

EXPOSURE DRAFT



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Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2018

Peter Cosgrove
Governor-General

By His Excellency's Command

Nigel Scullion [**DRAFT ONLY—NOT FOR SIGNATURE**]
Minister for Indigenous Affairs

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1 Name

This instrument is the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	Immediately after the commencement of Schedule 4 to the <i>Native Title Legislation Amendment Act 2018</i> .	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the following:

- (a) the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*;
- (b) the *Native Title Act 1993*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

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Schedule 1—Amendments

Corporations (Aboriginal and Torres Strait Islander) Regulations 2017

1 Section 5

Insert:

PBC Regulations means the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

2 Section 55 (heading)

Omit “**Functions**”, substitute “**Public information functions**”.

3 At the end of Part 11

Add:

55A Registered native title body corporate functions of the Registrar

- (1) For the purposes of paragraph 658-1(1)(k) of the Act, the Registrar has the functions of:
 - (a) assessing whether or not, in the Registrar’s opinion, a certificate given by a registered native title body corporate for the purposes of regulation 9 of the PBC Regulations complies with that regulation, on request by:
 - (i) a common law holder; or
 - (ii) a person who has a substantial interest in the decision to which the certificate relates; and
 - (b) notifying the person who requested the Registrar to make the assessment and the registered native title body corporate of the following:
 - (i) the date of the certificate;
 - (ii) the decision to which the certificate relates;
 - (iii) the Registrar’s opinion as to whether or not the certificate complies with regulation 9 of the PBC Regulations.

Note: The Registrar’s opinion does not affect the operation of subregulations 9(6) and (7) of the PBC Regulations.

- (2) The Registrar may collect (within the meaning of the *Privacy Act 1988*) information that is included in a certificate for the purposes of performing the functions mentioned in subsection (1).

4 In the appropriate position in Part 12

Insert:

Division 2—Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

61 Application of amendments made by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*

Section 55A, as inserted by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*, applies in relation to any certificate given under regulation 9 of the PBC Regulations after the commencement of Schedule 1 to the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*.

Native Title (Indigenous Land Use Agreements) Regulations 1999

5 Regulation 5 (definition of *native title decision*)

Omit “subregulation 8 (1)”, substitute “subregulation 3(1)”.

6 Paragraph 6(2)(e)

Omit “document mentioned in subregulation 9 (2)”, substitute “certificate under regulation 9”.

7 Subregulation 6(2) (note 2)

Omit “that will affect native title, must consult the common law holders”, substitute “to enter a body corporate agreement, must consult the common law holders on whom the decision would have an effect”.

8 Subregulation 6(2) (note 3)

Omit “document”, substitute “certificate”.

9 Subparagraph 7(2)(g)(i)

After “registered”, insert “native title”.

10 Paragraph 7(2)(g)

Omit “document mentioned in subregulation 9 (2)”, substitute “certificate under regulation 9”.

11 Subregulation 7(2) (note 2)

Omit “that will affect native title, must consult the common law holders”, substitute “to enter an area agreement, must consult the common law holders on whom the decision would have an effect”.

12 Subregulation 7(2) (note 3)

Omit “document”, substitute “certificate”.

13 Subparagraph 8(2)(e)(i)

After “registered”, insert “native title”.

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Schedule 1 Amendments

14 Paragraph 8(2)(e)

Omit “document mentioned in subregulation 9 (2)”, substitute “certificate under regulation 9”.

15 Subregulation 8(2) (note 2)

Omit “that will affect native title, must consult the common law holders”, substitute “to enter an alternative procedure agreement, must consult the common law holders on whom the decision would have an effect”.

16 Subregulation 8(2) (note 3)

Omit “document”, substitute “certificate”.

17 After regulation 9

Insert:

10 Application of amendments made by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*

The amendments of these Regulations made by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* apply in relation to any native title decision made after the commencement of Schedule 1 to that instrument.

Native Title (Prescribed Bodies Corporate) Regulations 1999

18 Subregulation 3(1)

Insert:

high level decision means a decision covered by paragraph (a), (b), (c) or (d) of the definition of ***native title decision***.

low level decision means a native title decision other than a high level decision.

19 Subregulation 3(1) (paragraph (b) of the definition of ***native title decision***)

Repeal the paragraph, substitute:

- (b) to enter an indigenous land use agreement under Subdivision B, C or D of Division 3 of Part 2 of the Act or an agreement under Subdivision P (right to negotiate) of that Division; or
- (c) to allow a person who is not a common law holder, or a class of persons who are not common law holders, to become members of a prescribed body corporate; or
- (d) to include one or more consultation processes in the constitution of a prescribed body corporate; or
- (e) to do, or to agree to, any act that would otherwise affect the native title rights or interests of the common law holders (other than a decision to make a compensation application).

20 Subregulation 3(1)

Insert:

standing instructions decision means a native title decision that is:

- (a) a low level decision; or
- (b) a decision to enter an indigenous land use agreement under Subdivision B, C or D of Division 3 of Part 2 of the Act in relation to the doing of an act by or for the benefit of the prescribed body corporate; or
- (c) a decision to enter an agreement under Subdivision P (right to negotiate) of that Division in relation to which the prescribed body corporate is the only grantee party.

21 Paragraph 4A(a)

Omit “native title decision”, substitute “high level decision that is not a standing instructions decision”.

22 Paragraphs 6(1)(d) and 7(1)(e)

Omit “regulation 8”, substitute “regulations 8 and 8B”.

23 After regulation 7

Insert:

7A Functions of prescribed body corporate in relation to certain compensation applications

- (1) For the purposes of section 58 of the Act, a prescribed body corporate that makes a compensation application on behalf of all the persons who claim to be entitled to the compensation has the following functions:
 - (a) to hold payments received as compensation in trust;
 - (b) to invest or otherwise apply the money held in trust as directed by the persons entitled to the compensation;
 - (c) to consult with the persons entitled to the compensation in accordance with regulation 8B;
 - (d) to perform any other function relating to the compensation as directed by the persons entitled to the compensation.
- (2) Without limiting subregulation (1), in order to perform its functions, a prescribed body corporate may, on behalf of the persons who claim to be entitled to compensation:
 - (a) consult other persons or bodies; and
 - (b) enter into agreements; and
 - (c) exercise procedural rights; and
 - (d) accept notices required by any law of the Commonwealth, a State or a Territory to be given to the persons who claim to be entitled to compensation.

Note: A prescribed body corporate that makes a compensation application on behalf of persons who claim to be entitled to the compensation is also subject to regulations 8B to 10.

24 Regulation 8 (heading)

Repeal the heading, substitute:

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8 Consultation with, and consent of, common law holders in relation to native title decisions

25 Subregulations 8(1) and (2)

Repeal the subregulations, substitute:

Consultation and consent is required before a native title decision is made

- (1) Before making a native title decision, a prescribed body corporate that holds native title rights and interests in trust for the common law holders, or is an agent prescribed body corporate, must consult with, and obtain the consent of, the common law holders on whom the proposed native title decision would have an effect.
- (2) The prescribed body corporate must consult and obtain consent in relation to a high level decision in accordance with this regulation.
- (2A) The prescribed body corporate must consult and obtain consent in relation to a low level decision in accordance with this regulation or regulation 8A.

No need to consult or obtain consent in relation to a standing instructions decision if covered by approval

- (2B) However, the prescribed body corporate does not need to consult and obtain consent in relation to a standing instructions decision covered by an approval under subregulation (8).

Ways of consulting and obtaining consent

26 Subregulations 8(3) and (4)

After “common law holders”, insert “on whom the proposed native title decision would have an effect”.

27 Subregulation 8(5)

Repeal the subregulation.

28 Before subregulation 8(6)

Insert:

Effect of failure to consult or obtain consent

29 At the end of regulation 8

Add:

Approval for standing instructions decisions

- (8) A standing instructions decision (the *later decision*) is covered by an approval under this subregulation if:
 - (a) the prescribed body corporate has, in relation to another standing instructions decision (the *first decision*), consulted with, and obtained the consent of, the common law holders on whom the later decision would have an effect in accordance with:

- (i) if the first decision is a high level decision—subregulation (3) or (4);
or
 - (ii) if the first decision is a low level decision—subregulation (3) or (4) or regulation 8A; and
 - (b) the prescribed body corporate has the approval of the common law holders to make standing instructions decisions of the same kind as the first decision without needing to consult and obtain further consent; and
 - (c) the later decision is of the same kind as the first decision; and
 - (d) any conditions imposed by the common law holders on the approval have been met in relation to the later decision.
- (9) Common law holders may give or revoke the approval mentioned in paragraph (8)(b), and impose, vary or revoke conditions on the approval:
- (a) if the first decision is a low level decision—using a relevant consultation process in the constitution of the prescribed body corporate; or
 - (b) in any case:
 - (i) if there is a particular process of decision-making that, under the Aboriginal or Torres Strait Islander traditional laws and customs of the common law holders, must be followed in relation to giving the approval—in accordance with that process; or
 - (ii) otherwise—in accordance with the process of decision-making agreed to, or adopted, by the common law holders for giving the approval.

30 Regulations 8A and 9

Repeal the regulations, substitute:

8A Alternative consultation processes in relation to native title decisions

- (1) This regulation applies to the making of a low level decision if the prescribed body corporate has in its constitution one or more consultation processes to which the common law holders on whom the decision would have an effect have consented.
- (2) Before making a native title decision, the prescribed body corporate must consult with, and obtain the consent of, the common law holders on whom the native title decision would have an effect using the relevant consultation process in its constitution.

8B Consultation and consent in relation to compensation applications

- (1) Before making a compensation application, a prescribed body corporate must consult with, and obtain the consent of:
 - (a) if the application is made in relation to an area of land or waters in relation to which the prescribed body corporate holds, or is an agent prescribed body corporate in relation to, the native title rights and interests—the common law holders; or
 - (b) otherwise—all persons who claim to be entitled to the compensation.
- (2) If there is a particular process of decision-making that, under the Aboriginal or Torres Strait Islander traditional laws and customs of the common law holders or persons who claim to be entitled to compensation, must be followed in relation to

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Schedule 1 Amendments

the giving of the consent mentioned in subregulation (1), the consent must be given in accordance with that process.

- (3) If subregulation (2) does not apply, the consent must be given by the common law holders or persons who claim to be entitled to compensation in accordance with the process of decision-making agreed to, or adopted, by them for giving the consent.

9 Certificate in relation to consultation and consent

- (1) As soon as practicable after:
- (a) a prescribed body corporate that holds native title rights and interests in trust for the common law holders, or is an agent prescribed body corporate, makes a native title decision; or
 - (b) a prescribed body corporate decides to make a compensation application; the prescribed body corporate must give a certificate in writing.
- (2) The certificate must certify that:
- (a) for a high level decision other than a standing instructions decision—the common law holders on whom the decision will have an effect have been consulted about, and have consented to, the decision in accordance with regulation 8; or
 - (b) for a high level decision that is a standing instructions decision:
 - (i) if the decision is covered by an approval under subregulation 8(8)—the decision is of that kind; or
 - (ii) in any case—the common law holders on whom the decision will have an effect have been consulted about, and have consented to, the decision in accordance with regulation 8; or
 - (c) for a low level decision:
 - (i) if the decision is covered by an approval under subregulation 8(8)—the decision is of that kind; or
 - (ii) in any case—the common law holders on whom the decision will have an effect have been consulted about, and have consented to, the decision in accordance with regulation 8 or 8A; or
 - (d) for a decision to make a compensation application—all the persons required by regulation 8B to be consulted and to give consent have been consulted about, and have consented to, the making of the application in accordance with regulation 8B.

Note: The Registrar of Aboriginal and Torres Strait Islander Corporations has functions in relation to certificates given under this regulation: see section 55A of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017*.

- (3) The certificate must include the following:
- (a) the date of the certificate;
 - (b) details of the process of making the decision;
 - (c) details (including names) of the persons who participated in the process of making the decision;
 - (d) if the certificate is of a kind mentioned in subparagraph (2)(b)(i) or (c)(i)—details of the process for consultation, consent and approval under subregulation 8(8);

- (e) if paragraph (d) does not apply—details of the consultation and consent process.
- (4) The certificate must be executed by the prescribed body corporate in accordance with subsection 99-5(1) or (2) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.
- (5) The prescribed body corporate may collect (within the meaning of the *Privacy Act 1988*) information about common law holders or persons who claim to be entitled to compensation for the purposes of giving a certificate.
- (6) A certificate given in accordance with this regulation in relation to a native title decision is prima facie evidence that the common law holders on whom the native title decision will have an effect have been consulted with and have consented to the decision.
- (7) A certificate given in accordance with this regulation in relation to a decision to make a compensation application is prima facie evidence that all the persons required by regulation 8B to be consulted and to give consent have been consulted with and have consented to the making of the application.

31 Regulation 10 (heading)

Omit “certain documents”, substitute “certificates”.

32 Subregulations 10(1) and (2)

Repeal the subregulations, substitute:

- (1) A prescribed body corporate must give a copy of a certificate under regulation 9 to a person mentioned in subregulation (3) of this regulation if the body corporate has made a native title decision or has decided to make a compensation application.

33 Subregulation 10(3)

Omit “document if”, substitute “certificate if”.

34 Paragraph 10(3)(a)

Repeal the paragraph, substitute:

- (a) is a common law holder or has a substantial interest in the decision to which the certificate relates; and

35 Paragraph 10(3)(b)

Omit “document”, substitute “certificate”.

36 At the end of the instrument

Add:

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Schedule 1 Amendments

Part 5—Application, saving and transitional provisions

Division 1—Application of amendments made by the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

27 Application of amendments made by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*

- (1) The amendments of regulation 4A made by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* apply in relation to consent obtained after the commencement of Schedule 1 to that instrument.
- (2) The amendments of Parts 1 and 2 made by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*, other than the amendments of regulation 4A, apply in relation to:
 - (a) any native title decision made after the commencement of Schedule 1 to that instrument; and
 - (b) any compensation application made after that commencement.