



Exposure draft

Native Title Legislation Amendment Bill 2018

Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

Public consultation paper

October 2018



Introduction

The Australian Government has developed a package of reforms to the native title system. We are seeking stakeholder feedback on the proposed amendments, which are contained in two separate exposure drafts:

- Native Title Legislation Amendment Bill 2018 – which would amend the *Native Title Act 1993* (Native Title Act) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act)
- Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 – which would amend the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations), the Native Title (Indigenous Land Use Agreements) Regulations 1999 (ILUA Regulations), and the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (CATSI Regulations).

The proposed amendments are informed by feedback from stakeholders following consultation on an options paper for native title reform released on 29 November 2017. The options for reform were drawn from a number of reviews, including:

- the Australian Law Reform Commission’s report on ‘*Connection to Country: Review of the Native Title Act 1993 (Cth)*’, published June 2015 (ALRC Report)
- the report to the Council of Australian Governments on the ‘*Investigation into Indigenous Land Administration and Use*’, published December 2015 (COAG Investigation), and
- the Office of the Registrar of Indigenous Corporation’s 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review).

Submissions in response to the options paper closed on 28 February 2018. During the consultation period, the Government received 52 submissions and held over 40 consultation meetings across the country. It also convened an Expert Technical Advisory Group comprised of nominees from the National Native Title Council, National Native Title Tribunal, government and industry, to receive advice on key reforms.

The objective of the proposed reforms is to deliver improvements to native title claims resolution, agreement-making, and dispute resolution processes in the Native Title Act and other legislation, including to:

- ensure the validity of existing section 31 agreements after the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10
- give greater flexibility to native title claimants to set their internal processes, including to allow the claim group to place conditions on the applicant’s authority and allowing the applicant to act by majority
- streamline and improve native title claims resolution and agreement-making, including by allowing historical extinguishment over areas of national and state park to be disregarded where the parties agree
- increase the transparency and accountability of prescribed bodies corporate, and
- create new pathways to address native title-related disputes arising following a native title determination.

This document outlines the purpose of the proposed amendments and seeks stakeholder views on the approach to amending the law. The annexure at the end of this document summarises the individual measures, cross referenced to their location in the options paper and in the exposure draft legislation.

Finally, consultation on the options paper noted the potential native title implications arising from Western Australia’s proposal to validate mining leases affected by the decision in *Forrest & Forrest Pty Ltd v Wilson* [2017] HCA 30. The Australian Government is continuing to work with the Western Australian Government and other affected stakeholders on this issue.

Making a submission

The exposure drafts are available at: <www.ag.gov.au/consultations>

Submissions on the proposed amendments can be emailed to: native.title@ag.gov.au.

Submissions may also be posted to:

Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Submissions should be provided by 10 December 2018. Submissions may be made publicly available. Please indicate if you wish your submission to be confidential. Please note that submissions or comments will generally be subject to freedom of information provisions.

Schedule 1—Role of the applicant

The applicant is the person or group of people authorised by a native title claim group to make and manage the claim on their behalf. The names of the people comprising the applicant appear on the Register of Native Title Claims as the registered native title claimant (RNTC).

The ALRC Report and subsequent COAG Investigation recommended a number of changes to the way the applicant operates and its accountability to the claim group – including allowing the applicant to act by majority and allowing the claim group to impose conditions on the way the applicant performs its duties. These measures are intended to give native title groups greater flexibility around setting their internal processes.

Part 1—Authorisation

The amendments in this Part would implement the recommendations in the ALRC Report and COAG Investigation that the Native Title Act be amended to clarify that the claim group may define the scope of the authority of the applicant (**recommendation 10-6** in the ALRC Report, **table 1, item 2** of the COAG Investigation), and to clarify the relationship between the applicant and the claim group (**recommendation 10-9**).

Allowing the claim group to place conditions on the applicant’s authority

Proposal

This measure would allow a native title claim or compensation group to place conditions on the authority of the applicant. While the applicant currently has the power under section 62A to deal with all matters arising in relation to a native title application, in practice many claim groups expect that the applicant will bring key decisions back to the group for consideration or specific authorisation.

Examples of conditions that the claim or compensation group would be able to place on the applicant include requiring the applicant to seek specific authorisation from the claim group before agreeing to a consent determination, or before discontinuing or amending an application. The group would also be able to impose a condition that the applicant is required to act unanimously (displacing the rule in new section 62C that the applicant may act by majority as a default position – see page 6).

Draft amendments

New section 251BA (Item 21, Part 1, Schedule 1) would allow for conditions to be imposed on the applicant as part of the authorisation processes under sections 251A and 251B (**subsection 251BA(1)**). The conditions would need to be imposed in accordance with traditional decision-making processes, or if no such processes exist, a process agreed to by the claim group (**subsection 251BA(2)**).

The provision would not impose any new specific consequences for the application failing to comply with any conditions. A note is proposed that would explain that consequences may include the replacement of the applicant under section 66B, or a Federal Court of Australia order under section 84D.

Section 62A would also be amended to make clear that the applicant’s power to deal with all matters to do with an application is subject to conditions on the authorisation of the applicant under subsection 251BA (**Items 9 and 10, Part 1, Schedule 1** – which creates new **subsection 62A(2)**).

Public notification of conditions on the applicant's authority

Proposal

During consultation on the options paper, stakeholders raised the need for public notification of any conditions placed by the claim or compensation claim group on the applicant's authority. This would be to ensure that relevant parties are aware of any conditions in their dealings with the applicant.

Accordingly, this reform would require any conditions on the authorisation of the applicant to be outlined in the originating native title claim or compensation application, and supported by affidavits accompanying the application. Details of any conditions on the applicant's authority would also be recorded on the Register of Native Title Claims, or the Schedule of claims, if not registered.

Any changes to the conditions on the applicant's authority would also require the originating application to be amended, which would then require copies of the amended application to be provided to the National Native Title Registrar.

Draft amendments

Court application and affidavit

New paragraphs 62(1)(ba) and 62(3)(b) (Items 6-8, Part 1, Schedule 1) would require the details of any conditions on the authority of the applicant to be part of the details required to be included in the originating native title claim or compensation application. New **subparagraphs 62(1)(a)(vi)-(vii) and 62(3)(a)(v)-(vii) (Items 5-7, Part 1, Schedule 1)** would also require any conditions on the authorisation of the applicant to be outlined in affidavits accompanying a native title claim or compensation applications.

The relevant court forms contained in the Native Title (Federal Court) Regulations 1998 would also be updated to reflect these changes (to be drafted).

Register of Native Title Claims

New paragraph 186(1)(h) (Item 12, Part 1, Schedule 1) would require the contents of the Register of Native Title Claims to record whether there are any conditions on the authority of the applicant.

Under new subparagraph **paragraph 190A(6A)(d)(vi) (Item 13, Part 1, Schedule 1)**, the Native Title Registrar would be required to accept an amended registered claim for registration if, among other specified amendments, the only effect of the amendment was the imposition, variation or revocation of a condition on the applicant's authority.

The amendment to **paragraph 190C(4)(b) (Item 14, Part 1, Schedule 1)** would require the Registrar to be satisfied not only that the applicant is authorised by the claim group, but that any conditions on the applicant's authority have been satisfied, when registering the claim. New **subparagraph 24CG(3)(b)(iii) (Item 1, Part 1, Schedule 1)** would require a statement to the effect that any conditions relating to the making of an area Indigenous land use agreement (ILUA) are satisfied to accompany an application for registration of that ILUA.

Native title representative body certification

Section 203BE of the Native Title Act currently requires native title representative bodies (NTRBs) to certify that native title applications and the registration of ILUAs are properly authorised. New **subparagraph 203BE(2)(aa) and paragraph 203BE(5)(c) (Items 17-20, Part 1, Schedule 1)** would provide that an NTRB may only certify a native title application or agreement where it is of the opinion that any conditions on the applicant's authority that relate to the making of the application or agreement have been satisfied.

A number of other consequential changes are proposed to reflect the proposed amendments to section 203BE, including **subparagraph 24CH(2)(d)(i) (Item 2, Part 1, Schedule 1)**; **subsection 24CI(1) (Item 3, Part 1, Schedule 1)**; and **paragraph 24CK(2)(c) (Item 4, Part 1, Schedule 1)**.

Changes to conditions

Where there are any changes to conditions imposed on the applicant by a subsequent authorisation, **subsection 251BA(3) (Item 21, Part 1, Schedule 1)** would require that the person or persons authorised must seek leave to amend the determination or compensation application filed with the Federal Court to reflect the new condition, or any variation/revocation of previously imposed conditions.

Section 64 of the Native Title Act deals with the circumstances where an application should be amended. That section requires an updated application to be given to the Native Title Registrar by the CEO of the Federal Court. Once the Registrar receives a copy of an amended application under section 64, section 66A of the Native Title Act requires that he or she give notice of the amended application to each person who is a party to the proceeding. These existing procedures would ensure that all parties to the proceeding, and the Registrar of the National Native Title Tribunal (NNTT), would be notified of any changes to the applicant's authority.

Clarify the duties of the applicant to claim group

Proposal and draft amendment

At the time of the ALRC Report, there was uncertainty around the nature of the duties owed by the applicant to the claim group; in particular, it was unclear whether the applicant owed a fiduciary duty to members of this group. The ALRC Report subsequently recommended (**recommendation 10-9**) that the Native Title Act be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the claim group.

On 7 December 2017, the Federal Court handed down its decision in *Gebadi v Woosup* [2017] FCA 1467 (*Gebadi*) which confirmed that the applicant does owe a fiduciary duty to the claim group (outlined at paragraph 102 of the court's judgment). In particular, the court found that members of the claim group are entitled to expect that the applicant will act in the best interests of the claim group in exercising any of the functions, powers, responsibilities and discretions conferred upon it.

To clarify the duties owed by the applicant to the claim group, and in light of the Federal Court's decision in *Gebadi*, it is proposed that new **section 62B (Item 11, Schedule 1, Part 1)** would confirm that any obligation of the applicant under the Native Title Act does not relieve or detract from the operation of any other duty of the applicant at common law or in equity to persons in the native title claim group or compensation claim group.

Application and transitional provisions

The provisions outlined above would commence the day after Royal Assent, but the transitional provisions at **Item 22** provide that they would apply only in circumstances where the relevant authorisation decision also takes place after commencement.

What this means is that where a group authorises an applicant or an ILUA prior to the commencement of the amending legislation, the current registration provisions for the claim or agreement would continue to apply to that agreement/claim, even after the legislation commences. Where a group's authorisation decision does not occur until after the commencement of the legislation, the new provisions would apply (**Item 22(1) and (2)**).

Similarly, a group would not be able to impose conditions on the authority of an applicant until after the legislation commences; the current legal status of authorisation conditions would continue to apply to all authorisation decisions made prior to the commencement of the amendments (**Item 22(3) and (4)**).

Part 2—Applicant decision-making

The amendments in this Part would implement the recommendations in the ALRC Report and the COAG Investigation for the Native Title Act to be amended to allow the applicant to act by majority (**recommendation 10-6** of the ALRC Report and **Table 1, Item 2** of the COAG Investigation).

The applicant is currently required to act unanimously when carrying out its duties or performing its functions under the Native Title Act. The Full Federal Court’s decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 (the *McGlade* decision) also held that area Indigenous land use agreements (area ILUAs) must be signed by all members of the RNTC (who are also the applicant) before they can be registered and come into effect (including members of the applicant who are deceased).

On 14 June 2017, the Australian Parliament passed the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* in response to the *McGlade* decision. The 2017 amendments changed the default position for making future area ILUAs so that only a majority of the members of the RNTC are required to be a party to the agreement, unless the claim group determines otherwise.

In addressing the *McGlade* decision in this way, the 2017 amendments partly implemented the ALRC and COAG recommendations to allow the applicant to act by majority for executing area ILUAs only. The purpose of these proposals is to extend that change to everything the applicant can or must do under the Native Title Act as a default rule, and to allow the claim group to specify a different threshold if they choose to do so.

Allowing the applicant to act by majority as the default position

Proposal

This reform would allow the applicant to act by majority by default when exercising a power or performing a function under the Native Title Act. The proposal would involve the creation of a new general rule that the applicant can act by majority, but would also specifically amend who must be a party to any native title agreement to be a majority of the members of the applicant. However, the native title claim or compensation group would retain the ability to displace this default rule by placing a condition on the applicant which would require unanimous action (or any other threshold) in the terms of the authorisation.

Draft amendments

New **section 62C (Item 32, Part 2, Schedule 1)** would create a general rule that the applicant may act by majority. The rule would be subject to any conditions on the authorisation of the applicant, including, for example, a condition that the applicant act unanimously in doing certain things or for all of its duties (**subsection 62C(4)**).

The rule would only apply after a native title determination or compensation claim has been made on the basis all members of the applicant should be named on the application and provide an accompanying affidavit under section 62 (noting this is the point in time at which the composition of the applicant becomes ascertainable). This is the intended effect of **paragraph 62C(1)(a)**.

The rule would allow a majority of the applicant to do anything required or permitted “under this Act [i.e. the Native Title Act], or for the purposes of this Act under another law of the Commonwealth” (**paragraph 62C(1)(c)**). The provision is also only intended to apply to actions by the applicant, and is not intended to affect how other people do things in relation to the applicant (for example, how notice is given to the applicant).

Where a majority of the applicant does a thing under the Native Title Act, they would be required to notify the other ‘authorised persons’ within a reasonable time (**subsection 62C(3)**). This measure ensures that members of

the applicant are aware of decisions made in their absence, to ensure transparency and promote consultation between members.

The rule is intended to apply to the applicant acting in any capacity under the Native Title Act, including as an RNTC or native title party (**subsection 62C(5)**).

Specific amendments to native title agreement-making processes

In addition to the new general rule, specific provisions relating to the making of native title agreements would also be amended to provide that a majority of the applicant can be a party to such agreements, with similar requirements about notifying other members.

The amendments to **sections 24CD, 24CG, 24CL and 24DE (Items 23-29, Part 2, Schedule 1)** would change the requirements for how the applicant – known for the purposes of ILUA agreement-making as the RNTC – can enter into area and alternative procedure ILUAs. The amendments would clarify that the RNTC can become a party to an ILUA if a majority of those people agree to become a party (or whatever alternative number is a condition of the claim group’s authorisation decision), to require any members of the RNTC who do not agree to participate in the decision to enter into the ILUA to be notified, and make other minor changes to update references to the RNTC.

Similarly, the proposed **amended note to subparagraph 29(2)(b)(i)** and **new subsections 31(1C) and (1D) (Items 30 and 31, Part 2, Schedule 1)** would clarify that that only a majority of the RNTC are required to be a party to agreements made under the section 31 of the Native Title Act (unless the claim group requires all members of the RNTC to jointly be a party). . Section 31 agreements primarily relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights. Members of the RNTC who do not enter into the section 31 agreement must be notified of the decision.

Application and transitional provisions

These changes would apply six months after Royal Assent (see **Section 2, Table Item 3**). This would ensure that claim groups have the opportunity to displace the default rule if they choose to do so, and that claim groups are given sufficient notice of the possibility, if the default rule is not displaced, of a majority of the applicant entering into native title agreements on their behalf. The transitional provisions (**Item 38, Part 2, Schedule 1**) would ensure that the amendments apply only to:

- area ILUAs where the application for registration is made after the commencement of the legislation, and
- section 31 agreements which are made after the commencement of the legislation.

This means that the current provisions of the Native Title Act would continue to apply to section 31 agreements/area ILUA registration applications made before the commencement of the new provisions, even in circumstances where the registration decision is not made or the section 31 agreement does not take effect until after the new provisions commence.

Part 3 – Replacement of applicant

Changing the composition of the applicant without a further authorisation process, and succession planning

Proposal

The Native Title Act currently requires a native title claim or compensation group to replace individual members of the applicant in all circumstances by authorising a new applicant under section 251B, and having the new applicant make an application for the Federal Court to replace them under section 66B. This is the case even where a member of the applicant is deceased or incapacitated and the application is made purely to remove that person from the applicant.

This reform would allow the remaining members of the applicant to apply to the court without needing to go through an authorisation process under section 251B in circumstances where an individual member of the applicant has passed away or is incapable of performing the functions of the applicant. It would also allow native title claim and compensation groups to put in place succession-planning arrangements for individual members of the applicant as part of the authorisation process.

These amendments would implement **recommendations 10-7** and **10-8** of the ALRC Report.

Draft amendment

New **subsections 66B(2A), (2B) and (2C) (Item 42, Part 3, Schedule 1)** would set out the process by which the remaining members of the applicant may apply to the Federal Court for, and the power of the court to order, a replacement applicant in circumstances where a previous member of the applicant dies or is incapacitated.

Subsection 66B(2B) would allow the court to make an order around the constitution of the applicant in the following circumstances:

- where there is an authorised ‘reserve’ member of the claim group, that this person and the other continuing members of the applicant constitute the applicant (**paragraph 66B(2B)(a)**) – i.e. this is the succession-planning scenario)
- that the continuing members of the applicant may continue to act despite the death/incapacity of one member (**paragraph 66B(2B)(b)**), and
- members of the claim group applying for the order may be added to the continuing members of the applicant if so authorised by the claim group (**paragraph 66B(2B)(c)**).

The effect of the amendment would be that when a member of an applicant dies or becomes incapacitated, a group of people – either the remaining members of the applicant, the remaining members of the applicant and a replacement member under a succession plan, or a new group of people entirely – would be able to apply to the court for an order that those people are now the applicant.

In making any order, the court must determine whether there is an effective succession plan in place, whether the previous members of the applicant continue to be authorised to act, or whether a fresh authorisation has occurred. The court would then be able to order that the relevant people are jointly considered to be the applicant (**subsection 66B(2C)**).

Application and transitional provisions

These changes would commence six months after Royal Assent (**Section 2, Table Item 3**). This is to ensure claim groups have sufficient notice of the changes to section 66B and the way the court would deal with applications to

remove or change members of the applicant. Where an application is made to remove or replace a member of the applicant who has died or becomes incapacitated, provided the application is made after the commencement of the section, the new process applies irrespective of the date that the person dies or becomes incapacitated.

Schedule 2 – Indigenous land use agreements

Part 1 – Body corporate and area agreements

Allow body corporate ILUAs to cover areas where native title has been extinguished

Proposal

Section 24BC of the Native Title Act currently provides that body corporate Indigenous land use agreements (ILUAs) can only be made where there are registered native title bodies corporate (RNTBCs) in relation to all of the agreement area. This means that, even though compensation for extinguishment is one of the subject matters body corporate ILUAs can deal with under section 24BB, native title groups are required to enter into area ILUAs to deal with compensation over extinguished areas. Area ILUAs can be more costly and time-consuming than body corporate ILUAs, as they involve an authorisation process and a longer notification period.

To enable wider use of body corporate ILUAs and reduce transaction costs and registration timeframes, this reform would allow body corporate ILUAs to include areas where native title has been extinguished.

This amendment would implement one of the recommendations in **Table 1, Item 14** of the COAG Investigation.

Draft amendment

New subsections 24BC(2)(a) and (b) (Item 2, Part 1, Schedule 2), would allow a body corporate ILUA to include areas for which the relevant native title determination:

- expressly or impliedly states that there is no native title over an area, or
- expressly excludes an area because it was a subject to a previous exclusive possession act.

Remove the requirement for the Registrar to notify an area ILUA unless he or she is satisfied it meets the requirements to be an ILUA

Proposal and draft amendment

Section 24CH addresses the notification requirements for area ILUAs, and currently requires the Native Title Registrar to instigate the notification process for an agreement even if he or she is not satisfied that the agreement meets the requirements of an ILUA set out in sections 24CA – 24CE. The **amendment to section 24CH (Item 3, Part 1, Schedule 2)** would provide that the Registrar only needs to proceed to notify an ILUA if he or she is satisfied that the ILUA meets those requirements.

This amendment would implement one of the recommendations in **Table 1, Item 14** of the COAG Investigation.

Application and transitional provisions

These changes would commence the day after Royal Assent and the transitional provision (**Item 4, Part 1, Schedule 2**) would ensure they apply to any application for registration of an ILUA made after the commencement of the provision, even if the agreement was entered into before the commencement.

Part 2 – Deregistration and amendment

Allow minor amendments to be made to an ILUA without requiring a new registration process

Proposal

This measure would allow parties to make minor amendments to ILUAs by agreement, rather than by registering an entirely new ILUA. The measure would also allow the Native Title Registrar to update the Register of ILUAs once notified in writing. Amendments which could be made through this process would be limited to:

- updating property descriptions previously covered by the ILUA, but not so as to result in the inclusion of any area of land or waters not previously covered by the agreement
- updating descriptions identifying parties to the ILUA, including where a party has assigned or otherwise transferred rights and liabilities under the ILUA
- updating administrative processes relating to the ILUA, or
- doing a thing specified by the Minister by legislative instrument.

This amendment would implement one of the recommendations in **Table 1, Item 14** of the COAG Investigation.

Draft amendment

New section 24ED (Item 7, Part 2, Schedule 2) would allow parties to an ILUA to make minor changes to ILUAs by agreement, while preserving its binding nature.

New subsection 24ED(1) would outline the types of amendments that could be made to an ILUA, and would require that those amendments be agreed to by the parties, and notified in writing to the Registrar. **New subsection 24ED(2)** would confirm the ILUA's binding effect on common law holders.¹ **New subsection 24ED(3)** would operate with **new paragraph 24ED(1)(f)**, which would provide that an amendment can do a thing specified in a legislative instrument, to confirm that the responsible Commonwealth Minister (currently the Attorney-General) would be able to specify a thing that an amendment can do.

Clarify that the removal of an ILUA from the Register of ILUAs does not invalidate future acts subject to that ILUA

Proposal and draft amendment

Section 199C of the Native Title Act sets out the instances when the Native Title Registrar must remove details of an ILUA from the Register of ILUAs. These include instances where:

- a party advises the Registrar that their agreement has expired
- all parties advise the Registrar that they wish to terminate their agreement, or
- the Federal Court makes an order, because an ILUA was induced by fraud, undue influence or duress.

Section 24EB currently provides that future acts the subject of the ILUAs removed from the Register are valid for the period that they were on the Register.

¹ The term 'common law holders' is used to refer to people who hold native title rights and interests, whether or not a determination has been made by the Federal Court.

New **subsections 24EB(2A) and 24EBA(7) (Items 5-6, Part 2, Schedule 2)** would clarify that the removal of the details of an agreement from the Register would not affect any future acts done in accordance with the agreement, or any future acts already invalidly done which were purportedly validated by an agreement. The **new note to subsection 199C(1) (Items 8-9, Part 2, Schedule 2)** would note the existence of the new subsections and confirm their operation.

This amendment would implement the recommendation in **Table 2, Item 2** of the COAG Investigation.

Application and transitional provisions

These changes would commence the day after Royal Assent, and the transitional provision (**Item 10, Part 2, Schedule 2**) would ensure that **new section 24ED** – which would allow minor amendments to ILUAs – would apply in relation to any agreement, the details of which are on the Register, after the item commences. This would mean that parties would be able to make minor amendments to ILUAs through the new process the day after Royal Assent, even if those minor amendments were agreed prior to the legislation commencing.

Schedule 3 – Historical extinguishment

Part 1 – Park areas

Allow historical extinguishment to be disregarded over areas of national, state or territory parks with the agreement of the parties

Proposal

Generally, once native title is extinguished it cannot be revived. However, in some circumstances, sections 47, 47A and 47B of the Native Title Act allow the courts to disregard extinguishment on unallocated Crown land, reserves set aside for Aboriginal or Torres Strait Islander peoples, and pastoral leases held by traditional owners.

Schedule 3, Part 1 contains amendments which would enable parties to agree to disregard the historical extinguishment of native title over an area that has been set aside or vested to preserve the natural environment such as national, state and territory parks and reserves.

The amendments in this Part would ensure that native title can be recognised over parks and reserves where there is agreement between parties, even where the creation or vesting of the national, state or territory park or reserve may otherwise extinguish native title.

Draft amendment

New section 47C (Item 2, Division 1, Part 1, Schedule 3) would apply to allow for the extinguishment of native title in areas of national, state or territory park, to be disregarded. This means those areas could be included in claims for native title, provided that the relevant conditions are met, and that any previous acts which may have extinguished native title could be set aside for the purpose of determining the claim.

The provision differs from the other provisions allowing historical extinguishment to be set aside (sections 47, 47A and 47B), in that the relevant federal, state or territory government responsible for the creation of the park would need to agree that extinguishment can be set aside (**paragraph 47C(1)(b)**). Once this agreement is reached, it would be open to the Federal Court to determine that native title exists in the area, provided it is established in the usual way.

Park areas

New **subsection 47C(2)** would set out which areas would be capable of being included in a native title claim under the provision. The section would cover any area set aside, or any area where an interest is granted or vested, under any law with an environmental purpose. Areas set aside for other reasons, such as agriculture, would not fall within the definition and therefore not come within the scope of the section.

Public works

New **subsections 47C(3) and (4)** would allow the extinguishing effect of public works within the park area to be disregarded. Subsection 47C(3) would allow the government which is party to the broader agreement to apply section 47C in the proceedings to include a statement in that agreement that historical extinguishment as a result of public works can be disregarded, whereas subsection 47C(4) would ensure that if a different government – for example, the Commonwealth where the park in question is a state park – is responsible for the public work, that different government can also agree in writing to extinguishment as a result of its public works within the park area being disregarded.

Notice and comment

The proposed amendment includes provisions (**subsections 47C(5) and (6)**) that would require the government party to the agreement to publicly notify its intention to include the park area in a determination under section 47C, and allow at least three months for public comment before the agreement could be made.

Effect of the agreement and determination

Generally, **subsection 47C(7)** would require historical extinguishment to be disregarded over relevant park areas where the parties have reached the required agreement.

Where a determination relying on section 47C is made, it would nevertheless preserve (by **subsection 47C(8)**) the following: the validity of the act creating the park or any prior extinguishing act; the interest of any person in the public works on the land, and access to the public works; and public access to the park area, as well as applying the non-extinguishment principle to those acts. This would ensure that the application of section 47C does not affect whether the prior acts were validly done, and would preserve public access to park areas; it also would ensure that these acts suppress, rather than extinguish, native title to the extent of any inconsistency. The section would also exempt any acts which deal with the ownership of natural resources by the Crown (**subsection 47C(9)**), so these acts are not affected by the section.

The consequential amendments (**Items 3-14**) would:

- amend **various sections** to refer to section 47C and other procedural requirements imposed by the section (**Items 3, 4, 7-9, 11-14**).
- amend **section 62** to ensure that any agreement made under section 47C is provided to the Federal Court with an application under the section (**Item 5**)
- amend **section 62** to ensure that existing applications can be amended to include areas agreed to be included by the parties under section 47C (**Item 6**), and
- amend **section 66A** to ensure that where an application is amended to include an area claimed under section 47C, that other persons with interests in the area are notified that this has occurred (**Item 10**).

Application and transitional provisions

These changes would commence the day after Royal Assent, and the transitional provision (**Item 15, Part 1, Schedule 3**) would clarify that applications which are made after the provisions commence, or applications which are currently on foot when the provisions commence, are applications to which the amendments would apply. Applications for native title which are currently on foot when the provision commences could be amended to include an area under section 47C.

Item 16, Part 1, Schedule 3 would ensure that the provision which would allow the Registrar to accept applications amended to include section 47C areas, commence on the day after Royal Assent, after the amendments which would allow the parties to make such amended applications. The item would ensure that the sequencing of the amendments is correct.

Part 2 – Pastoral leases

Allow historical extinguishment to be disregarded over pastoral leases controlled or owned by the native title claimants

Proposal

As noted above, section 47 of the Native Title Act allows past extinguishment of native title to be disregarded in a native title determination over pastoral leases held by the native title claimant, a trustee on trust for any of the native title claimants, or a company whose shareholders are any of the native title claimants.

While section 47 includes companies whose shareholders are any of the native title claimants, it does not include registered native title bodies corporate (RNTBCs) set up under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, whose members, rather than shareholders, are the native title claimants.

To resolve this issue, this measure would amend the Native Title Act to clarify that section 47 can also apply to pastoral leases held by RNTBCs, which have members rather than shareholders.

This amendment would implement the recommendation made at **Table 1, Item 6** of the COAG Investigation.

Draft amendment

The amendment to **subparagraph 47(1)(b)(iii) (Item 17, Part 2, Schedule 3)** would provide that section 47 applies to a body corporate that has members rather than shareholders, and holds a pastoral lease over an area subject to an application under section 61.

Application and transitional provisions

These changes would commence the day after Royal Assent and the transitional provision (**Item 18, Part 2, Schedule 3**) would ensure that the amendment applies for any application made or on foot after the item commences. This means that where an application has been made, but not finally determined, before the commencement of the section, the section would still apply to it.

Part 3 – Future acts where prior extinguishment to be disregarded

Ensuring the future acts regime applies to ‘section 47s’ land

Proposal

Table 1, Item 12 of the COAG Investigation recommended amending the Native Title Act to ensure that the future acts regime applies to land and waters to which section 47B applies. This amendment would give effect to this recommendation, and extend to land to which sections 47, 47A and the new section 47C apply.

Draft amendment

The proposed amendment to section 227 (Act affecting native title) (**Item 21, Part 3, Schedule 3**) would confirm that an act affects native title if the circumstances described in the proposed subsection 227(2) exist. Expanding the definition of an act affecting native title in this way would inform the definition of ‘future act’ in section 233, which in turn would inform the application of Part 2, Division 3 of the Native Title Act (i.e. the future acts regime).

For example, an act would affect native title (and may then be a future act to which the future acts regime applies) if –

- a claimant application is made (**subsection 227(2)(a)** and **table item 3, column 1**)
- section 47B applies in relation to the area (**subsection 227(2)(b)** and **table item 3, column 2**)
- if prior extinguishment was disregarded, the determination of the claimant application would then be that native title exists in relation to the area (**subsection 227(2)(c)**), and
- if prior extinguishment was disregarded, the act would then extinguish or be inconsistent with native title rights and interests (**subsection 227(2)(d)** and **table item 3, column 3**).

Item 19, Part 3, Schedule 3 would amend section 224, which gives meaning to the expression ‘native title holder’. The section currently applies to circumstances where native title has been determined. The item would amend the meaning of ‘native title holder’ to include, for the purposes of an action mentioned in subsection 227(2) (as discussed above), the people who would be determined to be the common law holders under the circumstances described in that subsection.

This measure would ensure that the future acts regime operates consistently across areas where native title has been extinguished, while also ensuring that sections 47, 47A, 47B and new 47C can continue to operate.

Application and transitional provisions

The amendments would take effect the day after Royal Assent. **Item 22, Part 3, Schedule 3** would apply the changes to any act done after the amendments commence. This means that any act to be done on an area claimed under the historical extinguishment provisions, after the amendments commence, would need to comply with the future acts regime.

Schedule 4 – Allowing a registered native title body corporate to bring a compensation application

Allow a registered native title body corporate to be the applicant on a compensation claim

Proposal

It is generally understood that the present terms of the Native Title Act do not allow a registered native title body corporate (RNTBC)² to bring a compensation application over areas where native title has been fully extinguished. Currently, RNTBCs can only bring compensation applications over areas where native title has been partially extinguished or impaired.

The Government proposes to amend the Native Title Act to allow, in addition to the status quo, an RNTBC to make a compensation claim over areas within the external boundary of its determination area where native title has been fully extinguished.

Draft amendment

Items 1-4, Schedule 4 would amend **section 58** of the Native Title Act to expand the functions of RNTBCs in relation to compensation applications that are provided for under the PBC Regulations.

Item 5, Schedule 4 would amend **subsection 61(1)** to clarify and broaden the scope of circumstances under which an RNTBC can make a compensation application. The new **subsection 61(1)** would clarify the current position that an RNTBC can make a compensation application over areas held by the RNTBC on behalf of the common law holders or as an agent in relation to the native title. The new **subsection 61(1A)** would allow an RNTBC to make a compensation application on behalf of all the persons who claim to be entitled to the compensation if –

- the determination is sought in relation to an area (the ‘extinguished area’) that is within the external boundary of the area covered by an approved determination of native title (the ‘earlier determination’) under which the RNTBC holds, or is an agent prescribed body corporate in relation to, native title rights and interests, and either:
 - the earlier determination is that native title does not exist in relation to the extinguished area, or
 - the extinguished area was expressly excluded from the area covered by the earlier determination because it was a subject to a previous exclusive possession act.

The effect of the new **subparagraph 61(1A)(c)** at **Item 5** would be that the ‘persons who claim to be entitled to the compensation’ are the common law holders in relation to the ‘earlier determination’.

Amendments are also proposed to the PBC Regulations to provide that the RNTBC must consult with, and obtain the consent of, the common law holders or persons who claim to be entitled to the compensation before the

² Common law holders must nominate a corporation, known as a prescribed body corporate or ‘PBC’, to manage their native title rights. Once a determination of native title is made by the Federal Court and the PBC appears on the National Native Title Register as the entity that holds the native title rights, it is also becomes a Registered Native Title Body Corporate or RNTBC. These corporations are also sometimes known as ‘native title corporations’.

RNTBC can make a compensation claim on their behalf. These are contained in the amendments to the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*, explained below on page 30.

Item 6, Schedule 4 would ensure the amendments to **section 61** apply to a compensation application made after commencement of the item.

Schedule 5 – Intervention and consent determination

Part 1 – Intervention in proceedings

Clarifying the Commonwealth Minister’s intervention power in High Court proceedings

Proposal and draft amendment

Section 84A of the Native Title Act provides that the Commonwealth Minister (i.e. the Attorney-General) can intervene in Federal Court proceedings under the Native Title Act. However, the definition of ‘Federal Court’ under section 253 of the Native Title Act appears to limit the application of the intervention power to proceedings in the Federal Court only, not extending to the High Court of Australia.

Item 1 of Part 1, Schedule 5 would amend **subsection 84A(1)** to clarify that the Commonwealth Minister’s right of intervention extends to proceedings in the High Court, as well as the Federal Court.

Clarify that the Commonwealth Minister, as an intervener, is required to consent to agreements reached under section 87

Proposal and draft amendment

Section 87 of the Native Title Act allows the Federal Court to make orders in relation to native title and compensation proceedings in terms agreed by the parties to the proceedings. Section 84 sets out who the “parties” are to such proceedings. However, it only includes the Commonwealth Minister (i.e. the Attorney-General) in his capacity as a party, and not intervener under section 84A of the Native Title Act. This is in contrast to section 87A which expressly requires the Commonwealth Minister, as intervener, to be a party to the agreement for the court to make a determination for a part of an area (see subparagraph 87A(1)(c)(vii)).

To address this inconsistency, the amendment to **section 87 (Item 3 and 4, Part 1, Schedule 5)** would clarify that the Commonwealth Minister, as intervener, is required to agree to the terms of orders made under section 87. Consequential amendments would ensure that the Commonwealth Minister as intervener is accorded status as a party to the proceedings (**Items 2 and 5**).

Clarify that the Commonwealth is not required to sign a consent determination in circumstances where it previously intervened and later withdrew

Proposal and draft amendment

Subparagraph 87A(1)(c)(vii) in its current form indicates that there is a possibility that the Commonwealth is required to sign a consent determination in circumstances where it previously intervened and later withdrew.

Items 1-5, Part 1, Schedule 5 would confirm that the agreement of a Commonwealth Minister who has intervened in the proceedings is required for an agreement reached for the purposes of section 87. Section 87 is often relied upon as part of the process of determining native title claims by consent. **Item 6, Part 1, Schedule 5** would amend **subparagraph 87A(1)(c)(vii)** to clarify that the agreement of a Commonwealth Minister who had intervened in a proceeding, but subsequently withdrawn, would not be required.

Item 7, Part 1, Schedule 5 would insert a new **subsection 87A(13)** to clarify the role of the Commonwealth Minister who has intervened in relation to agreed statements of facts.

Application and transitional provisions

Item 8, Part 1, Schedule 5, would set out how the amendments to the role of the Commonwealth Minister as intervener, and the Minister's ability to intervene in High Court proceedings, are intended to apply in the future and to applications currently on foot. The changes would apply to:

- any proceeding commenced after the commencement of the item
- any proceeding commenced before the commencement of the item which has not been finally determined
- any proceeding where a consent determination is filed with the court after the commencement of the item, irrespective of when the Commonwealth minister intervened in the proceeding or when it was commenced, and
- any agreed statements of fact filed with the court after the commencement of the item.

The effect of these provisions would be that any proceeding on foot at the commencement of the item is subject to the new rules, irrespective of when it was filed or when the Commonwealth minister intervened in the proceedings (if relevant), as well as any subsequent proceeding. These provisions would commence the day after Royal Assent.

Part 2 – Consent determinations

Clarify the Federal Court's powers to make a part consent determination as compared to a whole determination

Proposal

Section 87 of the Native Title Act currently allows the Federal Court to make orders in relation to native title proceedings in terms agreed by the relevant parties. Section 87A allows the Federal Court to make orders for part of a claim area where certain interest holders agree. Stakeholders have indicated that there is confusion around the appropriate use of sections 87 and 87A, where part of a native title application is being determined, but that part consists of the remainder of the area covered by the application.

The Federal Court decision in *Yaegl People #2 v AG New South Wales* [2017] FCA 993 clarified that section 87 should be used where there has been a determination over part of a claim area and all that remains to be determined is the balance of the claim area. In response to this decision and stakeholder feedback, this measure would clarify that only section 87 may be used where a part of an area of a native title application is being determined, and that part consists of the remainder of the area covered by the application.

Draft amendment

Item 9, Part 2, Schedule 5 would amend **paragraph 87A(1)(b)** to clarify that section 87A should be used where a determination is to be made for part of an area, and following that determination, an undetermined part of the claim area will remain.

Item 10, Part 2, Schedule 5 would insert a **note** at the end of subsection 87A to clarify that section 87 should be used where a determination is to be made for the entire, or the part of the claim area, where that area consists of the remainder of the area covered by the determination application.

Item 11, Part 2, Schedule 5 would ensure that the amendments to these provisions apply to any proposed consent determination, the terms of which are filed with the court after Royal Assent.

Schedule 6 – Other procedural changes

Part 1 – Objections

Clarify that native title parties to inquiries about expedited procedure objection applications include only native title parties who have objected

Proposal and draft amendment

If a government party to a section 31 agreement (a native title agreement relating to mining) declares that a particular act to be done under a section 31 agreement attracts the expedited procedure process, then the act can be done. If a native title party objects to the use of the expedited procedure process, then the National Native Title Tribunal (NNTT) must consider the objections and determine whether the process can be used.

Stakeholders have raised concerns that the way parties to an application are described in section 141 means that native title parties who do not object to the use of the expedited procedure process are nevertheless required to participate in an objection application lodged by another native title party.

Section 141 of the Native Title Act would be amended (**Item 2, Part 1, Schedule 6**) to clarify that only native title parties who object to an act attracting the expedited procedure are party to the NNTT's inquiries into those objection applications.

Clarify the objections process for a future act under subsection 24MD(6B), to provide that any party can refer an objection to adjudication

Proposal and draft amendment

The Native Title Act currently specifies particular procedural arrangements for future acts that pass the freehold test – that is, acts proposed to be done which affect native title the same way they would affect a person with freehold interest in land. Part of those procedural requirements is an objections process, where a person whose native title interests will be affected by the proposed future act may object to the doing of the act and be consulted on ways to minimise the effect of the act on their native title rights. The native title party also has the right to request that the issue be referred to an independent person or body for determination.

Stakeholders have raised concerns that, if a native title party is not satisfied with the consultation process but does not refer the matter to an independent person or body, there may be no way to properly resolve the objection, since neither the government nor the proponent party have the right to refer the matter to adjudication.

Item 1, Part 1, Schedule 6 would amend **paragraph 24MD(6B)(f)** to allow any of the parties to an objections process to refer the matter to an independent person for a final determination of appropriate conditions (if any) on the doing of the act.

Application and transitional provisions

These amendments would commence the day after the amendments receive Royal Assent, and would apply to any objections process which is live when the amendment commences/begins after the amendment commences, unless the objections process has already been resolved (**Item 3, Part 1, Schedule 6**).

Part 2 – Section 31 agreements

Validation of section 31 agreements

Proposal

As noted above in the discussion on Schedule 1 of the Bill ('Role of the Applicant'), the *McGlade* decision found that a particular kind of native title agreement – area Indigenous land use agreements (ILUAs) – are invalid where not all members of the applicant were party to the agreement. The reasoning in the decision could similarly affect agreements made under section 31 of the Native Title Act, which primarily relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights. This measure would confirm the validity of section 31 agreements potentially affected by the flaw identified in *McGlade*.

Draft amendment

Item 6, Division 1, Part 2, Schedule 6 would confirm the validity of section 31 agreements that are potentially affected by the *McGlade* decision. Section 31 agreements that were entered into prior to the commencement of this amending Bill would be validated, provided that at least one of member of each relevant native title party is a party to the agreement. This provision would have retrospective application. **Sub-item 11(2)** would provide that the relevant agreements are taken to be, and to have always been, agreements made under section 31 of the Native Title Act.

Item 6 would substantially replicate Items 9(1) & (2) of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* that validated area ILUAs made on or before 2 February 2017 to which not all members of the registered native title claimant (RNTC) were party.

However, Item 6 departs from Item 9(1A) of the 2017 amendments in that it would not validate section 31 agreements where no RNTCs were party to the agreement. There is no required authorisation process for section 31 agreements and no requirement for these agreements to be registered to have legal effect. As such, it would be inappropriate to extend validation to an agreement not signed by any of the members of the RNTC given the significant and binding effect of these agreements once they are made.

Application and transitional provisions

These amendments would commence the day after the amendments receive Royal Assent (**Section 2, Table Item 10**). They would have retrospective effect, meaning that any agreement validated by the item would have effect as if it had been valid from the date it was made.

Require the National Native Title Tribunal to be notified of the existence of ancillary agreements to Indigenous land use agreements and section 31 agreements

Proposal

When entering into an ILUA or section 31 agreement, the native title and grantee parties may also negotiate a confidential further agreement which details matters additional or ancillary to the matters required to be outlined in the main agreement. Currently, the Native Title Act requires parties to section 31 agreements and all three types of ILUAs to provide copies of their agreement to the NNTT, and in the case of section 31 agreements, to advise the Attorney-General of the making of the agreement. For ILUAs, the Act also specifies that the ILUA Regulations may set out other documents which should accompany a registration application. Neither the Act nor

ILUA Regulations require the parties to provide ancillary agreements to the NNTT or even to note whether they exist.

This measure would require that, when parties provide a copy of their section 31 agreements or ILUA to the NNTT/Native Title Registrar, they must also notify the NNTT of the existence of any ancillary agreements. This would enable the NNTT to note the existence of ancillary agreements on the Register of ILUAs.

Draft amendment

Item 4, Division 1, Part 2, Schedule 6 would amend section 41A to provide that the parties to a section 31 agreement must advise the relevant arbitral body about the existence of any other written agreement made in connection with the doing of the act covered by the section 31 agreement. This amendment would not require parties to provide a copy of their ancillary agreements to the NNTT.

Application and transitional provisions

These amendments would commence the day after Royal Assent (**Section 2, Table Item 9**), and would apply to any agreement of a kind mentioned in paragraph 31(1)(b) of the Native Title Act which is made after the item commences (**Item 5, Part 1, Schedule 6**).

Record of section 31 agreements

Proposal

Section 199A of the Native Title Act requires the Native Title Registrar to keep a publicly available Register of ILUAs. The Register is available on the NNTT website and contains specific details of ILUAs as required by section 199B. The Native Title Registrar may also publish any other details of the agreement that the Registrar considers appropriate. The signed ILUA itself is currently not publically available.

There is no registration process for section 31 agreements. Accordingly, there is currently no publicly available register that records any details of these types of agreements.

To create the same level of transparency that exists for ILUAs, the Government is considering creating a public record of section 31 agreements, containing similar information to that available on the Register of ILUAs. However, the public record would not have the legislative effect of the Register of ILUAs (when an ILUA is registered it has the effect of binding all persons holding native title within the area of the agreement). The agreements themselves would not be made public.

Allow the government party to cease being a party to negotiations for section 31 agreements

Proposal and draft amendment

When entering into a section 31 agreement, section 31 of the Native Title Act currently requires all negotiation parties, being the grantee (eg a mining company), the native title party, and the government party (the Commonwealth, a state or territory), to negotiate the agreement in good faith with a view to obtaining the agreement of each of the native title parties. As the government party is not always involved in the doing of the act the subject of the agreement, and therefore is often unnecessarily involved in negotiations, this measure would allow the government party to exclude itself from negotiations, with the consent of all other negotiation parties.

This amendment would implement the recommendation made in **Table 1, Item 17** of the COAG Investigation.

Items 7 and 8, Division 2, Part 2, Schedule 5 would amend **subsection 25(2) and subsection 31(1)** to provide that a government party to a section 31 agreement may limit its participation in negotiations about matters which do not affect that party, provided the other parties to the agreement provide their written consent.

Application and transitional provisions

These amendments would commence six months after the day after Royal Assent (**Section 2, Table Item 11**). **Item 10(1), Part 2, Schedule 6** ensures that the change to allow a government party to opt out of negotiations (with the consent of the other parties) about a section 31 agreement, would apply irrespective of whether the negotiations start before or after the commencement of that measure. **Item 10(2), Part 2, Schedule 6** would ensure that, after the commencement of the item, a government party is still required to be a party to the agreement for it to be made.

Schedule 7 – National Native Title Tribunal

Extend access to dispute resolution assistance from the National Native Title Tribunal to registered native title bodies corporate and common law holders

Proposal

This measure would confer on the National Native Title Tribunal (NNTT) a new function to allow it to provide assistance to registered native title bodies corporate (RNTBCs) and common law holders to promote agreement about native title and the operation of the Native Title Act. Both RNTBCs and common law holders would be able to approach the NNTT for this assistance. The function is drafted broadly to provide flexibility in how it is used, but is intended to cover the NNTT providing assistance to RNTBCs/common law holders to:

- establish governance processes that are consistent with the Native Title Act and PBC Regulations, eg agreed processes that are consistent with traditional decision making
- support resolution of disputes between common law holders and RNTBCS, which may include mediation, and
- facilitate collaboration and resolve disputes between RNTBCs.

Draft amendment

Item 1, Schedule 7 would insert a new **section 60AAA** of the Native Title Act that would establish a new function for the NNTT to provide assistance to RNTBCs and common law holders to promote agreement about native title and the operation of the Act.

Although the NNTT would be available to provide support in the event of conflicts, it is expected that RNTBCs would go through their internal dispute resolution processes prior to seeking the assistance of the NNTT. This expectation would be complemented by the new requirement for RNTBCs to establish internal dispute resolution processes with non-member common law holders that would be inserted by Schedule 8 (see discussion at p 30).

The new **subsection 60AAA(3)** would allow the NNTT to enter into an agreement with the RNTBC or common law holder under which either or both would be liable to pay the Commonwealth for the assistance. This provision would allow the NNTT to seek contributions to cover the cost of the assistance where this would support the NNTT's exercise of the function, for example travel or mediation costs. It is not intended that these agreements would go beyond cost recovery. This provision would have a similar effect to subsection 203BK(3), which allows the NNTT to enter into costs agreements with native title representative bodies for assistance provided.

The proposed **subsection 60AAA(4)** would prevent the NNTT from disclosing information it has obtained in the course of exercising this function without the prior consent of the person who provided the information.

Consequential amendments to support this function would be inserted by **Item 2, Schedule 7** (which would ensure this function is captured in the list of functions of the NNTT in section 108) and by **Item 4, Schedule 7** (which would ensure the President may give directions about the management of the function under section 123).

Acting appointments to the National Native Title Tribunal

Proposal and draft amendment

Subsection 111(1) of the Native Title Act provides that members (including the President and Deputy President) of the NNTT are appointed by the Governor-General.

New section 115A (**Item 3, Schedule 7**) would allow the responsible Commonwealth Minister (currently the Attorney-General) to appoint a person to act as a member (including as the President and Deputy President) during periods where the position is vacant or the incumbent is absent from duty. This is consistent with arrangements for acting statutory appointments in other Commonwealth legislation.

An acting appointee would still need to hold the qualifications of the relevant position as set out section 110 of the Act. The President would retain the ability to delegate his/her powers to one or more of the members of the NNTT under section 113 of the Act.

Application and transitional provisions

These amendments would commence the day after Royal Assent (**Section 2, Table Item 12**).

Schedule 8 – Registered native title bodies corporate

There are currently 188 registered native title bodies corporate (RNTBCs) across Australia (as at 17 October 2018), with varying levels of resourcing and capacity, managing native title over approximately 36 per cent of Australia's land mass. The effective management of native title rights and interests relies on the sustainable operation of RNTBCs.

The Government proposes to amend the CATSI Act to improve the accountability, transparency and governance of RNTBCs, with a particular focus on decision-making and improved dispute resolution pathways. In addition to the changes to the CATSI Act, which are set out below, there are also related changes in the exposure draft Registered Native Title Bodies Corporate Legislation Amendment Regulations. These changes are set out at the end of this document.

Part 1 – Registrar oversight

Appointment of a special administrator

Proposal and draft amendment

Items 1-3, Division 1, Part 1, Schedule 8 would amend **section 487-5** of the CATSI Act to clarify that the Registrar of Indigenous Corporations may place an RNTBC under special administration where it has conducted its affairs in a way that is contrary to the interests of the common law holders. This reform would add to the grounds currently available to the Registrar of Indigenous Corporations under section 487-5 (which include where the affairs of the corporation are being conducted in a way which is contrary to the interests of the members as a whole, or the appointment of a special administrator is required in the public interest).

Part 2 – Membership and common law holders

Require RNTBC constitutions to include dispute resolution pathways for common law holders

Proposal and draft amendment

Subsection 66(1) of the CATSI Act requires a corporation's constitution to include processes for the resolution of disputes internal to the operation of the corporation. Disputes in relation to RNTBCs may arise with common law holders who are not members of the RNTBC. In these circumstances, the dispute resolution processes currently required are unlikely to apply to disputes with non-members as these disputes are external to the operation of the corporation. **Items 9 and 10, Division 1, Part 2, Schedule 8** would add the requirement in **subsection 66(1)(3A)** that RNTBC constitutions also include dispute resolution pathways for common law holders who are non-members of the corporation. **Items 4, 5 and 8, Division 1, Part 2, Schedule 8** would make this additional rule part of the internal governance rules of the RNTBC.

Require RNTBC constitutions to reflect the native title determination

Proposal and draft amendment

The PBC Regulations provide that an Aboriginal and Torres Strait Islander corporation can only be an RNTBC if all members are common law holders, or are persons to whom the common law holders have consented to being

members. Currently, it is possible for an RNTBC to change the eligibility requirements for membership set out in its constitution to exclude some common law holders from membership of the RNTBC.

Items 11 and 12, Division 1, Part 2, Schedule 8 would require RNTBCs to include in their constitution particular eligibility requirements relating to common law holders. **Item 14, Division 1, Part 2, Schedule 8** would amend **sections 141-25** to require RNTBC constitutions to reflect the native title determination which would ensure that eligibility for membership is open to all common law holders either directly or indirectly, i.e. RNTBCs would continue to be able to recognise representative membership, whereby all family groups that make up the common law holders are represented by at least one member of the RNTBC. **Items 5-7, Division 1, Part 2, Schedule 8** would make consequential changes to internal governance rules provisions.

Limit grounds for cancelling RNTBC membership

Proposal and draft amendment

The CATSI Act sets out in section 150-15 the grounds for cancellation of membership to an Aboriginal and Torres Strait Islander corporation, specifically: where the member is not eligible for membership; has ceased to be eligible for membership; has not paid the membership fees; or the member is uncontactable, not an Aboriginal or Torres Strait Islander person or has misbehaved. Corporations can also add further grounds to their constitutions.

Items 15-19, Division 1, Part 2, Schedule 8 would amend **sections 150-15 and 150-20** of the CATSI Act to remove the option to add further grounds for cancellation of membership in RNTBC constitutions. This reform would ensure that RNTBCs are not able to create additional cancellation grounds to disenfranchise certain members or classes of members. The new **section 150-22** inserted by **Item 20, Division 1, Part 2, Schedule 8** would set out the way in which membership of a member of an RNTBC has to be cancelled in case of ineligibility or unpaid membership fees. **Item 22, Division 1, Part 2, Schedule 8** would allow the Registrar to exempt an Aboriginal and Torres Strait Islander corporation from **section 150-22**.

Application and transitional provisions

Item 22, Division 1, Part 2, Schedule 8 sets out the transitional provisions which would apply for the changes to RNTBC constitution requirements and the grounds for cancelling membership. New corporations registered after the item commences (on the day after Royal Assent (**Section 2, Table Item 11**)) would be required to comply with the new requirements from the date they are registered (**Sub-Item 22(1), Division 1, Part 2, Schedule 8**), whereas corporations which are already registered when the provision commences would have two years, or until they update their constitutions, whichever occurs first (**sub item 22(2), Division 1, Part 2, Schedule 8**). The provision would also set out the circumstances where the Registrar of Indigenous Corporations could register changes to a corporation's constitution.

The two-year period would also apply to allow an Aboriginal or Torres Strait Islander corporation which is registered when the changes in Schedule 4 commence to update its constitution if it is inconsistent with those changes (**Sub-Item 22(6), Division 1, Part 2, Schedule 8**).

Limit an RNTBC directors' discretion to refuse membership

Proposal and draft amendment

The directors of Aboriginal and Torres Strait Islander corporations are responsible for deciding membership applications. Currently directors have discretion under the CATSI Act to refuse to accept membership even where an applicant meets the eligibility requirements and has applied for membership in the required manner. **Items 23 to 26, Division 2, Part 2, Schedule 8** would amend **section 144-10** of the CATSI Act to remove this discretion in

relation to RNTBCs, so that directors would be prevented from arbitrarily denying membership to applicants who are eligible for membership, given the responsibilities of RNTBCs to the common law holders.

Application and transitional provisions

The measures would commence the day after Royal Assent (**Section 2, Table Item 12**) and would apply to any application for membership of an Aboriginal and Torres Strait Islander corporation made after the commencement of the measure (**Item 27, Division 2, Part 2, Schedule 8**).

Part 3 – Jurisdiction of courts

Confer on the Federal Court of Australia exclusive jurisdiction in relation to registered native title body corporate-related matters under the CATSI Act

Proposal and draft amendment

Currently, the Federal Court has exclusive jurisdiction (other than the High Court) to hear and determine native title applications. The Federal Court has developed, on a national basis, case management and related strategies to facilitate the resolution of disputes under the Native Title Act.

Items 28-30, Part 3, Schedule 8 would amend **section 586-1** of the CATSI Act to consolidate the jurisdiction for native title related dispute matters within the Federal Court by conferring on it exclusive jurisdiction for: civil matters arising under the CATSI Act with respect to RNTBCs; and matters arising under the *Administrative Decisions (Judicial Review) Act 1977* related to decisions under the CATSI Act with respect to RNTBCs. **Items 31-38, Part 3, Schedule 8** would make consequential amendments to the CATSI Act to give effect to this amendment. This proposal aims to promote the development of a coherent body of jurisprudence in relation to the kinds of issues which frequently arise under the CATSI Act with respect to RNTBCs.

Application and transitional provisions

The Federal Court's exclusive jurisdiction would operate only for matters commenced after the commencement of this measure (**Item 39, Part 3, Schedule 8**). The item would commence the day after Royal Assent (**Section 2, Table Item 12**). Where a matter has commenced in a state, territory, or family court prior to the commencement of this measure, it is proposed that the state, territory or family court would continue to have jurisdiction to hear that matter until it is concluded. It is not proposed that matters currently before other courts would be transferred to the Federal Court on the commencement of this measure.

Where, prior to the commencement of this measure, a matter had commenced in a state, territory, or family court, or a state, territory, or family court had made a decision, it is proposed that the state, territory or family courts would continue to have jurisdiction to hear any appeal from that matter.

Schedule 9 – Just terms compensation

Entitlement to ‘just terms’ compensation

Proposal and draft amendment

Item 1, Schedule 9 would insert a ‘historic shipwrecks clause’ not uncommon in Commonwealth legislation. Section 21 of the *Historic Shipwrecks Act 1976* (Cth) was the first of such clauses, hence the generic term now used to describe similar provisions.

In general terms, the item would ensure that if, apart from the item, any of the provisions of the Amendment Act would acquire property of a person other than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution), that person would be entitled to compensation. The item is similar to section 53 of the Native Title Act.

As an example, if the bill were enacted and then it were found that in a particular case, the provision retrospectively deeming an agreement to be an agreement within the meaning of section 31 of the Native Title Act would result in the Commonwealth acquiring a right to challenge the operation of that agreement, the person from whom that right was acquired would be entitled to compensation for the acquisition of the right.

Application and transitional provisions

These amendments would commence the day after Royal Assent (**Section 2, Table Item 12**).

Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

The Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 (Amendment Regulations) would amend the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations), the Native Title (Indigenous Land Use Agreements) Regulations 1999 (ILUA Regulations), and the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (CATSI Regulations). The following proposed measures focus on improving the accountability and transparency of PBCs to the common law holders.

Clarify the requirement to consult with groups of common law holders

Proposal

The Government proposes to address the uncertainty around the requirement for PBCs to consult with groups of common law holders. The current PBC Regulations implicitly require PBCs to identify sub-groups with particular rights and interests across the determination area. The proposal would clarify that it is not necessary to identify sub-groups of common law holders if the native title rights and interests are held equally across the determination area.

Draft amendment

Item 27, Schedule 1 of the Amendment Regulations would repeal **subregulation 8(5)** of the PBC Regulations so that PBCs would no longer be required to identify and consult with groups of common law holders whose native title rights and interests would be affected by the proposed native title decision.

Subregulations 8(3) and (4) would not be affected by this amendment. They set out the decision-making process that must be used to obtain common law holders' consent, depending on whether the common law holders have a mandatory traditional decision-making process which must be followed or whether they have agreed to and adopted a decision-making process for a proposed native title decision.

Clarify the consultation and consent requirements for native title decisions

Proposal

The Government proposes to bring all types of native title decisions under a single definition and to clarify the consultation and consent process to be used for each type of decision.

This proposal also outlines whether the decision can be made by the PBC on the basis of standing instructions and introduces two types of 'standing instructions decisions', in addition to the status quo.

Draft amendments

Item 19, Schedule 1 of the Amendment Regulations would amend the definition of 'native title decision' under **subregulation 3(1)** of the PBC Regulations. **Item 18** would introduce a new 'high' or 'low' level classification. High level decisions would be those which require consultation with common law holders (including via standing instructions where relevant). Low level decisions would be those for which the PBC may, following consultation and with the consent of common law holders, adopt an alternative consultation process in their constitution.

Item 20 would outline the types of decisions which would be able to be made on the basis of standing instructions (essentially low level decisions or decisions to enter an ILUA where the future act in question is proposed by or for the benefit of the PBC or to enter a section 31 agreement where the PBC is the only grantee party). The common law holders would need to give their approval for the PBC to act on the basis of standing

instructions in relation to these types of decisions. The ability for common law holders to give or revoke this approval, and to impose, vary or revoke conditions on the approval, would be set out in **subregulations 8(8) and 8(9)** at **Item 29**.

The new **regulations 8 and 8A (Items 24-30)** would set out the consultation and consent requirements for decisions which would be able to be made on the basis of standing instructions and which decisions would need to have the consent of common law holders.

These changes to the consultation and consent processes would require the consequential amendments to the PBC Regulations at **Items 21 and 22** and to the ILUA Regulations at **Items 5, 7, 11 and 15**.

Require prescribed bodies corporate to consult with, and seek the consent of, common law holders before making a compensation application

Proposal

The Government proposes to amend the PBC Regulations so that PBCs must consult with, and obtain the consent of, common law holders or persons who claim to be entitled to the compensation before making a compensation application.

Draft amendment

Item 23, Schedule 1 of the Amendment Regulations would insert a new **regulation 7A** into the PBC Regulations to confer functions on PBCs in relation to compensation applications. **Item 30** would insert new **regulation 8B**, which sets out the consultation and consent process to be used. The enhanced certification requirements outlined immediately below also apply.

This proposal relates to the proposal in Schedule 4 of the Native Title Legislation Amendment Bill outlined above which would allow a PBC to bring a compensation application over areas where native title has been fully extinguished.

Enhance the certification requirements for certain decisions made by prescribed bodies corporate

Proposal

To improve transparency, the Government is proposing to amend the certification requirements under the PBC Regulations. The amendments would provide that when a PBC makes a native title decision, or decides to make a compensation application, the PBC is obliged to certify that the consultation and consent requirements for that decision have been complied with.

Draft amendments

Under the proposed changes to **regulation 9 (Item 30, Schedule 1** of the Amendment Regulations), the decision-making process would be required to be clearly set out (**subregulation 9(3)** at **Item 30**). PBC directors would be required to sign the certificate, rather than five members (**subregulation 9(4)** at **Item 30**). The certificate could be taken as prima facie evidence that the consultation and consent requirements have been complied with (**subregulations 9(6) and 9(7)** at **Item 30**).

In addition, under the new **regulation 10** at (**Items 31-55**), the common law holders (whether or not they are members of the PBC) and persons with a 'substantial interest' in the decision to which the certificate relates (including the Registrar of Indigenous Corporations) would be able to access a copy of the certificate on request.

Similarly, if the decision is a ‘standing instructions decision’ (defined in **subregulation 3(1)** at **Item 20**), the PBC would be required to certify, in accordance with the new **regulation 9** at **Item 30**, that such standing instructions had been given.

The proposed changes to the certification regime under the PBC Regulations would require consequential amendments to the ILUA Regulations (**Items 6, 8-10, 12-14, and 16**).

Create an additional power for the Registrar of Indigenous Corporations to make a finding that a certificate fails to comply with the PBC Regulations

Proposal

The Government proposes to provide the Registrar of Indigenous Corporations with the function of ensuring that certificates issued by PBCs contain all the required information and have been validly executed by the PBC (see immediately above for the proposed amendments to the certification requirements). Where a certificate fails to comply with the PBC Regulations, the Registrar would make a finding that the certificate is non-compliant.

To avoid doubt, the Government does not intend for the Registrar to intervene in PBC decision-making - the proposal does not include giving the Registrar the power to direct the PBC to issue a compliant certificate - but a PBC’s refusal to undertake one of its functions or to fulfil one of its obligations under the PBC Regulations, including the proposed enhanced certification function, could be a relevant consideration in considering whether to appoint a special administrator (see Schedule 8, Part 1, Items 1-3).

Draft amendment

Regulation 55A of the CATSI Regulations (**Item 3, Schedule 1** of the Amendment Regulations) would be amended to allow the Registrar of Indigenous Corporations to assess whether or not a certificate issued by an PBC complies with the certification requirements under the PBC Regulations. The certificate would be assessed following a request by a common law holder or a person who has a substantial interest in the decision to which the certificate relates (**paragraph 55A(1)(a)** at **Item 3**). This amendment would allow the person who requested the certificate to be notified of the Registrar’s opinion as to whether or not the certificate complies (**paragraph 55A(1)(b)** at **Item 3**).

Consequential amendments are proposed to **Items 1, 2 and 4** to reflect these changes.

Remove the requirement to consult with native title representative bodies

Proposal and draft amendment

The Government proposes to streamline PBC’s decision-making process by removing the requirement for PBCs to consult with, and consider the views of, native title representative bodies for the area to which the native title rights and interests relate. This would be achieved by repealing **subregulation 8(2)** of the PBC Regulations (**Item 25, Schedule 1** of the Amendment Regulations).

Application and transitional provisions

The transitional provision at **Item 4, Schedule 1** of the Amendment Regulations would ensure that the new **regulation 55A** of the CATSI Regulations would apply in relation to any certificate given under **regulation 9** of the PBC Regulations after the commencement of Schedule 1 to the Amendment Regulations.

Item 17 would ensure that the consequential amendments to the ILUA Regulations would apply in relation to any native title decision made after the commencement of Schedule 1 to the Amendment Regulations.

Item 36 would ensure that the amendments to the PBC Regulations (except for the consequential amendment to **regulation 4A** at **Item 21**) would apply after the commencement of Schedule 1 to the Amendment Regulations. The consequential amendment to **regulation 4A (Item 21)** would apply in relation to consent obtained after the commencement of Schedule 1 to the Amendment Regulations.

Annexure – Summary of proposed measures

Measure description	Reference in options paper	Location in exposure draft	Page in Consultation Paper
Schedule 1, Part 1 – Role of the applicant – authorisation			
Clarify the duties of the applicant to claim group	A5	Item 11	5
Allowing the claim group to place conditions on the applicant's authority	A1	Item 21	3
Schedule 1, Part 2 – Role of the applicant – decision-making			
Allowing the applicant to act by majority as the default position	A2 (for general process) Page 5 (for section 31 agreements specifically)	Item 32 Items 30-31	6
Schedule 1, Part 3 – Role of the applicant – replacement			
Changing the composition of the applicant without a further authorisation process, and succession planning	A3 (for simplified replacement processes) A4 (for succession planning)	Item 42	8
Schedule 2, Part 1 – Indigenous land use agreements – body corporate and area agreements			
Allow body corporate ILUAs to cover areas where native title has been extinguished	C1	Item 2	10
Remove the requirement for the Registrar to notify an area ILUA unless he or she is satisfied it meets the requirements to be an ILUA	C3	Item 3	10
Schedule 2, Part 2 – Indigenous land use agreements – deregistration and amendment			
Allow minor amendments to be made to an ILUA without requiring a new registration process	C2	Item 7	11
Clarify that the removal of an ILUA from the Register of ILUAs does not invalidate future acts subject to that ILUA	C7	Item 9	11
Schedule 3 – Historical Extinguishment			
Allow historical extinguishment to be disregarded over areas of national, state or territory parks with the agreement of the parties	E6	Item 2, Division 1, Part 1	13
Allow historical extinguishment to be disregarded over pastoral leases controlled or owned by the native title claimants	E3	Item 17, Part 2	15
Ensuring the future acts regime applies to 'section 47s' land	C5	Item 21, Part 3	15

Measure description	Reference in options paper	Location in exposure draft	Page in Consultation Paper
Schedule 4 – Allowing a prescribed body corporate to bring a compensation application			
Allow a registered native title body corporate (RNTBC) to be the applicant on a compensation claim	E4	Item 5	18
Schedule 5, Part 1 – Intervention and consent determination – intervention in proceedings			
Clarify that the Commonwealth Minister, as an intervener, is required to consent to agreements reached under section 87	G23	Items 3 and 4	20
Clarify that the Commonwealth is not required to sign a consent determination in circumstances where it previously intervened and later withdrew	G23	Item 6	20
Schedule 5, Part 2 – Intervention and consent determination – consent determination			
Require the National Native Title Tribunal to be notified of the existence of ancillary agreements to ILUAs and section 31 agreements	Mentioned in options paper – page 16	Item 4, Division 1	25
Allow the government party to cease being a party to negotiations for section 31 agreements	C8	Items 7 and 8, Division 2	26
Clarify the Federal Court’s powers to make a part consent determination as compared to a whole determination	G22, G23	Items 9 and 10	21
Schedule 6 – Other procedural changes			
Clarify the objections process for a future act under subsection 24MD(6B), to provide that any party can refer an objection to adjudication	C9	Item 1, Part 1	24
Clarify that native title parties to inquiries about expedited procedure objection applications include only native title parties who have objected	G4	Item 2, Part 1	24
Validation of section 31 agreements	No proposal number; page 5	Item 6, Division 1, Part 2	25
Schedule 7 – National Native Title Tribunal			
Extend access to dispute resolution assistance from the National Native Title Tribunal to prescribed bodies corporate and common law holders	F11	Item 1	28
Schedule 8, Part 1 – Registered native title bodies corporate – Registrar oversight			
Appointment of a special administrator	F1	Items 1-3, Division 1	30
Schedule 8, Part 2 – Registered native title bodies corporate – Membership and common law holders			
Require RNTBC constitutions to include dispute resolution pathways for common law holders	F3	Items 4-5, 8-10, Division 1	30

Measure description	Reference in options paper	Location in exposure draft	Page in Consultation Paper
Require RNTBC constitutions to reflect the native title determination	F3	Items 5-7, 11, 12, 14, Division 1	31
Limit grounds for cancelling RNTBC membership	F4	Items 15-20 and 22, Division 1	31
Limit an RNTBC directors' discretion to refuse membership	F5	Items 23-26, Division 2	32
Schedule 8, Part 3 – Registered native title bodies corporate – Jurisdiction of courts			
Confer on the Federal Court of Australia exclusive jurisdiction in relation to RNTBC-related matters under the CATSI Act	F11	Items 28-38	32
Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018			
Create an additional power for the Registrar of Indigenous Corporations to make a finding that a certificate fails to comply with the PBC Regulations	F7	Item 3	36
Clarify the consultation and consent requirements for native title decisions	F10	Item 18-20, and items 24-30	34
Require PBCs to consult with, and seek the consent of, common law holders before making a compensation application	E5	Item 23	35
Remove the requirement to consult with native title representative bodies	C4	Item 25	36
Clarify the requirement to consult with groups of common law holders	F9	Item 27	34
Enhance the certification requirements for certain decisions made by the PBCS	F7	Item 30-35	35
Measures not in options paper			
Acting appointments to the National Native Title Tribunal	N/A	Item 3, Schedule 7	29
Clarifying the Commonwealth Minister's intervention power to High Court proceedings	N/A	Item 1, Part 1, Schedule 5	20