9)(d)

1.153 Item 51 would amend paragraph 24NA(9)(d). Amendments made by item 49 would provide that, where there is no RNTBC for the whole of the area affected by the act, notice can be effected by complying with paragraphs 24NA(9)(c) and 24NA(9)(d).

1.154 Item 51 would amend paragraph 24NA(9)(d) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to any registered native title claimants for the area not covered by a RNTBC. Similarly, item 50 would amend paragraph 24NA(9)(c) to provide that where there is not a RNTBC for the whole of the affected area, notice should be given to the representative body for the area not covered by a RNTBC.

Item 52 – Paragraph 24NA(10)(b)

1.155 Item 52 would repeal and replace paragraph 24NA(10)(b). Subdivision N validates future acts to the extent they relate to an offshore place, if the requirements of the subdivision are complied with. Subsection 24NA(8) confers certain procedural rights on native title holders, and any registered native title claimants.

1.156 Where this would give the native title holders any procedural right that requires another person to do any thing in relation to the native title holders, subsection 24NA(10) facilitates the doing of that thing in circumstances where there has been no approved determination of native title. This is because where there has been no approved determination of native title there will be uncertainty about whether or not native title exists and, if so, who might hold the native title rights and interests in the relevant area. Where there has been an approved determination of native title, the RNTBC represents all native title holders for the area and will therefore be the appropriate contact.

1.157 Under the Native Title Act, a RNTBC should be determined at the same time as the making of an approved determination that native title exists (section 55). However, in some circumstances there may be a delay in determining a RNTBC following a determination of native title. In these circumstances, the same uncertainty that exists before a determination about the appropriate person or persons to contact to satisfy procedural requirements will continue after a determination until such time as the RNTBC is determined.

1.158 Item 52 would repeal and replace paragraph 24NA(10)(b) to provide that the same specific requirements about satisfying procedural requirements that presently apply before an approved determination is made will continue to apply up until a RNTBC is determined for the whole of the area affected. Paragraphs 24NA(10)(c) and 24NA(10)(d), as amended by items 53 and 54, would provide that where there is not a RNTBC for the whole of the affected area, a person may give effect to procedural requirements by doing the thing in relation to any registered native title claimant for the area not covered by the RNTBC or, if there are no registered native claimants, by ensuring the representative body for the area not covered by a RNTBC has an opportunity to comment on the doing of the act.

Item 53 – Paragraph 24NA(10)(c)

1.159 Item 53 would amend paragraph 24NA(10)(c). Amendments made by item 52 would provide that, where there is no RNTBC for the whole of the area affected by the act, a requirement to do a thing to give effect to procedural requirements may be effected by complying with paragraphs 24NA(10)(c) and 24NA(10)(d).

1.160 Item 53 would amend paragraph 24NA(10)(c) to provide that where there is not a RNTBC for the whole of the affected area, the procedural requirements may be given effect by doing the thing in relation to any registered native title claimants for the area not covered by a RNTBC. Similarly, item 54 would amend paragraph 24NA(10)(d) to provide that, if there are no registered native title claimants, the procedural requirements may be given effect by ensuring any representative bodies for the area have an opportunity to comment on the doing of the act.

Item 54 – Paragraph 24NA(10)(d)

1.161 Item 54 would amend paragraph 24NA(10)(d). Amendments made by item 52 would provide that, where there is no RNTBC for the whole of the area affected by the act, a requirement to do a thing to give effect to procedural requirements may be effected by complying with paragraphs 24NA(10)(c) and 24NA(10)(d).

1.162 Item 54 would amend paragraph 24NA(10)(d) to provide that, if there are no registered native title claimants for the area not covered by a RNTBC, the procedural requirements may be given effect by ensuring any representative bodies for the area have an opportunity to comment on the doing of the act. Similarly, item 53 would amend paragraph 24NA(10)(c) to provide that where there is not a RNTBC for the whole of the affected area, the procedural requirements may be given effect by doing the thing in relation to any registered native title claimants for the area not covered by a RNTBC.

Item 55 – Paragraph 28(2)(a)

1.163 Item 55 would repeal and replace paragraph 28(2)(a). This amendment is consequential to amendments made by item 58 to 60 and 69.

1.164 Section 28 provides that where there has been a failure to comply with the right to negotiate processes outlined in paragraphs 28(1)(a) to (h) the act will only be invalid to the extent it affects native title. Existing subsection 28(2) provides that the act will be invalid even in circumstances where the requirements have been complied with, if the trustee of moneys held in trust pursuant to a condition imposed by a determination by the relevant Minister under subsections 36C(5) or 42(4) or by the arbitral body under subsection 41(3) is informed by the government party that it no longer proposes to do the act (pursuant to section 52) but the government party does the act anyway, without complying with the right to negotiate provisions.

1.165 Items 58 to 60 and 69 propose amendments that would replace this trust regime with a bank guarantee regime. Item 55 would amend paragraph 28(2)(a) to reflect changes made by items 58 to 60 and 69. Proposed paragraph 28(2)(a) would provide that the act will be invalid even where an amount is secured by bank guarantee pursuant to sections 36A, 38 or 42 and the Registrar is informed by the government party that it no longer proposes to do the act as mentioned in proposed subsection 52(2) (see item 69).

Item 56 – Subsection 29(8)

1.166 Item 56 would repeal subsection 29(8) and insert proposed subsections 29(8) and 29(8A). Section 29 requires the relevant Government party to give notice of a future act to which Subdivision P of Division 3 of Part 2 of the Native Title Act applies. Under section 29, notice must be given to certain persons (subsection 29(2)), as well as the general public (subsection 29(3)).

1.167 Existing subsection 29(8) enables the Government party to give notice to the public of two or more acts to which Subdivision P applies in the same notice. There is no equivalent provision to enable notice to be given of two or more acts to specific persons. The requirement to give individual notices in relation to each future act is inefficient. Item 56 would insert proposed subsection 29(8) which would provide that the Commonwealth Minister may determine the circumstances and manner in which persons under subsection 29(2) may be given notice of two or more acts in the same notice. This determination would be a legislative instrument.

1.168 Proposed subsection 29(8A) would include the existing provision in subsection 29(8), enabling notice of two or more acts to be given to the public in one notice. Notice to the public must be given in the way determined by the Commonwealth Minister (see section 252). This determination is also a legislative instrument (see item 32 of Schedule 4).

Item 57 – At the end of section 31

1.169 Item 57 would insert proposed subsection 31(4). Acts to which Subdivision P of Division 3 of Part 2 applies are subject to the right to negotiate. Section 31 sets out the normal negotiation procedure for acts after notice is given of an act under section 29. Paragraph 31(1)(b) provides that the negotiation parties must negotiate in good faith with a view to reaching agreement in relation to the act. Subsection 31(3) provides that, if any of the negotiation parties request, the arbitral body must mediate among the parties to assist in obtaining their agreement.

1.170 Proposed subsection 31(4) would provide that, if the arbitral body is the NNTT, the NNTT must not use or disclose information to which it has access only because it provided assistance under subsection 31(3). without first obtaining the consent of the person who provided the information, except for specific purposes.

1.171 The NNTT may use the information obtained during the negotiation for the purpose of providing the assistance as requested, and for the purpose of establishing whether a negotiation party has negotiated in good faith as mentioned in paragraph 31(1)(b). Subsection 36(2) provides that the arbitral body must not make a determination in relation to the act if it is satisfied that any of the negotiation parties (other than the native title parties) did not negotiate in good faith as required under paragraph 31(1)(b). To make such a determination, it would be appropriate for the NNTT to use information to which it has access because it provided assistance to the parties in negotiating an agreement.

1.172 The NNTT is only restricted from using information that it only has access to because it provided assistance to the parties. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public

sources, for example, a publicly accessible register of interests in land or waters, but in fact obtained from the parties during the course of the negotiation. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 31. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.173 Proposed subsection 31(4) would ensure that information obtained by the NNTT during the course of providing assistance to negotiate an agreement is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT.

1.174 Items 5, 16, 20, 25, 30, 66, 68, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Items 58 to 61 – Bank Guarantee Regime

1.175 These items create a more flexible scheme for payments held under right to negotiate processes. Currently, paragraphs 36C(5)(b), 41(3)(b) and 42(5)(b) provide that an arbitral body or minister may, upon application, determine that a future act can be done subject to conditions, including that a certain amount of money be paid and held in trust in accordance with the regulations. Section 52 prescribes the circumstances under which that money should be paid out of trust. No regulations have been made enabling holding of the relevant money in trust and the provisions have never been used.

1.176 Items 58 to 60 propose amendments that would replace this trust regime with a bank guarantee regime. The benefit of this approach is that proponents would generally not need to pay the full amount of money into trust, and would therefore be able to continue to use the amount guaranteed unless and until the guarantee is called upon. The bank guarantee would offer adequate security, without tying up funds for lengthy periods of time until compensation for the relevant act is finally determined.

Item 58 – Subsection 36C(5)

1.177 Item 58 would repeal and replace section 36C(5). Currently, subsection 36C(5) provides that the relevant Minister may make a determination that an act may be done subject to the condition that an amount of money is paid and held in trust until it is dealt with in accordance with section 52. Proposed new subsection 36C(5) would instead allow the relevant Minister to make a determination that an act may be done subject to the condition that an amount be secured by bank guarantee. Similar to current subsection 36C(5), the new subsection would provide that the arbitral body must determine the amount and specify the person who must secure the amount in that way. The person who secures the amount of money will usually be the future act proponent.

1.178 To ensure guarantees are only obtained from prudentially regulated financial institutions, proposed subsection 36C(5) would require the guarantee to be given by an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Banking Act). The guarantee would be secured in favour of the Registrar. Proposed section 52 would specify the conditions under which the Registrar could call upon the

bank guarantee and distribute the funds (see item 69). It would also be necessary to comply with regulations that are to be made about the securing of an amount by bank guarantee and any other matter in relation to such a guarantee.

Item 59 – Subsection 41(3)

1.179 Item 59 would repeal and replace subsection 41(3). Currently, subsection 41(3) provides that the arbitral body make a determination that an act may be done subject to the condition that an amount of money be paid and held in trust until it is dealt with in accordance with section 52. Proposed new subsection 41(3) would instead allow the arbitral body to make a determination that an act may be done subject to the condition that an amount be secured by bank guarantee. New subsection 41(3) would provide that the arbitral body must determine the amount and specify the person who must secure the amount in that way.

1.180 To ensure guarantees are only obtained from prudentially regulated financial institutions, proposed subsection 41(3) would require the guarantee to be given by an authorised deposit-taking institution within the meaning of the Banking Act. The guarantee would be secured in favour of the Registrar. Proposed section 52 would specify the conditions under which the Registrar could call upon the bank guarantee and distribute the funds (see item 69). It would also be necessary to comply with regulations that are to be made about the securing of an amount by bank guarantee and any other matter in relation to such a guarantee.

Item 60 – Subsection 42(5)

1.181 Item 60 would repeal and replace subsection 42(5). Currently, section 42 provides that the relevant Minister may overrule the determination of an arbitral body and declare that a condition to be complied with is that an amount be paid and held in trust until it is dealt with in accordance with section 52. Proposed new subsection 41(3) would instead allow the relevant Minister declare that a condition to be complied with is that an amount be secured by bank guarantee. New subsection 41(3) would provide that the arbitral body must determine the amount and specify the person who must secure the amount in that way.

1.182 To ensure guarantees are only obtained from prudentially regulated financial institutions, proposed subsection 42(5) would require the guarantee to be given by an authorised deposit-taking institution within the meaning of the Banking Act. The guarantee would be secured in favour of the Registrar. Proposed section 52 would specify the conditions under which the Registrar could call upon the bank guarantee and distribute the funds (see item 69). It would also be necessary to comply with regulations that are to be made about the securing of an amount by bank guarantee and any other matter in relation to such a guarantee.

Item 61 – Paragraph 43(2)(j)

1.183 Item 61 would repeal and replace paragraph 43(2)(j) so that alternative state regimes will have the option of providing for a bank guarantee regime or a trust regime.

Items 61 to 64 - Alternative State Regimes

1.184 Section 43 enables a State or Territory to establish right to negotiate procedures which operate to the exclusion of the provisions in the Native Title Act where the Commonwealth Minister is satisfied the alternative provisions meet statutory criteria set out in subsection 43(2). The key amendments put beyond doubt the validity of the current South Australian section 43 determinations in relation to mining and opal mining (made in 1995 and 1997 respectively) which had the effect of replacing the Native Title Act right to negotiate provisions with a right to negotiate regime under South Australian legislation. The amendments also provide that the inclusion in State or Territory legislation of conjunctive agreement/determination provisions or expedited procedure provisions of the kind included in the Native Title Act would not in the future preclude the Commonwealth Minister from making a determination under section 43.

1.185 Conjunctive agreement/determination procedures under the Native Title Act are found in subsection 26D(2). These provisions exempt particular grants from the right to negotiate where there is express recognition in an existing agreement or determination that the grant will not be subject to the right to negotiate process. The agreement covers several stages of a proposed development, but may only accord notice and the right to negotiate at the initial agreement.

1.186 Expedited procedure provisions in the Native Title Act are found in section 32. These provisions exempt particular grants from the right to negotiate where there is no objection to the nomination by the relevant government that a grant has only low impact, or, following an objection, the arbitral body determines that the grant is of that kind.

Item 62 – After subsection 43(2)

1.187 Item 62 would insert proposed subsection 43(2A) to ensure that the inclusion in State or Territory alternative state regimes of provisions which have a similar effect to the conjunctive agreement/determination provisions and the expedited procedure provisions of the Native Title Act does not mean that those alternative provisions cannot comply with subsection 43(2). Conjunctive agreement/determination provisions and expedited procedure provisions are defined by item 63. This means that if the provisions proposed by a State or Territory to be the subject of a determination by the Commonwealth Minister include such provisions, the Commonwealth Minister may nevertheless be able to make the determination.

1.188 If a State or Territory amends alternative provisions subject to a determination to include conjunctive agreement/determination provisions or expedited procedure provisions, the Commonwealth Minister will not be in a position to revoke the determination for that reason alone.

Item 63 – At the end of section 43

1.189 Item 63 would insert proposed subsection 43(5), which provides a definition of ‘conjunctive agreement/determination provisions’ and ‘expedited procedure provisions’ both of which are used in proposed subsection 43(2A) (see item 62). The definition of conjunctive agreement/determination provisions refers to provisions that

are included in alternative provisions, and that in the opinion of the Commonwealth Minister have an effect, in combination with the other alternative provisions, that is similar to the effect that subsection 26D(2) of the Native Title Act has in combination with other provisions of Subdivision P of Division 3 of Part 2.

1.190 The definition of expedited procedure provisions refers to provisions that are included in alternative provisions, and that in the opinion of the Commonwealth Minister have an effect, in combination with other alternative provisions, that is similar to the effect that section 32 of the Native Title Act has in combination with other provisions of Subdivision P of Division 3 of Part 2.

1.191 The word 'similar' is defined in the Macquarie Dictionary as 'having likeness or resemblance, especially in a general way'. This means the Minister has to form an opinion that the provisions, when looked at as a whole, resemble the effect that subsection 26D(2) or section 32 (as the case may be) of the Native Title Act has in combination with other provisions of Subdivision P of Division 3 of Part 2.

Item 64 - After subsection 43(3)

1.192 Sections 43 and 43A currently do not outline what happens in the event that an alternative state regime is revoked or otherwise no longer exists. Item 64 would insert new subsection 43(3A) to make it clear that if the alternative provisions cease to have ongoing effect, the Commonwealth Minister must revoke the determination made under paragraph 43(1)(b). This will mean that the relevant right to negotiate provisions in Subdivision P of Division 3 of Part 2 of the Native Title Act again apply.

Item 65 – After subsection 43A(9)

1.193 Item 65 would have similar effect to Item 64. It would insert new subsection 43A(9) to make it clear that if the alternative provisions cease to have ongoing effect, the Commonwealth Minister must revoke the determination made under paragraph 43A(1)(b). This will mean that the relevant right to negotiate provisions in Subdivision P of Division 3 of Part 2 of the Native Title Act again apply.

Item 66 – After subsection 44B(4)

1.194 Item 66 would insert proposed subsection 44B(4). Subdivision Q of Division 3 of Part 2 of the Native Title Act deals with rights of access over non-exclusive agricultural and pastoral leases. Subsection 44B(4) provides that any person wishing to make an agreement about rights of access under Subdivision Q may request assistance from the NNTT or a recognised State/Territory body to make the agreement.

1.195 Item 66 would insert proposed subsection 44B(4) which would provide that, if the body providing the assistance is the NNTT, the NNTT must not use or disclose information to which it has access only because it provided assistance under subsection 44B(4), without first obtaining the consent of the person who provided the information.

1.196 The NNTT is only restricted from using information that it has access to solely because it provided assistance to the parties. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but in fact obtained from the parties during the course of the negotiation. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 44B. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.197 Proposed subsection 44B(4) would ensure that information obtained by the NNTT during the course of providing assistance to make an agreement about rights of access under Subdivision Q is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT.

1.198 Items 5, 16, 20, 25, 30, 57, 68, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 67 – Section 44F

1.199 Item 67 is a consequential amendment to the insertion of proposed subsection 44F(2) under item 68.

Item 68 – At the end of section 44F (after the note)

1.200 Item 68 would insert proposed subsection 44F(2). Subdivision Q of Division 3 of Part 2 of the Native Title Act deals with rights of access over non-exclusive agricultural and pastoral leases. Section 44F currently provides that if all of the persons involved in a dispute about a right conferred under subsection 44B(1) agree, they may request the NNTT or a recognised State/Territory body to mediate in the dispute.

1.201 Item 68 would insert proposed subsection 44F(2) which would provide that, if the body providing the assistance is the NNTT, the NNTT must not use or disclose information to which it has access only because it provided assistance in mediating the dispute under section 44F, without first obtaining the consent of the person who provided the information.

1.202 The NNTT is only restricted from using information that it has access to solely because it provided assistance to the parties. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but in fact obtained from the parties during the course of the negotiation. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 44F. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.203 Proposed subsection 44F(2) would ensure that information obtained by the NNTT during the course of mediating a dispute relating to statutory rights of access

under Subdivision Q is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT in mediating a dispute.

1.204 Items 5, 16, 20, 25, 30, 57, 66, 89 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 69 – Section 52 – Bank Guarantee Regime

1.205 Item 69 would repeal and replace section 52. Items 58-61 propose amendments that would replace the trust regime with a bank guarantee regime for payments held under right to negotiate processes. Existing section 52 prescribes the circumstances when funds can be called upon or distributed if an amount of money is being held on trust in accordance with paragraphs 36C(5)(b), subsection 41(3) or paragraph 42(5)(b). Whilst the general conditions currently set out in section 52 would be retained, it is necessary to amend section 52 to reflect the new bank guarantee regime.

1.206 Proposed section 52 would specify when the Registrar may call upon or cancel the bank guarantee and how the Registrar must distribute the amount that was secured under the bank guarantee to the ultimate beneficiary. While the bank guarantee would be made in favour of the Registrar, the Registrar would only ever direct the authorised-deposit taking institution to pay the amount secured to the Registrar for the purpose of distributing the money to either the ultimate beneficiary (the person who is found to be entitled to compensation) or the person who secured the amount by bank guarantee if the determined amount is less than the amount that was secured.

1.207 If a condition to be complied with under a determination made under section 36A or section 38 or a declaration made under section 42 is that an amount is to be secured by bank guarantee given by an authorised deposit-taking institution in favour of the Registrar, the Registrar would need to take specific action when certain circumstances occur. This is set out in the table under proposed subsection 52(2).

1.208 Items 1, 2, 6 and 7 of the table would provide that the Registrar must direct the authorised deposit-taking institution to *cancel* the bank guarantee where:

- a 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 (item 1) or
- the Government party informs the Registrar that it is not going to do the act (item 2) or
- a determination is made that no person is entitled to compensation (item 6) or
- the person who secured the amount by bank guarantee obtains an alternative bank guarantee from an authorised deposit-taking institution (item 7).

1.209 Cancelling the bank guarantee would discharge the obligation on the bank (and thus the person or body who was required to take out the guarantee) to pay out any money.

1.210 Item 3 of the table would provide that if a determination of native title is made, and the RNTBC wishes to accept the bank guarantee amount instead of any compensation to which the native title holders may be entitled under Division 3 for the act, and the person who secured the amount by bank guarantee agrees, the Registrar must direct the authorised deposit-taking institution to pay that amount to the Registrar and the Registrar must pay that amount to the RNTBC.

1.211 Items 4 and 5 of the table set out the circumstance where a determination is made that a person (the ultimate beneficiary) is entitled to compensation in accordance with Division 5 of Part 2 of the Native Title Act or on just terms under a law of the Commonwealth or of a State or Territory dealing with the compulsory acquisition of rights or interests in the land or waters in relation to which compensation is claimed. In this circumstance, the Registrar would direct the authorised deposit-taking institution to pay the amount secured to the Registrar.

1.212 If the amount secured under the bank guarantee is less than or equal to the amount determined the Registrar would pay that amount to the ultimate beneficiary. Proposed subsection 52(5) would provide that if the amount secured by the bank guarantee was less than the amount determined, the Government party must pay the shortfall. If the amount secured under the bank guarantee is more than the amount determined, the Registrar would pay an amount equal to the amount determined to the ultimate beneficiary and pay the remainder to the person who secured the original amount by bank guarantee.

1.213 Proposed subsection 52(3) provides that if a determination is made that a person is entitled to compensation and some or all of the compensation is constituted by the transfer of property or the provision of goods or services, the Registrar must apply to the Court for a direction as to the payment of the amount secured. Item 8 of the table in section 52(2) would provide that if the Court orders that an amount be paid to the person (the ultimate beneficiary), the Registrar must direct the authorised deposit-taking institution to pay the amount secured under the bank guarantee to the Registrar. The Registrar would then pay an amount equal to the amount the Court orders to be paid to the ultimate beneficiary.

1.214 Item 9 of the table provides that if the Court decides that it would be just and equitable in all the circumstances to pay the amount secured by bank guarantee to a person (the ultimate beneficiary), the Registrar must direct the authorised deposit-taking institution to pay the amount secured to the Registrar and pay that amount to the ultimate beneficiary.

Item 70 – Paragraph 57(2)(a)

1.215 Item 70 would repeal and replace paragraph 57(2)(a). If the Court makes a determination that native title exists, the Court must make a determination under sections 56 or 57 about how the native title rights and interests will be held. Section 56 enables the Court to make a determination that native title is to be held in trust by a PBC. Before making such a determination, the PBC must indicate in writing its consent to holding the native title. However, if the native title is not to be held on trust, but rather the PBC will be an agent for the native title holders, the Court

may make a determination that the PBC is the agent for the native title holders without first being satisfied that the PBC has consented.

1.216 Item 70 would repeal and replace paragraph 57(2)(a) to provide that before making such a determination, the Court must obtain the written consent of the PBC. This will reflect the existing requirements for a PBC to consent where the PBC will hold the native title on trust for the native title holders.

Item 71 – Subparagraph 62(1)(a)(ii)

1.217 Item 71 would amend subparagraph 62(1)(a)(ii). Section 62 sets out the requirements for the making of a claimant application. Paragraph 62(1)(a) requires claimant applications to include an affidavit sworn by the applicant which, amongst other things, includes a statement that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register.

1.218 This provision is designed to ensure that a new native title application is not made over an area where native title has already been finally determined. Section 193 currently provides that entries in the National Native Title Register must include approved determinations of native title made by the Court, the High Court or by a recognised State/Territory body, as well as other determinations of, or in relation to, native title in decisions of courts or tribunals. (Items 108 and 109 would amend section 193 to give the Registrar discretion as to whether to include other determinations of, or in relation to, native title.)

1.219 Other determinations of, or in relation to, native title can potentially include a very wide range of native title related decisions which are not determinations of native title and should not necessarily prevent a native title claim being lodged over an area. At present, a State Supreme Court decision which may only have a lesser, *in personam* operation than an approved determination of native title, could prevent a native title claim being made if the Supreme Court decision is included on the National Native Title Register.

1.220 Item 71 would amend the requirement in subparagraph 62(1)(a)(ii) to provide that an affidavit accompanying an application must include a sworn statement that the applicant believes none of the area covered by the application is also covered by an approved determination of native title.

Item 72 – Subparagraph 62(1)(a)(v)

1.221 Item 72 would amend subparagraph 62(1)(a)(v). Section 62 sets out the requirements for the making of a claimant application. Paragraph 62(1)(a) requires claimant applications to include an affidavit sworn by the applicant which, among other things, includes a statement that the applicant is authorised by all persons in the native title claim group to make the application (see subparagraph 62(1)(a)(iv)) and stating the basis on which the applicant is authorised (see subparagraph 62(1)(a)(v)).

1.222 Section 251B sets out the process that the native title claim group must follow to authorise the applicant to make an application. The claim group must follow either a process of decision-making that must be complied with under traditional laws and

customs (see paragraph 251B(a)) or, in the absence of such a process, a process agreed to and adopted by the persons in the relevant claim group (see paragraph 251B(b)).

1.223 Some affidavits accompanying applications provide little or no information setting out the basis of authorisation, for example, merely setting out the date the authorisation meeting was held. This limits the utility of requiring the applicant to state the basis on which the applicant is authorised.

1.224 Item 72 would amend subparagraph 62(1)(a)(v) to provide that the applicant must include a statement in the affidavit accompanying the application setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. This should include indicating whether the decision-making process complied with paragraph 251(a) or 251(b).

1.225 Item 76 would make a similar amendment to the requirements for making a compensation application.

Item 73 – Paragraph 62(2)(c)

1.226 Item 73 would amend paragraph 62(2)(c). Section 62 sets out the requirements for the making of a claimant application. Subsection 62(2) sets out the details that must be included in a claimant application. Existing paragraph 62(2)(c) requires the application to include details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application. It is unclear whether the application need only include details of searches carried out by the applicants, or searches carried out by anybody.

1.227 The policy of the provision is to require the applicant to only include details of searches carried out by the native title group. Item 73 would amend paragraph 62(2)(c) to make clear that the application need only include details of searches carried out by, or on behalf of, the native title claim group.

Item 74 – After paragraph 62(2)(g)

1.228 Item 74 would insert proposed paragraph 62(2)(ga). This amendment is consequential to the changes made by item 101.

1.229 Section 62 sets out the requirements for the making of a claimant application. Subsection 62(2) sets out the details that must be included in a claimant application. Existing paragraph 62(2)(h) requires the application to include details of any notice given under section 29. This requirement is included because section 190A requires the Registrar to use his or her best endeavours to consider claims that are affected by a section 29 notice within a certain time period. Item 101 would amend section 190A to place a similar requirement on the Registrar to consider a claim promptly where the claim is affected by a notice given under paragraph 24MD(6B)(c).

1.230 Item 74 would insert proposed subsection 62(2)(ga) to require claimant applications to include details of any notice given under paragraph 24MD(6B)(c) that

the applicant is aware of and that relate to an area covered by the claim. This will ensure the Registrar is aware of relevant paragraph 24MD(6B)(c) notices when considering the claim for registration.

Item 75 – Subsection 62(2) (note)

1.231 Item 75 would amend the explanatory note following subsection 62(2). This amendment is consequential to the changes made by item 101.

1.232 The note presently states that notices under section 29 are relevant to subsection 190A(2). This is because the Registrar is required to use his or her best endeavours to consider claims affected by a section 29 notice within a certain time period. Item 100 would amend section 190A to place a similar requirement on the Registrar to consider a claim within a certain time period where the claim is affected by a notice given under paragraph 24MD(6B)(c). Item 75 would amend the note to subsection 62(2) to reflect the fact that notices given under paragraph 24MD(6B)(c) would also be relevant to subsection 190A(2).

Item 76 – Subparagraph 62(3)(a)(iv)

1.233 Item 76 would repeal and replace subparagraph 62(3)(a)(iv). Subsection 62(3) sets out the requirements for a compensation application whose making was authorised by a compensation claim group. Paragraph 62(3)(a) requires compensation applications to include an affidavit sworn by the applicant which, among other things, includes a statement that the applicant is authorised by all persons in the native title claim group to make the application (see subparagraph 62(3)(a)(iii)) and stating the basis on which the applicant is authorised (see subparagraph 62(3)(a)(iv)).

1.234 Section 251B sets out the process that the native title claim group must follow to authorise the applicant to make an application. The claim group must follow either a process of decision-making that must be complied with under traditional laws and customs (see paragraph 251B(a)) or, in the absence of such a process, a process agreed to and adopted by the persons in the relevant claim group (see paragraph 251B(b)).

1.235 Some affidavits accompanying applications provide little or no information setting out the basis of authorisation, for example, merely setting out the date the authorisation meeting was held. This limits the utility of requiring the applicant to state the basis on which the applicant is authorised.

1.236 Item 76 would amend subparagraph 62(3)(a)(iv) to provide that the applicant must include a statement in the affidavit accompanying the application setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. This should include indicating whether the decision-making process complied with paragraph 251(a) or 251(b).

1.237 Item 72 would make a similar amendment to the requirements for making a claimant application.

Item 77 – At the end of section 62A

1.238 Item 77 would insert a note at the end of section 62A. Section 62A provides that where an applicant has been authorised to make a claimant application or a compensation application (where the making of the application was authorised by a compensation claim group), the applicant may deal with all matters arising under the Native Title Act in relation to the application.

1.239 It has been suggested some parties mistakenly consider section 62A confers authority on the applicant to enter into ILUAs. However, section 251A sets out a separate process of authorisation for the entering into ILUAs.

1.240 To avoid doubt, item 77 would insert a note following section 62A making clear that section 62A only authorises an applicant to deal with matters arising in relation to the application and refers to the specific provisions relating to the authorisation of ILUAs.

Item 78 – Subsection 64(3)

1.241 Item 78 would repeal and replace subsection 64(3). This amendment is consequential to the changes made by item 107.

1.242 Section 64 provides for the amendment of applications. Existing subsection 64(3) provides that in the case of a claimant application, the fact that the Registrar is, under section 190A, considering the claim made in the application, does not prevent amendment of the application.

1.243 Following a decision by the Registrar not to register a claim, proposed section 190E (inserted by item 107) would provide that the claimant may seek internal review of the Registrar's decision. The claimant is also able to seek review of the Registrar's decision by the Court (see proposed subsection 190F inserted by item 107).

1.244 Item 78 would repeal and replace subsection 64(5) to provide that an application may be amended despite consideration by the Registrar under section 190A, as well as reconsideration by the Registrar under section 190E and review by the Court under section 190F. It is possible that amendment of the application may be necessary in order to meet the requirements of the registration test. It is desirable that applicants be permitted to amend their applications, despite any reconsideration or review of the decision not to register the claim.

Item 79 – Subsection 64(5)

1.245 Item 79 would repeal subsection 64(5). This amendment is related to the changes made by Item 82.

1.246 Section 64 provides for the amendment of applications. Subsection 64(5) deals with the requirements where a claimant application or a compensation application (where the making of the application was authorised by a compensation claim group) is amended to replace the applicant.

1.247 Whereas section 64 deals with all amendments to claims, section 66B deals specifically with applications to replace the applicant. Where an applicant is replaced following an application under section 66B, the Registrar is required to amend the Register of Native Title Claims, without reapplying the registration test to the application. However, where an application is amended under section 64, the Registrar must reapply the registration test.

1.248 In addition, subsection 64(5) requires that an application amended to replace an applicant include an affidavit sworn by the new applicant setting out the basis of their authorisation. Section 66B does not require the new applicant to provide an affidavit, but rather requires the Court to be satisfied the new applicant is properly authorised. The interaction between the provisions in section 66B and subsection 64(5) is unclear.

1.249 Item 82 would amend section 66B to expand the circumstances in which the Court may hear and determine an application to replace the applicant. To clarify the operation of the provisions, item 79 would repeal subsection 64(5). This would mean that all amendments to an application to replace an applicant would be made following an application under section 66B. The Registrar would not be required to reapply the registration test to applications amended to replace the applicant.

Item 80 – Subparagraph 66(3)(a)(iv)

1.250 Item 80 would amend subparagraph 66(3)(a)(iv). Where the Registrar is given a copy of an application for a determination of native title, the Registrar is required to give notice of the application to various persons set out in paragraph 66(3)(a). This includes any person who, when the application was filed, held a registered proprietary interest in relation to the land or waters covered by the application (subparagraph 66(3)(a)(iv)).

1.251 Subsection 66(6) provides that, where the application is a claimant application, the Registrar must not give notice of the application until the Registrar has made a decision about whether to accept the claim for registration. As a result, there can often be a significant delay between the filing of the application and the Registrar giving notice under subsection 66(3). Delays in the provision of relevant information to the Registrar are common, and retrospective information about registered proprietary interests (ie as at the day the claim was filed) may not be available. It is often difficult or impossible for the Registrar to comply with the requirement to notify persons who held a registered proprietary interest at the time the application was filed.

1.252 Furthermore, the purpose of notifying persons about an application is to ensure that persons with an interest in the application area are able to become parties to the proceedings if they wish. If a registered proprietary interest has changed hands during the time between filing of the application and the Registrar giving notice, it would be more appropriate for the notice to go to the present holder of the interest, rather than to a person who did hold, but no longer holds, an interest in the application area.

1.253 Item 80 would amend subparagraph 66(3)(a)(iv) to provide that the Registrar is required to give notice to any person who, at the time the notice is given, holds a registered proprietary interest in the area covered by the application.

Item 81 – After subsection 66A(1)

1.254 Item 81 would insert proposed subsections 66A(1A), 66A(1B) and 66A(1C). Section 66A sets out the requirements for the Registrar to notify certain persons when the Registrar is given a copy of an amended application.

1.255 Subsection 66A(1) requires the Registrar to notify parties of amendments to applications which change the area of land or waters covered by the 'original application'. The term 'original application' refers to the application as it stood when the application was first filed. An amendment to the area covered by the original application will normally reduce the area of land or waters covered by the original application, as an application cannot be amended to include land or waters that were not covered by the original application (see subsection 64(1)).

1.256 However, it is possible for an application to be amended to reduce the land or waters covered and then be subsequently amended to re-include land and waters covered by the original application. In those circumstances, the notification provisions in existing subsection 66A(1) will not require the Registrar to notify persons who, following the amendment to reduce the area of land and waters, withdrew as a party to the proceedings because their interests were no longer within the area covered by the application. If the application is to be amended to re-include areas covered by the original application, it is appropriate that all persons who may be affected by the change be notified of the amended application.

1.257 Proposed subsection 66A(1A) would therefore provide that, where an application is amended to re-include land or waters covered by the original application, the Registrar must:

- give notice to each person who is a party to the proceedings (see paragraph 66A(1A)(c))
- if, when the Registrar is given the amended application, the period of notice for the application (set out in section 66(10)(c)) has not ended, give notice to all persons to whom the Registrar gave notice of the application in accordance with paragraph 66(3)(a) and notify the public (see paragraph 66A(1A)(d)), and
- give notice to each person whom the Registrar would have been required to give notice to if the amended application were a new application, with the exception of those persons to whom notice would be given to as a result of paragraphs 66A(1A)(c) and (d) (see paragraph 66A(1A)(e)).

1.258 Similar to the requirements for giving notice under section 66, proposed subsection 66A(1B) would require the Registrar to specify a notification day for the amendment when notifying persons under section 66A(1A)(e). Proposed subsection 66A(1C) would require that each notice specify the same notification day. Each notice would also need to state that a person who wants to become a party in relation to the amended application must notify the Court within three months of the notification day, or, after that period, seek the leave of the Court.

1.259 Item 86 would make a consequential amendment to section 84 to enable those persons notified under paragraph 66A(1A)(e) to be automatically joined as a party to

proceedings if they notify the Court in writing within three months of the notification day in subsection 66A(1B).

1.260 These amendments will ensure that persons who withdrew from proceedings as a result of an amendment to reduce the area of land and waters covered are not disadvantaged as a result of a subsequent amendment to re-include the area of land or waters.

Item 82 – Subsection 66B(1)

1.261 Item 82 would repeal and replace subsection 66B(1). Section 66B enables a member or members of a native title claim group to apply to the Court to replace the applicant in a claimant application or a compensation application made by a compensation claim group. ('The applicant' can be one or more persons.)

1.262 Presently, an application can be made under section 66B where the current applicant is no longer authorised or where the current applicant has exceeded the authority given to him or her by the claim group. Item 82 would expand the scope of section 66B to provide for other circumstances in which the native title claim group may seek to replace the applicant.

1.263 Proposed subsection 66B(1) would provide that one or more members of the claim group may apply to the Court for an order that the member, or the members jointly, replace the current applicant on the grounds that a person who is (alone or jointly with one or more other persons) the current applicant either:

- consents to his or her replacement
- consents to his or her removal
- had died or become incapacitated
- is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it, or
- has exceeded the authority given to him or her by the claim group to make the application and to deal with matters arising in relation to it.

1.264 Section 23 of the *Acts Interpretation Act 1901* (Acts Interpretation Act) provides that, unless the contrary intention appears, words in the singular include the plural. Proposed subsection 66B(1) would therefore enable the claim group to make an application to replace the applicant where, for example, a number of the persons who are the applicant have died, become incapacitated, or no longer wish to be the applicant.

1.265 The Court may make the order if satisfied that the member or members making the application are authorised to make the application and to deal with matters arising in relation to it.

1.266 Item 79 would repeal subsection 64(5), which currently also deals with amending a claim to replace the applicant. Accordingly, proposed section 66B would be the only mechanism through which any changes to the applicant could be made.

Item 83 – At the end of subsection 66B(1)

1.267 Item 83 would insert an explanatory note following subsection 66B(1). The note would indicate that section 251B states what it means for a person or persons to be authorised by all the persons in the claim group to deal with matters in relation to a claimant application or a compensation application. The explanatory note will indicate to readers that section 251B sets out the authorisation process for making an application and dealing with all matters arising in relation to the application, including the making of applications pursuant to section 66B.

Item 84 – Subsection 69(1) (table item dealing with claim registration application)

1.268 Item 84 would amend an item in the table set out in subsection 69(1). This item is consequential to the change made by item 107.

1.269 Section 69 sets out applications that may be made to the Court under Division 1A of Part 3 of the Native Title Act. One such application is an application mentioned in subsection 190D(2). Subsection 190D(2) provides that where the Registrar does not accept a claim for registration, the claimant may seek review by the Court of the Registrar's decision. Item 107 would repeal section 190D and insert proposed sections 190D, 190E and 190F. Section 190F would provide for appeal to the Court, as is currently provided for in subsection 190D(2). Item 84 would amend the item in the table dealing with applications to the Court for review of a registration decision to refer to proposed subsection 190F(1), instead of subsection 190D(2).

Item 85 – At the end of section 82

1.270 Item 85 would insert proposed subsection 82(3). Section 82 deals with the Court's way of operating and the requirements in relation to the rules of evidence.

1.271 Section 47B of the *Federal Court of Australia Act 1976* (Federal Court Act) gives the Court discretion to allow a person to appear before the Court, or to make a submission to the Court, by way of video link, audio link or other appropriate means. Section 47C of the Federal Court Act sets out conditions the Court must be satisfied of before making an order to use video link, audio link or other prescribed means including, for example, factors affecting the quality of the transmission via video or audio link.

1.272 As interlocutory hearings, such as directions hearings, are often conducted in regional centres, while many of the parties to proceedings may be located elsewhere, attendance in person at these hearings can be expensive and time consuming. Allowing parties to participate in interlocutory hearings via video link or audio link would assist in minimising costs associated with native title proceedings.

1.273 Proposed subsection 82(3) would require the Court to exercise the discretion in section 47B of the Federal Court Act if the Court is satisfied that the conditions set out in section 47C of the Federal Court Act are satisfied and it is not contrary to the interests of justice to do so. This is designed to enable more frequent use of video link and audio link where appropriate.

Item 86 – Paragraph 84(3)(b)

1.274 Item 86 would repeal and replace paragraph 84(3)(b) as a consequence of amendments made by item 81. Item 81 makes amendments to section 66A to set out the requirements for the Registrar to notify certain persons where an application is amended to re-include land or waters covered by the original application. Subsection 66A(1C) would provide that certain persons who receive notice under proposed subsection 66A(1A) would be able to automatically become a party to the proceedings if they notify the Court in writing within the specified notice period.

1.275 Item 86 would made consequential amendments to paragraph 84(3)(b) to enable certain persons who receive a notice under proposed subsection 66A(1A) to automatically become a party to proceedings if they notify the Court in writing that they wish to become a party within the notice period.

1.276 This amendment, along with those made by item 81, will ensure that persons who withdrew from proceedings as a result of an amendment to reduce the area of land and waters covered are not disadvantaged as a result of a subsequent amendment to re-include the area of land or waters.

Item 87 – After subsection 84(6)

1.277 Item 87 would insert proposed subsection 84(6A). Existing subsection 84(6) provides that any party to the proceedings (other than the applicant) may cease to be a party by giving written notice to the Court at any time before the first hearing of the proceedings. After this time, it is necessary for a party to seek the leave of the Court to withdraw as a party.

1.278 There is some uncertainty about when the 'first hearing' in a proceedings occurs. For example, it may be many years before a native title matter proceeds to trial but during the interim period, there is likely to be many directions hearings and other interlocutory hearings.

1.279 It is appropriate that parties be able to cease being a party in the proceedings without seeking leave of the Court at any time up until the substantive proceedings in the matter commence. Proposed subsection 84(6A) would provide that, for the purposes of subsection 84(6), the first hearing in a proceeding should not include directions hearings.

Item 88 – After section 84C

1.280 Item 88 would insert proposed section 84D.

1.281 Section 61 sets out the requirements for making an application. A claimant application or a compensation application made by a compensation claim group must be made by a person or persons authorised to make the application (see section 61). The person or persons who are authorised to make the application are jointly 'the applicant'. Section 251B sets out the process for authorising the applicant to make an application and deal with matters arising in relation to the application.

1.282 Questions about the validity of the applicant's authorisation can arise at any stage during proceedings. For example, there may be doubts raised about whether the

initial authorisation process authorising the making of the application was conducted properly. Even if the initial authorisation was valid, members of the claim group may suggest during proceedings that the person or persons who are the applicant have exceeded their authority in dealing with matters arising in relation to the application. Questions about authorisation may also arise if, for example, all of the persons who are the applicant die or become incapacitated or no longer wish to be the applicant. In circumstances where a deficiency in the authorisation of the claim is identified, it is unclear what steps the Court may take to address the problem. If the Court determines the application is not properly authorised, there is a question about whether the Court may continue to hear and determine the application. The inclusion of proposed section 84D seeks to clarify the Court's powers in relation to authorisation issues.

1.283 Proposed paragraph 84D(1)(a) would enable the Court to make an order requiring a person who made an application under section 61 to produce evidence to the Court that he or she was authorised to make the application. This may be appropriate where questions have been raised about the initial meeting authorising the making of the claim. Similarly, paragraph 84D(1)(b) would enable the Court to require a person who is dealing with the matter arising in relation to an application (as the applicant) to produce evidence showing that he or she is authorised to deal with matters arising in relation to the application. Such an order may be appropriate where there is some doubt as to whether the applicant continues to be properly authorised to deal with matters in relation to the application.

1.284 Proposed subsection 84D(2) would provide that the Court may make an order that evidence in relation to authorisation be produced, either on its own motion, or on application by a party to the proceeding or a member of the native title claim group or compensation claim group.

1.285 Proposed subsections 84D(3) and 84D(4) deal with circumstances where it is apparent that the making of an application was not properly authorised, or where the person who has dealt with, or is dealing with, a matter arising in relation to the application was not properly authorised to do so. Subsection 84D(4) provides that the Court may, after balancing the need for due prosecution of the application and the interests of justice, hear and determine the application, even where the claim is not properly authorised. While the requirements for an application to be properly authorised and for the applicant to be authorised by the claim group to deal with matters arising in relation to the application are very important, there may be circumstances in which the Court considers that it would be in the interests of justice to continue to hear and determine the application.

1.286 Determining whether it is in the interests of justice for the Court to hear and determine an application despite a defect in authorisation will be a matter for the Court to consider in the particular circumstances of the case. Relevant factors may include the nature of the defect in authorisation, whether the applicant is now authorised to deal with matters arising in relation to the application and whether the application has progressed to trial or mediation, or is still at the preliminary stages.

1.287 Proposed paragraph 84D(4)(b) would also enable the Court to make such other orders as the Court considers appropriate. These orders may be made in addition to

the Court hearing and determining the application or the Court may make any such orders it considers appropriate without hearing and determining the application.

1.288 There are a wide range of orders the Court may make, including orders about the use of evidence already taken in the proceedings or orders about the replacement of the applicant. For example, where the evidence produced following an order made under proposed subsection 84D(1) indicates that the applicant is no longer authorised, the Court could make an order that the application be dismissed within a certain time period if a member or members of the claim group do not make an application under section 66B to replace the applicant. Any application to replace the applicant should be made under section 66B, rather than by the Court directly under proposed subsection 84D(4), as an order made pursuant to section 66B will have certain consequences. In particular, the Registrar is required to amend the Register of Native Title Claims following an order under section 66B so that the details of the applicant are up-to-date.

1.289 Section 23 of the Acts Interpretation Act provides that, unless the contrary intention appears, words in the singular include the plural. References in section 84D to a ‘person’ who is not authorised would therefore also include where all persons who make up the applicant are not authorised.

Item 89 – After subsection 86F(2)

1.290 Item 89 would insert proposed subsection 86F(2A). Section 86F enables parties to a proceeding to negotiate an agreement that involves matters other than native title. Subsection 86F(2) enables the parties to proceedings to request assistance from the NNTT in negotiating the agreement.

1.291 Proposed subsection 86F(2A) would provide that the NNTT must not use or disclose information to which it has access only because it provided assistance in negotiating the agreement, without first obtaining the consent of the person who provided the information, except for specific purposes. The NNTT can use or disclose information obtained during the course of negotiations for the purpose of the negotiation and to mediate in relation the whole or part of the proceeding.

1.292 It is possible that the NNTT could provide assistance in negotiating an agreement under section 86F at the same time that a matter is before the NNTT for mediation under Division 4A of Part 6 of the Native Title Act. In these circumstances, it may be the same member of the NNTT mediating and negotiating an agreement under section 86F. (Note: subsection 136A(5) prevents a member presiding over a mediation conference under Division 4A of Part 6 from taking any further part in the proceedings, unless the parties agree otherwise.) It is also possible that a matter could be referred to mediation by the NNTT following the negotiation of an agreement under section 86F. In these circumstances it would be counterproductive to restrict the NNTT from using or disclosing information obtained during the negotiation.

1.293 The NNTT is only restricted from using information that it has access to solely because it provided assistance to the parties. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but

in fact obtained from the parties during the course of the negotiation. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 86F. It would only prohibit the NNTT from using or disclosing that information for any purposes.

1.294 Proposed subsection 86F(2A) would ensure that information obtained by the NNTT during the course of providing assistance to negotiate an agreement is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT.

1.295 Items 5, 16, 20, 25, 30, 57, 66, 68 and 113 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 90 – Paragraph 87(1)(d)

1.296 Item 90 would repeal paragraph 87(1)(d). Item 34 of Schedule 2 of the Native Title Amendment Bill 2006 would insert paragraph 87(1)(d). The Native Title Amendment Bill 2006 was the subject of inquiry by the Committee. Item 90 implements Recommendation 9 of the Committee's report, which recommended further consideration be given to section 87A of the Native Title Amendment Bill 2006.

1.297 Paragraph 87(1)(d) is consequential to an amendment made by item 35 of Schedule 2 of the Native Title Amendment Bill 2006 which would insert proposed section 87A. Section 87A would enable the Court to make a determination over part of a claim area where some, but not all, parties agree to the determination. Following a determination over part of a claim under section 87A, the claim would be deemed to be amended to remove the determined area and the Registrar would be required to amend the register without reapplying the registration test to the remainder of the claim.

1.298 Section 87 provides that the Court may make a consent determination over part of a claim area if all the parties to the proceeding agree. Paragraph 87(1)(d) would provide that the Court may only make an order under section 87 if the Court is satisfied the same order cannot be made under section 87A. This amendment sought to ensure that parties gain the benefit of an order made under section 87A (namely, not being required to undergo the registration test again) wherever possible.

1.299 However, concerns were expressed to the Committee that the inclusion of paragraph 87(1)(d) may cause uncertainty about when an order under section 87 can be made, and could call into question the validity of determinations that are made under section 87, possibly giving rise to a challenge about such determinations.

1.300 In response to these concerns, item 90 will repeal paragraph 87(1)(d). Where an order could be made under both sections 87 and 87A, it would be desirable that the order be made pursuant to section 87A, so as to afford parties the benefits of an order under that section.

Item 91 – Subparagraph 87A(1)(c)(v)

1.301 Item 90 would repeal and replace subparagraph 87A(1)(c)(v). Item 91, along with item 90, implements the Government's response to Recommendation 9 of the Committee's report into the Native Title Amendment Bill 2006. Item 35 of Schedule 2 of the Native Title Amendment Bill 2006 would insert proposed section 87A. Section 87A would enable the Court to make a determination over part of a claim area where some, but not all, parties agree to the determination. Following a determination over part of a claim under section 87A, the claim would be deemed to be amended to remove the determined area and the Registrar would be required to amend the register without reapplying the registration test to the remainder of the claim.

1.302 Proposed section 87A would require the consent of certain parties to the proceeding, including each person who holds a registered proprietary interest in the determination area and is a party to the proceedings. Concerns were expressed to the Committee that this provision may exclude persons with significant interests in the determination area, for example, owners of infrastructure installed under statutory powers, such as telecommunications networks, electricity and gas transmission and distribution systems.

1.303 Item 91 would repeal and replace subparagraph 87A(1)(c)(v) in response to these concerns. Proposed subparagraph 87A(1)(c)(v) would provide that each person who holds an *interest in relation to land or waters* in any part of the determination area at the time the agreement is made and is a party to the proceedings must consent before a determination may be made under section 87A. The term 'interest, in relation to land or waters' is defined in section 253. Most parties to the proceeding holding an interest that falls within the determination area will be required to consent to a determination under section 87A as amended. However, persons with an interest in relation to an area of the claim outside the determination area and persons with an interest in the determination area that is not an interest in relation to land or waters (such as persons who only have rights of access held by all members of the public) will not be required to agree to the determination being made.

Item 92 – At the end of section 124

1.304 Item 92 would insert proposed subsection 124(3). Section 124 sets out the members of the NNTT that must constitute the NNTT for the purposes of inquiries conducted under Division 5 of Part 6 of the Native Title Act. Proposed subsection 124(3) would set out requirements for the constitution of an inquiry in relation to a subsection 24DJ(1) objection application.

1.305 Section 24DJ deals with objections to the registration of an alternative procedure agreement. Subsection 24DJ(1) enables a person claiming to hold native title in relation to the area covered by the agreement to object to registration of the agreement. Subsection 24DJ(2) provides that, where an objection is made under subsection 24DJ(1), the parties to the agreement may seek assistance from the NNTT in negotiating with the person making the objection with a view to having the objection withdrawn. Where an objection is made and not withdrawn at the end of the notice period, the Registrar makes a decision following an inquiry by the Tribunal as to whether it would be fair and reasonable to register the agreement.

1.306 Proposed subsection 124(3) will provide that the NNTT, in an inquiry in relation to a subsection 24DJ(1) objection application inquiry, must not be constituted by, or include, a member who assisted a party to the alternative procedure agreement to which the application relates in negotiations mentioned in subsection 24DJ(2), unless the parties otherwise agree. Where a member of the NNTT has assisted parties to negotiate with a person who makes an objection with a view to having the objection withdrawn, it would be inappropriate for the same member to then form part of the NNTT for the purposes of holding an inquiry to consider the objection.

Item 93 – Paragraph 139(d)

1.307 Item 93 would amend paragraph 139(d). Paragraph 139(d) provides that the NNTT must, if a person has made an application under subsection 24DJ(1) objecting against registration of an ILUA and not withdrawn the objection, conduct an inquiry into whether the person satisfies the NNTT it would not be fair and reasonable to register the agreement.

1.308 Item 93 would amend paragraph 139(d) to define an application under subsection 24DJ(1) objecting against registration of an ILUA as a 'subsection 24DJ(1) objection application'.

Item 94 – Subsection 141(4)

1.309 Item 94 would amend subsection 141(4) as a consequence of amendments made by item 93. Item 93 would amend paragraph 139(d) to define the term 'subsection 24DJ(1) objection application'.

1.310 Subsection 141(4) sets out who would be parties to an inquiry into an objection under subsection 24DJ(1). Amended subsection 141(4) would refer to the defined term 'subsection 24DJ(1) objection application'.

Item 95 – After section 163

1.311 Item 95 would insert proposed section 163AA. Where a person claiming to hold native title in relation to land or waters covered by an alternative procedure agreement objects to the registration of the agreement, and that objection is not withdrawn, the Registrar must determine whether or not the objection should be upheld and registration of the agreement prevented (see sections 24DJ and 24DL). The Registrar makes a decision following an inquiry by the NNTT, pursuant to paragraph 139(d).

1.312 Section 139 also enables the NNTT to conduct other types of inquiries, for example, into right to negotiate applications. Where the NNTT conducts other types of inquiries, provisions in the Native Title Act require the NNTT to make a determination or report after holding the inquiry (see sections 162 and 163). However, at present there is no requirement on the NNTT to make a report or determination following the completion of a subsection 24DJ(1) objection application inquiry.

1.313 Proposed section 163AA would require the NNTT, after holding an inquiry into a subsection 24DJ(1) objection application, to make a report about the matters

covered by the inquiry. The NNTT would be required to state in the report any findings of fact upon which the report is based. Existing section 164 would require the report to be in writing and a copy of the report would be given to each of the parties.

Item 96 – Subsection 169(2)

1.314 Item 96 would amend subsection 169(2) as a consequence of amendments made by item 93. Item 93 would amend paragraph 139(d) to define the term ‘subsection 24DJ(1) objection application’.

1.315 Subsection 169(2) provides for appeals to the Court about a question of law stemming from a NNTT finding of fact under paragraph 139(d). Amended subsection 169(2) would refer to the defined term ‘subsection 24DJ(1) objection application’.

Item 97 – Paragraph 190(1)(a)

1.316 Item 97 would amend paragraph 190(1)(a) as a consequence of changes made by item 107. Paragraph 190(1)(a) requires the Registrar to include details of claims in the National Native Title Register that have been accepted for registration. Item 97 would amend paragraph 190(1)(a) so the Registrar would be required to include details of claims that have been accepted for registration on reconsideration by the Registrar under proposed section 190E (see item 107).

Item 98 – Paragraph 190(3)(a)

1.317 Item 98 would repeal and replace paragraph 190(3)(a) as a consequence of changes made by Item 107. Subsection 190(3) provides that if an amended claim is accepted for registration under section 190A, the Registrar must amend the National Native Title Register to reflect the amendment. This item would provide that the Registrar must also amend the National Native Title Register if the claim is accepted for registration on reconsideration by the Registrar under proposed section 190E (see item 107).

Item 99 – Paragraph 190(3)(b)

1.318 Item 99 is consequential to the changes made by item 107. If an amended claim is not accepted for registration under section 190A the Registrar must amend the National Native Title Register to remove any entry relating to the claim. This item would amend paragraph 190(3)(b) so the Registrar would be required to remove any entry relating to the claim if the amended claim is not accepted for registration on reconsideration by the Registration under proposed section 190E (see item 107).

Item 100 – After paragraph 190(4)(d)

1.319 Item 100 would insert paragraph 190(4)(da). Proposed paragraph 190(4)(da) would make clear that when a determination of native title has been made but no RNTBC has yet been determined, the Register of Native Title Claims should be amended to reflect that situation.

1.320 The NNTT currently proceeds on the basis that the claim is not finalised until the RNTBC has been determined or registered, which ensures that the native title

holders may still be notified of any proposed future acts pending registration. However, this approach gives rise to confusion where the determination establishes that native title has been extinguished over parts of the claim area, in so far as the National Native Title Register will not reflect this (and could suggest that the claimants continue to have procedural rights over those parts).

Item 101 – Subsection 190A(2)

1.321 Item 101 would repeal and replace subsection 190A(2).

1.322 Section 190A prescribes how the Registrar is to consider claimant applications. Existing subsection 190A(2) provides that if notice is given under section 29 about a proposed future act which would affect land or waters within the claim area, the Registrar must endeavour to finish considering that claim within four months. That timeframe reflects paragraph 30(1)(a) which provides that a person who, four months after notice is given under section 29, is a *registered* native title claimant over relevant land or waters will be a party to negotiations about the proposed future act.

1.323 Section 29 forms part of the right to negotiate provisions. Currently, the obligation in section 190A(2) does not extend to acts covered by State or Territory alternative right to negotiate regimes, or to other acts where procedural rights can arise.

1.324 Proposed subsection 190A(2) would extend the Registrar's obligation to also cover where he or she is given notice of a future act under a relevant State or Territory alternative right to negotiate regime. The timeframe within which the Registrar would need to use his or her best endeavours to finish considering the claim would reflect the time within which an objection to a future act can be made under the State or Territory's alternative regime.

1.325 Proposed subsection 190A(2) would also extend the Registrar's obligation to cover where notice is given by the Commonwealth, State or Territory under subsection 24MD(6B)(c) about a proposed future act. Section 24MD sets out how certain acts, which could be done in relation to land or waters whether there is native title or ordinary title over that land or waters, can be done. For example, section 24MD covers compulsory acquisition where both native title and non-native title interest are acquired and the native title holders are not caused any greater disadvantage than the non-native title holders.

1.326 Some types of acts covered by section 24MD – compulsory acquisitions which confer rights on persons other than the Commonwealth, State or Territory, and the creation or variation of a right to mine solely to enable construction of a mining related infrastructure facility – will give rise to procedural rights. Notice of such an act must be given by the Commonwealth, State or Territory to any registered native title claimant, native title body corporate and relevant representative body for the area (paragraph 24MD(6B)(c). Paragraph 24MD(6B)(d) provides that any claimant or body corporate may object to the act being done in so far as it affects their *registered* native title rights and interests within two months of the notification. Native title claimants who have not had their claim registered within this two month period are therefore unable to object to the act being done.

1.327 Proposed subsection 190A(2) would provide that where notice is given by the Commonwealth, State or Territory about a proposed future act under paragraph 24MD(6B)(c), and the Registrar has received a claim relating to the area that the notice covers, the Registrar would be required to use his or her best endeavours to finish considering the native title claim for registration within two months after the notice is given. This amendment is designed to encourage prompt consideration of the registration of claims that are subject to paragraph 24MD(6B)(c) notices, to ensure that procedural rights of native title claimants are protected wherever possible.

1.328 A consequential amendment to paragraph 24MD(6B)(c) will also be made to ensure the Registrar is given notice of the proposed future act (see item 42). This will ensure the Registrar is aware of claims that are subject to a paragraph 24MD(6B)(c) notice so that these claims can be considered promptly.

1.329 Proposed subsection 190A(2A) would also include a general obligation on the Registrar to finish considering the claim as soon as is practicable. Proposed subsection 190A(2) will ensure that greater priority is given to registration decisions.

Item 102 – Subsection 190A(6)

1.330 Item 102 would repeal and replace subsection 190A(6) which sets out the test for registration of a native title claim and insert proposed subsection 190A(6A).

1.331 Proposed subsection 190A(6A) would remove the requirement for the registration test to be applied to amended claims in specified circumstances. This is designed to encourage native title claimants to amend their claims to improve their clarity and quality, with a view to making those claims more easily understood and hence more amenable to resolution. Proposed subsection 190A(6A) would provide that amendments to a registered claim to reduce the area covered by the claim, remove a claimed right or interest, change the name of the representative body in the application, or change the address for service of the applicant, would no longer trigger the registration test and the Registrar will be required to accept the amended claim for registration.

1.332 Proposed subsection 190A(6) makes it clear that if a claim has been amended in a way that does not fall within one of the circumstances listed in section 190A(6A), the Registrar will need to apply the registration test and accept the amended claim if it satisfies the conditions in section 190B (which deals mainly with the merits of the claim) and section 190C (which deals with procedural and other matters).

Item 103 – Subsection 190B(1)

1.333 Section 190B contains the conditions about merits of the claim of which the Registrar must be satisfied to accept the claim for registration. Item 103 would omit the reference to paragraph 190A(6)(a) in subsection 190B(1) and replace subparagraph 190A(6)(b)(i). This is consequential to the proposed amendment in Item 102.

Item 104 – Subsection 190C(1)

1.334 Section 190C contains the conditions about procedural and other matters of which the Registrar must be satisfied to accept the claim for registration. Item 104 would omit the reference to paragraph 190A(6)(b) in subsection 190C(1) and replace subparagraph 190A(6)(b)(ii). This is consequential to the proposed amendment in item 102.

Item 105 – Paragraph 190C(4)(a) (at the end of the note)

1.335 Item 105 would amend the explanatory note following paragraph 190C(4)(e). Section 190C contains the conditions about procedural and other matters of which the Registrar must be satisfied to accept the claim for registration. Subsection 190C(4) provides that the Registrar must be satisfied that the application has been certified under Part 11 of the Native Title Act by each representative body that could certify the application in performing its functions under that Part. The explanatory note refers to readers to the provisions under which the representative body may certify the application.

1.336 Item 105 would amend the explanatory note to make clear that a representative body may certify an application, even if it is only the representative body for part of the area claimed.

Item 106 – After subsection 190C(4)

1.337 Item 106 would insert proposed subsection 190C(4A). Section 190C contains the conditions about procedural and other matters of which the Registrar must be satisfied to accept the claim for registration. Subsection 190C(4) provides that the Registrar must be satisfied that the application has been certified under Part 11 by each representative body that could certify the application in performing its functions under that Part.

1.338 Proposed subsection 190C(4A) would provide that the certification of an application under Part 11 by a representative body is not affected if, after certification, the recognition of the body as the representative body for the area concerned is withdrawn or otherwise ceases to have effect. This provision is inserted to avoid doubt about the effect of a lapse in recognition of the relevant representative body, particularly in circumstances where recognition is withdrawn or ceases to have effect in the time between when the application is made and when the Registrar decides whether to accept the claim for registration.

1.339 A similar amendment would be made by item 17.

Item 107 – Internal review of registration decisions

1.340 Item 107 would repeal and replace section 190D and insert proposed sections 190E and 190F. Section 190A requires the Registrar to apply the registration test to all claimant applications and all amended claimant applications. The proposed amendments would enable native title claimants to seek a *de novo* review by the Registrar where the Registrar has advised that the application has failed the registration test. Internal review of registration decisions will complement the

existing ability for claimants to apply to the Court for review, by providing a less time consuming means of reassessing the registration decision. Review by the Registrar (or Registrar's Delegate if the initial assessment was conducted by the Registrar) could only occur once, and would not be a pre-requisite for application to the Court for review under proposed subsection 190F(1).

<u>Proposed section 190D – if the claim cannot be registered – notice of decision</u>

1.341 Currently, section 190D provides that if the Registrar does not accept the claim for registration, the Registrar must give written notice to the Court and the applicant of his or her decision, including a statement of the reasons for the decision. Existing section 190D also provides for application to the Court for review of the Registrar's decision not to register a claim, and sets out a particular type of order the Court may make.

1.342 Pursuant to changes to be made by the Native Title Amendment Bill 2006, section 190D would also include provisions enabling the Court to dismiss certain unregistered claims.

1.343 Item 107 removes those provisions from section 190D and puts them in proposed section 190F. The restructure is consequential to the creation of proposed section 190E.

<u>Proposed section 190E – if the claim cannot be registered – reconsideration by the Registrar</u>

1.344 Proposed section 190D would enable a native title claimant to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. This reconsideration would be *de novo*, and the Registrar (or his or her Delegate if the Registrar made the initial decisions) would reconsider all relevant criteria.

1.345 The application would need to be in writing and must be made within 42 days of receiving notice of the Registrar's decision. The applicant would only be able apply to the Registrar for reconsideration of the claim once, and only if they have not already made an application to the Court for a review of the Registrar's decision. Review by the Registrar is not a prerequisite for appeal to the Court under proposed section 190F.

<u>Proposed section 190F – if the claim cannot be registered – review by the Court</u>

1.346 Proposed section 190F incorporates existing provisions enabling native title claimants to apply to the Court for a review of the Registrar's decision not to accept the claim for registration (proposed subsections 190F(1) to 190F(4)).

1.347 In addition, proposed section 190F includes provisions from the Native Title Amendment Bill 2006 enabling the Court to dismiss certain unregistered claims. That provision has been amended to take into account reconsideration by the Registrar under proposed section 190E.

1.348 Proposed subsections 190F(5) and (6) enable the Court to dismiss the application in which the claim was made if the Court is satisfied that the application in which the claim was made has not been amended since it was considered by the

Registrar and it is not likely to be amended in a way that would lead to a different outcome, and, in the opinion of the Court, there is no other reason why the claim should not be dismissed.

1.349 Proposed paragraph 190F(5)(b) limits the application of proposed subsection 190F(6) to certain circumstances, including where the applicant has not applied to the Registrar to reconsider his or her decision not to accept the claim for registration under proposed section 190E or the applicant has applied to the Registrar to reconsider the claim but the Registrar has again decided not to accept the claim for registration.

Item 108 - Paragraph 193(1)(c)

1.350 Item 108 would repeal paragraph 193(1)(c) and is consequential to the changes in item 109. The amendment removes the requirement that the National Native Title Register *must* include 'other determinations of, or in relation to, native title in decisions of courts or tribunals'. Instead, item 109 makes this to be a discretionary requirement. This is appropriate because the scope of the requirement is unclear, and there is no requirement for courts or tribunals generally to inform the Registrar of potentially relevant determinations.

Item 109 – Paragraph 193(5)

1.351 Item 109 would create proposed subsection 193(5), which would give the Registrar discretion to include information about other determinations of, or in relation to, native title decisions of courts or tribunals on the National Native Title Register. This was previously a mandatory requirement under paragraph 193(1)(c), which would be deleted by item 108.

Item 110 - Subsection 199(2)

1.352 Item 110 would amend the definition of 'relevant land titles office' in section 199. Section 199 is intended to ensure State and Territory land titles officers are informed of any native title determination in their jurisdiction. Existing subsection 199(2) contemplates regulations prescribing the bodies responsible for keeping a register of real estate interests in each jurisdiction. No such regulations have been made. The proposed amendment would remove the requirement that regulations prescribe the bodies responsible for keeping a register of real estate interests in each jurisdiction. The broad obligation for the Registrar to inform the 'relevant land titles office' in each jurisdiction will be retained.

Item 111 – Subsection 199B(3)

1.353 This item is a consequential amendment to the amendment of paragraph 24BH(1)(a) in item 7.

Item 112 – Subparagraph 199C(1)(c)(i)

1.354 Item 112 would repeal and replace subparagraph 199C(1)(c)(i). The amendment would clarify that the Registrar is to remove an expired ILUA from the Register of ILUAs when the Registrar is advised by the parties in writing and believes on reasonable grounds that the agreement has expired. Currently, the Registrar is

obliged to remove details of an ILUA from the Register of ILUAs if 'the agreement expires', but the existing provision does not provide any means through which the Registrar may establish that an agreement has in fact expired.

Item 113 – At the end of section 203BK

1.355 Item 113 would insert proposed subsection 203BK(4). Section 203BK provides that the NNTT may assist a representative body to perform its dispute resolution functions. Proposed subsection 203BK(4) would prohibit the NNTT from using or disclosing information gained during the provision of that assistance unless it first obtains the consent of the person who provided the information.

1.356 The NNTT is only restricted from using information that it has access to solely because it provided assistance performing dispute resolution functions. This provision does not restrict the NNTT from using or disclosing information which it could have obtained from public sources, for example, a publicly accessible register of interests in land or waters, but was in fact obtained from the parties during the course of providing assistance. The provision would also not restrict the NNTT from using or disclosing information for the purpose of providing the assistance under section 203BK. It would only prohibit the NNTT from using or disclosing that information for other purposes.

1.357 Proposed subsection 203BK(4) would ensure that information obtained by the NNTT during the course of providing assistance in dispute resolution is not used inappropriately, and would provide comfort to persons who seek assistance from the NNTT.

1.358 Items 5, 16, 20, 25, 30, 57, 66, 68 and 89 would make similar amendments restricting the NNTT from using or disclosing information obtained during the course of performing its functions.

Item 114 – Section 222 (after the table item dealing with subject to section 24FA protection)

1.359 Item 114 would insert 'subsection 24DJ(1) objection application' in the list of definitions in section 222.

Item 115 – Subsection 222(3) (note)

1.360 Item 115 would make a consequential amendment to the note in subsection 222(3) which was missed in the amendments made to the Native Title Act in 1998. The note refers to the concept of 'permissible' future acts, which was replaced by 'valid' future acts in the 1998 amendments.

Item 116 – Section 253 (definition of right to negotiate application*)*

1.361 Item 116 would replace an incorrect reference to paragraph 139(1)(b) with a reference to subsection 139(b).

Item 117 – section 253

1.362 This item inserts a definition of 'subsection 24DJ(1) objection application' into section 253.

Native Title Amendment Act 2007

Item 118 – Subitem 89(3) of Schedule 2

1.363 Item 118 would repeal and replace subitem 89(3) of Schedule 2 of the Native Title Amendment Act. This is a transitional provision, providing for implementation of changes made by the Native Title Amendment Bill 2006 (which if passed will become the Native Title Amendment Act).

1.364 Item 89 of the Native Title Amendment Bill 2006 would require the Registrar to reconsider all unregistered claims where the application that made the claim was filed after the 1998 amendments to the Native Title Act. Subitem 89(3) would require the Registrar to consider claims where a section 29 notice (or a notice given under an equivalent provision of a State or Territory law) was given by the end of four months after the notice is given. This reflects provisions that generally apply to the application of the registration test by the Registrar under section 190A.

1.365 Item 118 would repeal and replace subitem 89(3) as a result of amendments made to section 190A (see item 101). Proposed subsection 190A(2) would require the Registrar to consider claims affected by a notice given under paragraph 24MD(6B)(c), section 29 or under an equivalent provision of a State or Territory law within certain time periods. Item 118 would apply this change to the transitional provisions in subitem 89(3) contained in the Native Title Amendment Bill 2006.

Item 119 – Subitem 90(3) of Schedule 2

1.366 Item 119 would repeal and replace subitem 90(3) of Schedule 2 of the Native Title Amendment Act. This is a transitional provision, providing for implementation of changes made by the Native Title Amendment Bill 2006 (which if passed will become the Native Title Amendment Act)

1.367 Item 89 of the Native Title Amendment Bill 2006 would require the Registrar to apply or reapply the registration test to certain claims where the application that made the claim was filed before the 1998 amendments to the Native Title Act. Subitem 90(3) would require the Registrar to consider claims where a section 29 notice (or a notice given under an equivalent provision of a State or Territory law) by the end of four months after the notice is given. This reflects provisions that generally apply to the application of the registration test by the Registrar under section 190A.

1.368 Item 119 would repeal and replace subitem 90(3) as a result of amendments made to section 190A (see item 101). Proposed subsection 190A(2) would require the Registrar to consider claims affected by a notice given under paragraph 24MD(6B)(c), section 29 or under an equivalent provision of a State or Territory law within certain time periods. Item 119 would apply this change to the transitional provisions in subitem 89(3) contained in the Native Title Amendment Bill 2006.

Part 2—Application and other provisions

1.369 Part 2 of the Schedule sets out the application and other provisions for Schedule 1.

Item 120 – Definition

1.370 Item 120 would define terms for the purpose of Part 2 of Schedule 1. The 'commencing day' is defined as the day on which Schedule 1 commences (which will be on Proclamation or six months after the bill receives Royal Assent). The 'Principal Act' is defined as the Native Title Act.

Item 121 – Applications of items 7 to 13 and items 18, 19, 27, 28 and 111

1.371 Items 7 to 13 and items 18, 19, 27, 28 and 111 would make amendments to the requirements for the Registrar to give notice about ILUAs. Item 121 would make clear that these amendments apply to notices given on or after the commencing day.

Item 122 – Application of items 4, 5, 15, 16, 20, 24, 25, 30, 57, 66, 67, 68, 89 and 113

1.372 Items 4, 5, 15, 16, 20, 24, 25, 30, 57, 66, 67, 68, 89 and 113 would make amendments restricting the NNTT from using or disclosing certain information. Item 122 would make clear that these amendments apply to the use or disclosure of information on or after the commencing day, regardless of whether the information was obtained or the assistance in question provided on or after the commencing day.

Item 123 – Application of items 22, 23, 31, 32, 78, 84, 97, 98, 99, 101, 102, 103, 104 and 107

1.373 Items 22, 23, 31, 32, 78, 84, 97, 98, 99, 101, 102, 103, 104 and 107 would make amendments to the provisions requiring the Registrar to apply the registration test to claims and providing for review of registration decisions by the Registrar and the Court. Item 123 would make clear that these amendments apply in relation to claims in a claimant application made under section 63 and amended claims made under subsection 64(4) made on or after commencement day.

Item 124 – Application of item 33

1.374 Item 33 would amend the provision relating to permissible renewals by providing that multiple grants being renewed by a single grant are permissible renewals for the purposes of Subdivision I of Division 3 of Part 2. Item 124 would make clear that this amendment applies in relation to a single lease, licence, permit or authority granted on or after the commencing day.

Item 125 – Application of items 36, 37, 39, 40, 44, 45, 47, 48, 50, 51, 53 and 54

1.375 Items 36, 37, 39, 40, 44, 45, 47, 48, 50, 51, 53 and 54 would make amendments to the requirements to give notice or do certain things. These amendments will enable notice to be given to native title claimants or representative bodies where there has been a determination of native title, but a PBC is yet to be

established. Item 125 would make clear that these amendments apply in relation to notices given or things done on or after the commencing day.

Item 126 – Application of item 42

1.376 Item 42 would amend the notification requirements under paragraph 24MD(6B)(c). Item 126 would make clear that this amendment applies to notices given under paragraph 24MD(6B)(c) on or after the commencing day.

Item 127 – Applications of amendments made by items 62 and 63

1.377 Item 127 would ensure that the amendments made by items 62 and 63 apply to the making of determinations on or after the commencing day, and to the Commonwealth Minister's consideration of whether or not to revoke a determination on or after the commencing day, whether the determination was made before, on or after the commencement of the Schedule. However, this item does not apply to the existing South Australian determinations made in relation to mining and opal mining which are dealt with in item 138 of the Schedule.

Item 128 – Application of items 71 to 74

1.378 Items 71 to 74 would make amendments to the requirements for the making of a claimant application. Item 128 would make clear that these amendments apply in relation to claimant applications made on or after the commencing day.

Item 129 – Application of item 76

1.379 Item 76 would make an amendment to the requirements for the making of a compensation application. Item 129 would make clear that this amendment applies in relation to compensation applications made on or after the commencing day.

Item 130 – Application of item 80

1.380 Item 80 would amend the requirement for the Registrar to give notice of applications. Item 130 would make clear that this amendment applies in relation to applications given to the Registrar under paragraph 66(3)(a) of the Native Title Act on or after the commencing day.

Item 131 – Application of item 81

1.381 Item 81 would amend the requirement for the Registrar to give notice of amended applications. Item 131 would make clear this amendment applies in relation to applications given to the Registrar under section 64 on or after the commencing day.

Item 132 – Application of item 82

1.382 Item 82 would amend the provisions enabling an application to replace the applicant in a compensation or claimant application. Item 132 would make clear that this amendment applies in relation to claimant applications or compensation applications whether made before or after the commencing day.

Item 133 – Application of item 88

1.383 Item 88 would make amendments about possible defects in authorisation of an application. Item 133 would make clear that these amendments apply in relation to an application made under section 61 if the person or persons making the application were required to be authorised under the Native Title Act when the application was made.

Item 134 – Application of item 91

1.384 Item 91 would make amendments to section 87A. Section 87A would be inserted by item 35 of Schedule 2 of the Native Title Amendment Bill 2006. Item 134 would make clear that the amendments in item 91 apply in relation to applications made under section 61 of the Native Title Act, regardless of whether the application is made before or after the commencing day. This would be consistent with the application provisions for item 35 of Schedule 2 of the Native Title Amendment Bill 2006.

Item 135 – Application of item 92

1.385 Item 92 would make an amendment in relation to the constitution of the NNTT when hearing an inquiry into an objection to registration of an ILUA. Item 135 would make clear this amendment applies to inquiries that begin on or after the commencing day.

Item 136 – Effect of amendments of sections 190A to 190D of the Principal Act on transitional arrangements in the Native Title Amendment Act 2007

1.386 Items 89 and 90 of the Native Title Amendment Bill 2006 set out transitional arrangements requiring the Registrar to reconsider various claims for registration. Item 136 is an avoidance of doubt provision, which would make clear that various amendments to sections 190A to 190D of the Native Title Act are to be disregarded for the purposes of items 89 and 90 of the Native Title Amendment Act.

Item 137 – Application of amendments made by items 118 and 119

1.387 Items 118 and 119 would make amendments to the transitional process set out in items 89 and 90 of the Native Title Amendment Bill 2006. Item 137 would make clear that these amendments only apply where a notice referred to in those subitems is made on or after the commencing day.

Items 138 to 139 - Alternative State Regimes

1.388 Section 43 enables a State or Territory to establish right to negotiate procedures which operate to the exclusion of the provisions in the Native Title Act where the Commonwealth Minister is satisfied the alternative provisions meet statutory criteria set out in subsection 43(2). The key amendments put beyond doubt the validity of the current South Australian section 43 determinations in relation to mining and opal mining (made in 1995 and 1997 respectively) which had the effect of replacing the Native Title Act right to negotiate provisions with a right to negotiate regime under South Australian legislation. The amendments also provide that the

inclusion in State or Territory legislation of conjunctive agreement/determination provisions or expedited procedure provisions of the kind included in the Native Title Act would not in the future preclude the Commonwealth Minister from making a determination under section 43.

Item 138 – Validation of certain pre-commencement determinations in relation to South Australian alternative provisions etc.

1.389 Subitem 138(1) would provide that, to avoid any doubt, the determinations made by the then Commonwealth Minister on 18 October 1995 in relation to alternative provisions contained in the *Mining Act 1971* (Mining Act) of South Australia, and the determination made by the then Commonwealth Minister on 16 April 1997 in relation to alternative provisions contained in the *Opal Mining Act 1995* (Opal Mining Act) of South Australia are, and always have been, valid.

1.390 Subitems 138(2) and 138(4) would provide that, for the purposes of the Commonwealth Minister's consideration under subsection 43(3) in relation to alternative provisions contained in the Mining Act or the Opal Mining Act, references to conjunctive agreement/determination provisions or expedited procedure provisions in the new subsection 43(2A) include a reference to umbrella provisions. This is to ensure that the umbrella provisions contained in those alternative provisions at the time the determinations were made are preserved, so long as they remain in substantially the same form.

1.391 The effect of subitems 138(2) and 138(4) would be that if South Australia amends the alternative provisions the subject of the determinations listed in sub-item 138(1), the Commonwealth Minister will assess the compliance of the amended provisions with subsection 43(2), including as affected by subsection 43(2A), to decide whether the determination must be revoked. Regardless of whether the alternative provisions included conjunctive agreement/determination provisions, expedited procedure provisions or umbrella provisions at the time the determination was made or at any time afterwards, the inclusion of such provisions would not prevent the Commonwealth Minister being of the opinion that the alternative provisions comply with subsection 43(2). Notwithstanding the validation of the relevant determinations, these amendments are necessary to ensure the revocation provision under section 43 of the Native Title Act can, into the future, work effectively and in the manner that was intended.

1.392 Subitem 138(3) would define "Mining Act umbrella provisions" for the purposes of sub-item 138(2). Subitem 138(5) would define "Opal Mining Act umbrella provisions" for the purposes of subitem 138(4).

Item 139 – Entitlement to "just terms" compensation

1.393 Item 139 would ensure that the provisions of paragraph 51(xxxi) of the Commonwealth Constitution are complied with in relation to any possible acquisition of property of a person as a result of item 138, and in addition confers jurisdiction upon the Court in relation to any such matter.

Schedule 2—Representative Aboriginal/Torres Strait Islander Bodies

Overview

Schedule 2 of the Bill will further amend provisions governing representative bodies. These amendments are in addition to those proposed to be made by the Native Title Amendment Bill 2006, which will introduce a new regime for representative bodies. Schedule 2 of the Bill includes measures to:

- repeal inoperative provisions
- ensure that representative bodies are not subject to provisions of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) which reflect obligations already imposed by their incorporation statutes
- improve the process for reviewing decisions by representative bodies not to provide assistance to Aboriginal or Torres Strait Islander persons, and
- simplify and clarify provisions dealing with the transfer of documents and records from a former representative body to its replacement.

Part 1—Amendments

Item 1 – Section 201A (definition of exempt State body)

2.1 This item repeals the definition of exempt State body in section 201A. An exempt State body is a State statutory authority which represents the interests of, or acts on behalf of, Aboriginal or Torres Strait Islander peoples. Existing subsection 203AD(3) provides that the Commonwealth Minister must not recognise an exempt State body as a representative body unless satisfied about certain matters.

2.2 The 1998 amendments to the Native Title Act provided for bodies that were representative bodies under the original Act to be eligible for recognition as representative bodies under the current regime (see existing paragraph 201B(1)(b)). Some of these bodies were exempt State bodies.

2.3 The only bodies that will, in the future, be recognised as representative bodies are bodies incorporated under the *Aboriginal Councils and Associations Act 1976* (ACA Act) whose objects allow them to perform representative body functions (see existing paragraph 201B(1)(a)), bodies incorporated under the *Corporations Act 2001* (Corporations Act) (see the proposed amendment to subsection 201B(1) in item 5 of Schedule 1 of the Native Title Amendment Bill 2006) and any existing representative body that was a representative body before the current regime commenced (see existing paragraph 201B(1)(b)). No existing representative bodies are exempt State bodies. References to exempt State bodies in Part 11 will therefore be removed. (See also items 2, 3 and 4).

Item 2 – Subsection 203AD(3)

2.4 This item removes the reference to exempt State bodies in subsection 203AD(3). (See discussion under item 1).

Item 3 – Subsection 203CB(3)

2.5 This item removes the reference to exempt State bodies in paragraph 203CB(3)(b). (See discussion under item 1).

Item 4 – Division 6 of Part 11

General

2.6 This item will repeal and replace Division 6 of Part 11. This Division deals with the application of the CAC Act to representative bodies.

2.7 Existing section 203EA applies certain provisions of the CAC Act (the applied provisions) to representative bodies. These provisions deal with conduct of officers (the applied conduct of officers provisions (in Division 4 of Part 3 of the CAC Act)), restrictions on indemnities and insurance for officers (the applied indemnity and insurance provisions (in Division 4A of Part 3 of the CAC Act)), and civil consequences of contravening civil penalty provisions (the applied civil penalty provisions (in Schedule 2 of the CAC Act)). Existing section 203EB applies a modified version of provisions of the CAC Act that deal with directors' material personal interests.

Section 203E

2.8 Proposed section 203E re-enacts existing subsection 203E(1) which provides that Division 6 of Part 11 does not apply to anything that is not related to the performance of representative body functions or the exercise of representative body powers. Existing subsection 203E(2) will be repealed as at refers to exempt State bodies (see discussion under item 1).

Subsection 203EA(1)

2.9 The effect of proposed subsection 203EA(1) is that new section 203EA (which will deal with matters presently dealt with in existing sections 203EA and 203EB) will not apply to representative bodies that are registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) or incorporated under the Corporations Act.

2.10 Most representative bodies are incorporated under the ACA Act which will be replaced by the CATSI Act when that Act commences on 1 July 2007.

2.11 The CATSI Act includes provisions which reflect the applied conduct of officer provisions and the applied civil penalty provisions. From 1 July 2007, representative bodies registered under the CATSI Act would thus be subject to two sets of similar provisions covering these matters. Proposed paragraph 203EA(1)(a) will ensure that this does not occur. The application of the CAC Act to representative bodies registered under CATSI will be dealt with separately in proposed section 203EB.

2.12 As with other provisions in item 4, this provision will commence on 1 July 2007 to coincide with the commencement of the CATSI Act.

2.13 The Native Title Amendment Bill 2006 will allow bodies incorporated under the Corporations Act to be eligible for recognition as representative bodies (see the proposed amendment to subsection 201B(1) in item 5 of Schedule 1 of that Bill).

2.14 The Corporations Act includes provisions which reflect all of the applied provisions. Any future representative body incorporated under the Corporations Act would therefore be subject to two sets of similar provisions covering conduct of officers, restrictions on indemnities and insurance for officers and civil consequences of contravening a civil penalty provision. Proposed paragraph 203EA(1)(b) will therefore ensure that representative bodies incorporated under the Corporations Act are not subject to any of the applied provisions.

Subsections 203EA(2) and (3)

2.15 Matters currently dealt with in sections 203EA and 203EB will now be dealt with in proposed subsections 203EA(2) and (3).

2.16 After sections 203EA and 203EB were enacted, the applied provisions were repealed and replaced by the *Corporate Law Economic Reform Program Act 1999*. However, consequential amendments were not made to sections 203EA and 203EB. Item 4 therefore ensures that proposed section 203EA refers to current provisions of the CAC Act which are referable to the original applied provisions. The reference in existing section 203EA to Division 4 of Part 3 of the CAC Act will now be to Divisions 4 and 4A of Part 3 of the CAC Act. Apart from certain excluded provisions (see following), Divisions 4 and 4A of Part 3 and Schedule 2 of the CAC Act will now be applied. Section 203EA presently excludes clauses 8 and 12 of Schedule 2 of the former CAC Act. The reference to these clauses will be replaced by a reference to section 27C of the CAC Act. The effect of current section 203EB will be replicated by excluding the application of sections 27J and 27K of the CAC Act and substituting the modified version of those provisions presently applied by section 203EB in proposed subsection 203EA(3).

Section 203EB

2.17 As noted above, the CATSI Act includes provisions which reflect the applied conduct of officer provisions (in Division 4 of Part 3 of the CAC Act) and the applied civil penalty provisions (in Schedule 2 of the CAC Act). However, it does not include provisions akin to the applied indemnity and insurance provisions (in Division 4A of Part 3 of the CAC Act). Proposed section 203EB will therefore allow for these provisions to continue to apply to representative bodies registered under the CATSI Act. However, references in these provisions to applied civil penalty provisions (which will no longer be applied) will instead refer to equivalent provisions of the CATSI Act.

Section 203EC

2.18 Proposed section 203EC re-enacts the existing section which ensures that sections 203EA and 203EB do not affect the application of the CAC Act to bodies that are Commonwealth authorities.

Item 5 – Section 203FB

General

2.19 This item will repeal existing section 203FB and replace it with proposed sections 203FB, 203FBA and 203FBB.

2.20 Existing section 203FB allows for an Aboriginal or Torres Strait Islander person affected by a representative body's decision not to assist him or her in the performance of its facilitation and assistance functions to apply to the Secretary of the Department of Families, Community Services and Indigenous Affairs (the Secretary) for a review of the decision. A number of amendments are proposed to ensure that the process for reviewing assistance decisions is more transparent, efficient and timely.

Section 203FB

2.21 Proposed subsection 203FB(1) re-enacts the existing subsection. Proposed subsection 203FB(2) deals with who may conduct a review. Under existing subsection 203FB(2), the Secretary *must* appoint an external expert to conduct the review. Proposed paragraph 203FB(2)(a) would also allow the Secretary to review assistance decisions. It is envisaged that this option would be used where a request for a review raises less complex issues. The Secretary will retain the ability to appoint an external expert where more complex issues arise (proposed paragraph 203FB(2)(b)).

Section 203FBA

2.22 Proposed section 203FBA deals with reviews conducted by an external expert (proposed subsection 203FBA(1)).

2.23 Proposed subsection 203FBA(2) re-enacts existing subsection 203FB(3). It requires the external expert to recommend to the Secretary that the representative body's decision be affirmed, or that funding be provided under existing section 203FE for the matter to which the representative body's decision relates.

2.24 Proposed subsection 203FBA(3) lists the following matters that the external expert must have regard to in reviewing a representative body's decision:

- Whether providing assistance would be consistent with the representative body's priorities (proposed paragraph 203FBA(3)(a)). This reflects existing paragraph 203B(4)(a) which requires representative bodies to determine the priorities they will give to performing their functions.

- Whether providing the assistance would require the representative body to allocate or re-allocate its resources in a way that interferes with the efficient performance of its functions (proposed paragraph 203FBA(3)(b)). This reflects existing

paragraph 203B(4)(b) which allows representative bodies to allocate their resources as they think fit in order to perform their functions efficiently.

- Whether the representative body would breach a funding condition if it provided the assistance (proposed paragraph 203FBA(3)(c)). This reflects section 203CA which deals with conditions on funding provided to representative bodies.

- Whether providing assistance in relation to a section 61 application (that is, a native title determination application, a revised native title determination application or a compensation application) would promote an orderly, efficient and cost-effective process for making such applications (proposed subparagraph 203FBA(d)(i)). This reflects existing paragraph 203BC(3)(a) which requires representative bodies, in performing certain functions in relation to section 61 applications, to promote an orderly, efficient and cost-effective process for making such applications.

- Where other section 61 applications have been made or are proposed to be made in relation to land or waters covered by the application for assistance, whether providing assistance would be reasonable given the need to minimise the number of applications covering the land and waters (proposed subparagraph 203FBA(d)(ii)). This reflects existing paragraph 203BC(3)(b) which requires representative bodies, in performing certain functions in relation to section 61 applications, to make all reasonable efforts to minimise overlapping applications.

2.25 An external reviewer would already need to take the above matters into account. However, this is not well understood by people who apply to have assistance decisions reviewed. Proposed subsection 203FBA(3) is thus intended to ensure that people seeking reviews of assistance decisions understand the context in which representative bodies must decide whether to provide assistance, and the basis on which reviews of assistance decisions are conducted.

2.26 Existing subsection 203FB(4) provides that an external expert *may* refuse to conduct a review if the applicant has not made all reasonable efforts to seek an internal review by the representative body of its decision. Proposed subsection 203FBA(4) will provide that the external expert *must* refuse to review the decision under these circumstances. This will maximise the opportunity for disagreements about assistance to be resolved between the person seeking assistance and the representative body.

2.27 Existing subsection 203FB(5) provides that the external expert must report to the Secretary within 3 months of their appointment. Proposed subsection 203FBA(5) reduces this time to 60 days. This is consistent with other changes to time-limits in Part 11 proposed to be implemented by the Native Title Amendment Bill 2006.

2.28 Proposed subsection 203FBA(6) re-enacts existing subsection 203FB(6), which requires the external expert to invite submissions from representative bodies about the decision under review.

2.29 Proposed subsection 203FBA(7) re-enacts existing subsection 203FB(7). It requires the Secretary, following receipt of an external expert's report, to affirm the

representative body's decision or provide funding under existing section 203FE for the matter to which the representative body's decision relates.

2.30 Proposed subsection 203FBA(8) re-enacts existing subsection 203FB(8) which requires the Secretary to notify the applicant and the representative body of the outcome of a review.

203FBB

2.31 Proposed section 203FBB will provide for reviews by the Secretary to be conducted on the same bases as reviews by an external expert.

Item 6 – Subsection 203FC(2)

2.32 This item amends subsection 203FC(2) which deals with the transfer of documents and records from a former representative body to its replacement.

2.33 Existing section 203FC allows the Commonwealth Minister to issue directions requiring a former representative body to transfer documents and records to a replacement representative body where the replacement representative body needs these materials to perform its functions. Existing subsection 203FC(2) provides that where materials relate to a claim in a claimant application or a compensation application, or to determined native title rights and interests, directions may not require these materials to be transferred unless the relevant native title claimants or holders have asked the replacement representative body to assist them in relation to that claim or those rights and interests.

2.34 Proposed subsection 203FC(2) will provide that for materials that relate to a claim in a claimant application or a compensation application, directions may not require these materials to be transferred unless the replacement representative body advises the Minister in writing that it has been requested to perform a representative body function in relation to the claim.

2.35 Proposed subsection 203FC(2A) will provide that for materials that relate to determined native title rights and interests, directions may not require these materials to be transferred unless the replacement representative body advises the Minister in writing that it has been requested to perform a representative body function in relation to those rights and interests.

2.36 This would allow for the replacement representative body, rather than the Minister, to judge whether a request for assistance reflects the wishes of the relevant group of people. Representative bodies are best placed to make this judgment and make similar decisions when deciding to provide assistance in other contexts (see existing subsection 203BB(2) which provides that a representative body must not perform its facilitation and assistance functions in relation to a particular matter unless it is requested to do so).

2.37 Proposed paragraph 203FEA(3)(c) and proposed subsections 203FEA(1) and (2) (in item 45 of Schedule 1 of the Native Title Amendment Bill 2006) would operate to ensure that references to a replacement representative body and a former representative body in proposed subsections 203FC(2) and (2A) apply to bodies

funded under subsection 203FE(1) and bodies formerly funded under that subsection. For example, directions could require the transfer of materials under proposed subsection 203FC(2) if a body funded under subsection 203FE(1) to perform representative body functions for a former representative body's area advised the Minister in writing that it has been requested to perform a representative body function in relation to a claim

Item 7 – After subsection 203FC(4)

2.38 The item inserts proposed subsection 203FC(4A) which would ensure that a former representative body that is under external administration can still be made subject to directions issued under subsection 203FC(1).

Item 8 – Subsection 203FE(2)

2.39 This item makes a consequential amendment to subsection 203FE(2) as a result of the amendments to be made by item 5.

Item 9 – Section 203FI

2.40 Existing section 203FI allows the Secretary to delegate certain powers under Part 11 of the Native Title Act to senior Departmental officers. This item will allow the Secretary to delegate powers in proposed sections 203FBA and 203FBB (which deal with reviews of decisions by representative bodies not to assist an Aboriginal or Torres Strait Islander person).

Part 2—Application provisions

Item 10 – Application of item 4

2.41 This item provides that the amendment made by item 4 (which deals with the application of the CAC Act to representative bodies) applies in relation to conduct that occurs on or after the day on which the item commences (which will be 1 July 2007).

Item 11 – Application of item 5

2.42 This item provides that the amendment made by item 5 (which deals with reviews of decisions by representative bodies not to assist an Aboriginal or Torres Strait Islander person) applies to applications for review made on or after the day on which the item commences (which will be the day after the proposed Act receives Royal Assent).

Item 12 – Application of item 6

2.43 This item provides that the amendment made by item 6 (which deals with directions regarding the transfer of documents and records from a former representative body to its replacement) applies to directions issued on or after the day on which the item commences (which will be the day after the proposed Act receives Royal Assent).

Schedule 3—Amendments relating to Prescribed Bodies Corporate

Overview

When it makes a determination that native title exists, the Court must:

- Under paragraph 56(2)(b), determine a PBC to hold the native title rights and interests in trust for the common law native title holders (common law holders). These PBCs are referred to in this explanatory memorandum as trust PBCs, or

- Under paragraph 56(2)(c), determine that the common law holders hold the rights and interests. Under subsection 57(2), the Court must also in this case determine the PBC which, after becoming a RNTBC, is to perform the functions mentioned in subsection 57(3). These PBCs are referred to in this explanatory memorandum as agent PBCs. (A definition of agent PBC is proposed to be inserted by item 4 of Schedule 3 of the Native Title Amendment Bill 2006).

A PBC becomes a RNTBC when its details are entered on the National Native Title Register (see existing sections 193 and 253).

Schedule 3 of the Bill includes measures designed to:

- ensure that regulations can provide for the replacement of PBCs at the initiation of the common law holders under all possible circumstances, and

- implement two recommendations made in the PBC Report. The PBC Report was released by the Attorney-General and the Minister for Families, Community Services and Indigenous Affairs in October 2006. The Australian Government has accepted all of the PBC Report's recommendations.

<u>Replacement of PBCs at the initiation of the common law holders</u>

The Native Title Act envisages that regulations may provide for the replacement of PBCs at the initiation of the common law holders (see existing subsection 56(4), which would allow for the replacement of a trust PBC by another trust PBC, and section 60, which would allow for the replacement of an agent PBC by another agent PBC). However, existing regulation making powers would or may not allow an agent PBC to be replaced by a trust PBC, or a trust PBC to be replaced by an agent PBC. Further, they would or may not allow an agent PBC to become a trust PBC (that is, to change its functions from those of an agent PBC to those of a trust PBC), or a trust PBC to become an agent PBC (that is, to change its functions from those of a trust PBC to those of an agent PBC). Items 1 – 6 will remedy these deficiencies.

<u>PBC Report's recommendations</u>

The PBC Report's recommendations included measures to achieve the following broad outcomes:

- improve the ability of PBCs to access and utilise existing sources of assistance, including from representative bodies

- improve the flexibility of the PBC governance regime to accommodate the specific interests and circumstances of the common law holders

- better align existing sources of potential assistance with PBC needs, and

- encourage State and Territory government involvement in addressing PBC needs.

Most of the PBC Report's recommendations will be implemented administratively or through regulations made under existing powers in the Native Title Act. Two recommendations are proposed to be implemented by the Native Title Amendment Bill 2006. Schedule 3 of the Bill would implement two further recommendations

Recommendation 11 – cost-recovery by PBCs

The PBC Report's recommendation 11 was that the Native Title Act should be amended to authorise a PBC to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the Native Title Act or Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations) at the request of the third party. It also recommended that the amendments should provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred. Item 7 will implement this recommendation.

Recommendation 15 – 'default' PBCs

The PBC Report's recommendation 15 was that the Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. It also recommended that the [then] Office of Indigenous Policy Coordination should develop a comprehensive proposal for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.

A proposal has now been developed under which a particular government funded body or bodies (a default PBC) could perform the functions of an agent PBC (but not those of a trust PBC) in relation to determined native title rights and interests under the following circumstances:

- Where the common law holders fail to nominate a PBC in conjunction with a native title determination. The effect of existing paragraph 57(2)(c) is that under these circumstances, the Court must, in accordance with the regulations, determine which prescribed body is to perform the functions of an agent PBC. Existing section 59 allows for the regulations to prescribe the *kinds* of bodies corporate that may be determined under section 56 or 57. However, it would not allow for the prescription of particular bodies. Item 5 will amend section 59 so that a default PBC (as well as kinds of bodies corporate) can be prescribed for the purposes of paragraph 57(2)(c) (proposed subsection 59(2)).

- Where a liquidator is appointed to a PBC. This will be achieved by regulations made under proposed subparagraphs 56(4)(d)(ii) and 60(a)(ii) and related provisions (see below).

- At the initiation of the common law holders. This would be achieved by proposed regulation making powers that cover the replacement of an agent PBC or a trust PBC by an agent PBC at the initiation of the common law holders (see below).

The circumstances in which the common law holders may 'transfer out' of a default PBC and replace it with a new PBC will be specified by regulation. This would be achieved through proposed regulation making powers that cover the replacement of agent PBCs by trust PBCs or agent PBCs at the initiation of the common law holders (see below).

Part 1—Amendments

Native Title Act 1993

Item 1 – Subsection 56(4)

3.1 This item will repeal and replace existing subsection 56(4).

3.2 Proposed paragraph 56(4)(a) re-enacts existing paragraphs 56(4)(a) – (d) and (f) which allow regulations to provide for certain matters relating to the holding in trust of native title rights and interests. Existing paragraph 56(4)(e) allows for regulations to provide for the termination of a trust or the replacement of a trustee where the common law holders wish this to occur. These matters will now be dealt with separately in proposed paragraph 56(4)(d) and proposed paragraph 56(4)(b).

3.3 Proposed paragraph 56(4)(b) allows regulations to provide for the replacement of the trustee where the common law holders wish this to occur. This would cover replacement of a trust PBC by a new trust PBC. Proposed paragraph 56(4)(c) will allow regulations to deal with related matters, including the determination of the replacement PBC by the Court or some other person or body. Proposed paragraph 56(4)(c) also confers power to make regulations which prescribe the body corporate, or the kinds of bodies corporate, that can be determined.

3.4 Proposed subparagraph 56(4)(d)(i) allows regulations to provide for the termination of the trust under which a trust PBC holds native title rights and interests where the common law holders wish this to occur. Proposed paragraph 56(4)(e) provides for regulations to allow the Court or some other person or body to determine an agent PBC to replace the trust PBC. This would cover the replacement of a trust PBC by a new agent PBC. It would also allow regulations to provide for an existing trust PBC to become an agent PBC. Proposed paragraph 56(4)(e) also confers power to make regulations which prescribe the body corporate, or the kinds of bodies corporate, that can be determined. Proposed paragraph 56(4)(f) allows for regulations to deal with related and transitional matters.

3.5 Proposed subparagraph 56(4)(d)(ii) allows regulations to provide for the termination of the trust under which a trust PBC holds native title rights and interests

where a liquidator is appointed to the PBC. Proposed paragraph 56(4)(e) provides for regulations to allow the Court or some other body to determine an agent PBC to replace the trust PBC. These provisions would cover the replacement of a trust PBC by a default PBC (which must be an agent PBC). Proposed paragraph 56(4)(e) also confers power to make regulations which prescribe the body corporate or bodies corporate that can be determined as a default PBC. Proposed paragraph 56(4)(f) allows for regulations to deal with related and transitional matters.

Item 2 – At the end of section 56

3.6 This item will insert proposed subsection 56(7). Proposed paragraph 56(7)(a) allows regulations to provide for the Court or some other person or body to determine a trust PBC to replace an agent PBC where the common law holders wish this to occur. It would also allow regulations to provide for an existing agent PBC to become a trust PBC. Proposed paragraph 56(7)(a) also confers power to make regulations which prescribe the body corporate, or the kinds of bodies corporate that may be determined. Proposed paragraphs 56(7)(b) – (d) mirror existing paragraphs 56(4)(a) – (c) in allowing regulations to provide for certain matters relating to the holding in trust of native title rights and interests by the replacement PBC. Proposed paragraph 56(7)(e) allows for regulations to deal with related and transitional matters.

Item 3 – Paragraph 57(2)(c)

3.7 This item corrects a technical error in paragraph 57(2)(c), which refers to a ‘prescribed body’ rather than a ‘prescribed body corporate’.

Item 4 – Paragraph 58(a)

3.8 Paragraph 58(a) allows regulations to provide for a RNTBC to act as agent or representative of the common law holders if it does not hold native title on trust under section 56. A RNTBC may also hold native title on trust because it has replaced another PBC under regulations made under section 56. Item 4 therefore amends paragraph 58(a) so that it refers to holding of native title on trust under section 56 or regulations made under that section.

Item 5 - Section 59

3.9 Existing section 59 provides that the regulations may prescribe the *kinds* of bodies corporate that may be determined under section 56 or 57. As noted above, regulations under section 59 could not presently specify that a particular body corporate is to be determined under these provisions. Proposed subsection 59(1) will retain this requirement for PBCs that are determined in conjunction with the making of a native title determination (that is, the regulations will only be able to specify the kinds of bodies corporate that may be determined in this context). However, proposed subsection 59(2) will allow a particular body corporate (as well as kinds of body corporate) to be determined under paragraph 57(2)(c).

3.10 Proposed regulation making powers which will allow for the determination of a replacement PBC (paragraphs 56(4)(c), 56(4)(e), 56(7)(a) and 60(b)) are not dealt with in proposed section 59. This is because these provisions separately confer power

to make regulations which prescribe the body corporate, or the kinds of bodies corporate, that can be determined.

Item 6 – Section 60

3.11 This item will repeal and replace section 60. Proposed subparagraph 60(a)(i) and proposed paragraph 60(b) allow regulations to provide for the Court or some other person or body to determine an agent PBC to replace an agent PBC where the common law holders wish this to occur. Proposed paragraph 60(b) also confers power to make regulations which prescribe the body corporate, or the kinds of bodies corporate that may be determined. Proposed paragraphs 60(c) and (d) will allow regulations to deal with related and transitional matters.

3.12 Proposed subparagraph 60(a)(ii) and paragraph 60(b) would allow regulations to provide for the Court or some other body to determine a default PBC (which must be an agent PBC) to replace an agent PBC where a liquidator is appointed to the PBC. Proposed paragraph 60(b) also confers power to make regulations which prescribe the particular body corporate, or bodies corporate, that may be determined. Proposed paragraphs 60(c) and (d) will allow regulations to deal with related and transitional matters.

Item 7 – At the end of Part 2

3.13 This item inserts proposed sections 60AB and 60AC which deal with fees for services provided by RNTBCs, and the giving of opinions about these fees by the Registrar of Aboriginal Corporations (the Registrar). These sections will commence on 1 July 2008.

<u>Section 60AB</u>

3.14 Proposed subsection 60AB(1) allows a RNTBC to charge a person, other than a person mentioned in subsection 60AB(4), a fee for costs it incurs in: negotiating a 'right to negotiate' agreement (proposed paragraph 60AB(1)(a)); negotiating an agreement under alternative State or Territory provisions which replace the right to negotiate (proposed paragraph 60AB(1)(b)); or negotiating an ILUA (proposed paragraph 60AB(1)(c)).

3.15 Proposed subsection 60AB(2) allows regulations to provide for a RNTBC to charge a person, other than a person mentioned in subsection 60AB(4), a fee for costs it incurs in performing other functions.

3.16 Proposed subsection 60AB(3) provides that fees charged by RNTBCs must not be such as to amount to taxation (as this would be unconstitutional). A fee will not amount to a tax if it is imposed in respect of a service delivered to the persons required to pay the fee.

3.17 Proposed subsection 60AB(4) provides that a RNTBC cannot charge the following a fee: the common law holders for whom it is the RNTBC; another RNTBC; a representative body; a native title claimant for an area affected by an act to which negotiations mentioned in subsection 60AB(1) relate; or a native title claimant for an area proposed to be covered by an ILUA.

3.18 Proposed paragraph 60AB(5)(a) ensures that RNTBCs cannot charge fees for costs incurred as a party to proceedings or inquiries used to break a deadlock in negotiations mentioned in paragraphs 60AB(1)(a) or (b). This would primarily cover inquiries by the National Native Title Tribunal (NNTT) following an application for an arbitral body determination under existing section 35 (which may result in a determination about whether an act can be done, or done subject to conditions (see existing subsection 38(1)). It would also cover inquiries where the NNTT is not the arbitral body, or where determinations about whether an act can be done, or done subject to conditions, are made under alternative State or Territory provisions.

3.19 Proposed paragraph 60AB(5)(b) will also prevent RNTBCs from charging fees for participating in court proceedings (whether or not these proceedings are contemplated by the Native Title Act). Proposed paragraph 60AB(5)(c) allows regulations to prescribe other circumstances in which fees may not charged.

Section 60AC

3.20 Proposed section 60AC will allow persons who a RNTBC charges a fee to seek an opinion from the Registrar about whether the fee can be charged under section 60AB. An opinion could only be sought in relation to proposed fees, not fees that have already been paid. Proposed section 60AC will allow the Registrar to give an opinion about whether or not a proposed fee would exceed what is permitted by proposed section 60AB, in particular subsection 60AB(3). This subsection provides that fees charged by RNTBCs must not amount to taxation. For fees to avoid being a tax, they must be imposed in respect of a service delivered to the persons required to pay the fee.

3.21 Proposed subsection 60AC(1) allows a person who a RNTBC proposes to charge a fee to request an opinion. Proposed subsection 60AC(2) allows for the Registrar to provide an opinion. Proposed subsection 60AC(3) provides that if the Registrar's opinion is that the fee may not be charged under section 60AB, the RNTBC must withdraw the charge. Proposed subsection 60AC(4) provides that the Registrar's opinion is not a legislative instrument. Proposed subsection 60AB(5) allows regulations to provide for the circumstances in which the Registrar may decline to give an opinion, the process by which requests for an opinion are made and considered, the withholding of payment of fees where an opinion has been requested, and related matters.

Item 8 – At the end of section 193

3.22 Existing section 193 details the information that must be included on the National Native Title Register (the Register) maintained by the Registrar. This information includes information about PBCs. This item will insert proposed subsection 193(4) which will require the Registrar to update the Register where a PBC is replaced by another PBC or changes its functions.

Item 9 – Section 197

3.23 This item will repeal and replace section 197. Section 197 provides that the Registrar must include in the Register details of determinations and decisions covered by subsection 193(1). Proposed subsection 197(1) re-enacts the existing section.

Proposed subsection 197(2) will require the Registrar to update the Register in accordance with proposed subsection 193(4) in item 8.

Item 10 – Section 253 (paragraph (b) of the definition of agent prescribed body corporate)

3.24 This item will amend the definition of agent prescribed body corporate which is proposed to be inserted by the Native Title Amendment Bill 2006. The amendment reflects the proposed amendments to subsection 56(4) in item 1.

Part 2—Transitional provisions

Item 11 – Application of items 5 and 6

3.25 This item ensures that the amendments proposed to be made by items 5 and 6 do not affect regulations made under sections 59 or 60 that were in force before the commencement of Schedule 3 or are in force after Schedule 3 commences. It also ensures that anything done under such regulations is not affected and that the power to amend or repeal such regulations is not affected.

Item 12 – Application of item 7

3.26 This item provides that the amendment made by item 7 (which deals with fees for services provided by RNTBCs, and the giving of opinions about these fees by the Registrar) apply in relation to functions performed on of after commencing day (which will be 1 July 2008). If negotiations regarding a particular future act or ILUA have already commenced, RNTBCs will only be able to charge fees for costs they propose to incur with respect to these negotiations from commencing day.

Schedule 4—Technical amendments relating to legislative instruments

Overview

4.1 Schedule 4 makes a number of technical amendments to the Native Title Act in relation to legislative instruments. Currently, the Native Title Act provides that a number of determinations, instruments, approvals and revocations of determinations are disallowable instruments for the purposes of section 46A of the Acts Interpretation Act. Section 46A of the Acts Interpretation Act was repealed in 2003. Section 6 of the Legislative Instruments Act declares that instruments that were disallowable instruments for the purposes of section 46A of the Acts Interpretation Act are legislative instruments.

4.2 Schedule 4 will make changes to the Native Title Act to reflect the changes made by the Legislative Instruments Act.

Part 1—Amendments

Native Title Act 1993

Item 1 – Paragraph 23HA(a)

4.3 Item 1 would amend paragraph 23HA(a) to provide that a determination made under paragraph 24BH(a) is a legislative instrument.

Item 2 – Paragraphs 24GB(9)(c) and 24GD(6)(a)

4.4 Item 2 would amend paragraphs 24GB(9)(c) and 24GD(6)(a) to provide that a determination made under these paragraphs is a legislative instrument.

Item 3 – Subparagraph 24GE(1)(f)(i)

4.5 Item 3 would amend subparagraphs 24GE(1)(f)(i) to provide that a determination made under this subparagraph is a legislative instrument.

Item 4 – Paragraphs 24HA(7)(a), 24ID(3)(a) and 24JB(6)(a) and (7)(a)

4.6 Item 4 would amend paragraphs 24HA(7)(a), 24IC(3)(a) and 24JB(6)(a) and (7)(a) to provide that determinations made under these paragraphs are legislative instruments.

Item 5 – Subsections 24KA(8), 24MD(7) and 24NA(9)

4.7 Item 5 would amend subsections 24KA(8), 24MD(7) and 24NA(9) to provide that determinations made under these subsections are legislative instruments.

Item 6 – Subparagraph 26(1)(c)(iv)

4.8 Item 6 would amend subparagraph 26(1)(c)(iv) to provide that an approval under this subparagraph is a legislative instrument.

Item 7 – Paragraphs 26(2)(b) and (c)

4.9 Item 7 makes amendments to paragraphs 26(2)(b) and (c) as a consequence of amendments made by items 8 and 11.

Item 8 – Subsection 26A(1)

4.10 Item 8 would amend subsection 26A(1) to provide that a determination made under this subsection is a legislative instrument.

Item 9 – Subparagraph 26A(8)(a)(ii)

4.11 Item 9 would amend subparagraph 26A(8)(a)(ii) to provide that the revocation under this subparagraph of a determination is a legislative instrument.

Item 10 – Paragraph 26A(8)(b)

4.12 Item 10 would amend paragraph 26A(8)(b) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 11 – Subsection 26B(1)

4.13 Item 11 would amend subsection 26B(1) to provide that a determination made under this subsection is a legislative instrument.

Item 12 – Paragraph 26B(9)(b)

4.14 Item 12 would amend paragraph 26B(9)(b) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 13 – Subsection 26C(2)

4.15 Item 13 would amend subsection 26C(2) to provide that a determination made under this subsection is a legislative instrument.

Item 14 – Paragraph 26C(6)(b)

4.16 Item 14 would amend paragraph 26C(6)(b) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 15 – Paragraph 43(1)(b)

4.17 Item 15 would amend paragraph 43(1)(b) to provide that a determination made under this paragraph is a legislative instrument.

Item 16 – Paragraph 43(3)(b)

4.18 Item 16 would amend paragraph 43(3)(b) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 17 – Subparagraph 43(3)(c)(ii)

4.19 Item 17 would amend subparagraph 43(3)(c)(ii) to provide that a determination under this subparagraph is a legislative instrument.

Item 18 – Paragraph 43(3)(c)

4.20 Item 18 would amend paragraph 43(3)(c) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 19 – Subsection 43(3) (note)

4.21 Item 19 would amend the explanatory note to subsection 43(3). The existing note provides that a determination mentioned in subparagraph 43(3)(c)(ii) is a disallowable instrument and refers to section 214. The note will be repealed as a result of items 17 and 31, which render the note inaccurate.

Item 20 – Paragraph 43A(1)(b)

4.22 Item 20 would amend paragraph 43A(1)(b) to provide that a determination made under this paragraph is a legislative instrument.

Item 21 – Paragraph 43A(9)(b)

4.23 Item 21 would amend paragraph 43A(9)(b) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 22 – Subparagraph 43A(9)(c)(ii)

4.24 Item 22 would amend subparagraph 43A(9)(c)(ii) to provide that a determination under this subparagraph is a legislative instrument.

Item 23 – Paragraph 43A(9)(c)

4.25 Item 23 would amend paragraph 43A(9)(c) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 24 – Subsection 43A(9) (note)

4.26 Item 24 would amend the explanatory note to subsection 43A(9). The existing note provides that a determination mentioned in subparagraph 43A(9)(c)(ii) is a disallowable instrument and refers to section 214. The note will be repealed as a result of items 22 and 31, which render the note inaccurate.

Item 25 – Subsection 207A(1)

4.27 Item 25 would amend subsection 207A(1) to provide that a determination under this subsection is a legislative instrument.

Item 26 – Paragraph 207A(4)(b)

4.28 Item 26 would amend paragraph 207A(4)(b) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 27 – Subsection 207B(3)

4.29 Item 27 would amend subsection 207B(3) to provide that a determination under this subsection is a legislative instrument.

Item 28 – Paragraph 207B(7)(d)

4.30 Item 28 would amend paragraph 207B(7)(d) to provide that the revocation under this paragraph of a determination is a legislative instrument.

Item 29 – Section 214

4.31 Item 29 would repeal section 214. Section 214 provides that certain instruments are disallowable instruments for the purpose of section 46A of the Acts Interpretation Act. Section 46A of the Acts Interpretation Act was repealed and those instruments listed as disallowable instruments in section 214 are deemed, by section 6 of the Legislative Instruments Act, to be legislative instruments. This item would repeal section 214 to remove the redundant reference to disallowable instruments.

Item 30 – Subsection 245(4)

4.32 Item 30 would amend subsection 245(4) to provide that a determination under this subsection is a legislative instrument.

Item 31 – Subsections 251C(4) and 251C(5)

4.33 Item 31 would amend subsections 251C(4) and 251C(5) to provide that determinations under these subsections are legislative instruments.

Item 32 – Subsection 252(1)

4.34 Item 32 would amend subsection 252(1) to provide that a determination under this subsection is a legislative instrument.

Item 33 – Section 253 (paragraph (i) of the definition of infrastructure facility*)*

4.35 Item 33 would amend paragraph (i) of the definition of 'infrastructure facility' in section 253 to provide that a determination made under this paragraph is a legislative instruments.

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Item 34 – Subclause 14(3) of Schedule 5

4.36 Item 34 would amend subclause 14(3) of Schedule 5 to provide that a revocation under this subclause of a determination is a legislative instrument.

Item 35 – Subclause 14(3) of Schedule 5 (second sentence)

4.37 Item 35 would repeal the second sentence in subclause 14(3) of Schedule 5 which provides that a revocation under subclause 14(3) is a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act. This amendment is

consequential to the amendment in item 34 and the repeal of section 46A of the Acts Interpretation Act.

Item 36 – Clause 26 of Schedule 5 (note)

4.38 Item 36 would repeal and replace the explanatory note following clause 26 of Schedule 5. The note states that section 214 of the Native Title Act would make the original determination under clause 26 a disallowable instrument which is required to be tabled. Item 36 would amend the note to reflect the fact that section 214 of the Native Title Act and section 46A of the Acts Interpretation Act are no longer in force but were in force at the time the original determination was made.