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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**NATIVE TITLE AMENDMENT BILL 2006**

EXPLANATORY MEMORANDUM

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

## **Abbreviations used in the Explanatory Memorandum**

CATSI Consequential Act	<i>Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006 (Cth)</i>
Claims Resolution Review	Native Title Claims Resolution Review
Court	Federal Court of Australia
NNTT	National Native Title Tribunal
NTSP	Native title service provider
PBC	Prescribed body corporate
PBC Regulations	Native Title (Prescribed Bodies Corporate) Regulations 1999
PBC Report	Report on the Structures and Processes of Prescribed Bodies Corporate
Representative body	Representative Aboriginal/Torres Strait Islander body
RNTBC	Registered native title body corporate

# NATIVE TITLE AMENDMENT BILL 2006

## *Outline*

In September 2005, the Government announced a package of six inter-related reforms to the native title system. The primary purpose of the Bill is to amend the *Native Title Act 1993* to implement aspects of four of the six elements of the reform package:

- measures to improve the effectiveness of representative Aboriginal and Torres Strait Islander bodies (representative bodies)
- an independent review of native title claims resolution processes to consider how the National Native Title Tribunal (NNTT) and the Federal Court of Australia (Court) may work more effectively in managing and resolving native title claims
- measures to encourage the effective functioning of prescribed bodies corporate (PBCs), the bodies established to manage native title once it is recognised, and
- reforms to the native title non-claimants (respondents) financial assistance program to encourage agreement-making rather than litigation.

Schedule 1 of the Bill introduces a new regime for representative bodies. The proposed measures are designed to:

- enhance the quality of services provided by representative bodies by broadening the range of organisations that can undertake activities on behalf of claimants
- streamline the process for withdrawing recognition from poorly performing representative bodies and appointing a replacement body, and make corresponding changes to other provisions governing representative bodies
- put a time limit on the recognised status of representative bodies to ensure a focus on outcomes (while ensuring that all existing representative bodies are initially invited to be recognised for between one and six years)
- reduce red-tape by removing the requirement for representative bodies to prepare strategic plans and table their annual reports in Parliament
- ensure that entities funded to perform representative body functions can provide the same services as representative bodies, and
- make it easier to change representative body areas.

Schedule 2 of the Bill implements a number of recommendations made by an independent review into the native title claims resolution process (Claims Resolution Review). The purpose of the Claims Resolution Review was to identify ways to improve the efficiency and effectiveness of the claims resolution process and consider how the Court and NNTT could work together more effectively to facilitate the timely resolution of claims.

The proposed measures are designed to address a number of key issues identified in the Claims Resolution Review, including:

- promoting better communication and coordination between the Court and the NNTT
- removing the duplication of functions between the Court and the NNTT
- improving the effectiveness of NNTT mediation, and
- facilitating improved behaviour of parties.

Schedule 3 of the Bill amends provisions relating to PBCs. In October 2006, the Attorney-General, the Honourable Philip Ruddock MP, and the Minister for Families, Community Services and Indigenous Affairs, the Honourable Mal Brough MP, released a report examining the structures and processes of PBCs (PBC Report). The report included an examination of the appropriateness of the existing statutory governance model for PBCs. The amendments in the Bill will allow for two of the recommendations in the PBC report to be implemented which will enable improvements to the flexibility of the PBC governance regime to accommodate specific interests and circumstances of the native title holders.

Schedule 4 of the Bill amends section 183, which provides that the Attorney-General may grant assistance to non-claimant parties to an inquiry, mediation or proceeding related to native title, and to non-claimant parties negotiating indigenous land use agreements. The amendment will expand the scope of section 183 to enable the Attorney-General to grant assistance to non-claimant parties to develop standard form agreements, or review existing standard form agreements, relating to the normal negotiation and expedited procedure of the right to negotiate process for mining related acts. This amendment allows assistance to be approved for legal and other costs associated with the development of standard form agreements and the review of existing standard form agreements.

### **Financial impact statement**

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

## **NOTES ON CLAUSES**

### **Clause 1: Short title**

1. Clause 1 provides for the Act to be cited as the *Native Title Amendment Act 2006*.

### **Clause 2: Commencement**

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

### **Clause 3: Schedule(s)**

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

## **Schedule 1 – Amendments relating to representative Aboriginal/Torres Strait Islander bodies**

### ***Overview***

Schedule 1 introduces a new regime for representative bodies under which:

- representative bodies will be recognised for fixed terms of between one and six years, rather than for an indefinite period as at present, with existing representative bodies being recognised during a transition period for an initial fixed term
- the criteria governing recognition and withdrawal of recognition from representative bodies, and extension, variation and reduction of representative body areas will be simplified, with the Commonwealth Minister being given new powers to extend and vary representative body areas
- bodies incorporated under the *Corporations Act 2001* will be able to be recognised as representative bodies
- existing requirements for representative bodies to prepare strategic plans and prepare annual reports for tabling in Parliament will be removed, and
- native title service providers funded to perform representative body functions for an area for which there is no representative body will be able to operate in the same way as representative bodies to the extent that this is appropriate.

### **Fixed term recognition and transitional arrangements**

The Bill repeals spent transitional provisions under which representative bodies were recognised following the 1998 amendments to the Native Title Act and introduces arrangements which will apply during the new transition period. The new transition period will run from the day on which the amendments commence (transitional commencing day) to the end of 30 June 2007.

After the transition period starts, the Commonwealth Minister must invite existing representative bodies to apply to be recognised for their areas for terms of between one and six years. The term for which a representative will be invited to apply will be specified in the invitation. The Minister must recognise an existing representative body that applies to be recognised in response to an invitation. If an existing representative body does not apply to be recognised for its area, the Minister may invite other eligible bodies to apply to be recognised as the representative body for an area wholly or partly within the area. Recognitions for all existing representative bodies who have applied to be recognised for their areas during the transition period take effect on 1 July 2007. If a representative body does not apply to be recognised for its area in response to an invitation issued during the transition period, its recognition will cease at the end of 30 June 2007.

It is anticipated that the areas for which existing representative bodies will be invited to apply will be the areas for which they were recognised on transitional commencing day. However, the transitional arrangements factor in the possibility that a

representative body's area may be extended, varied or reduced between transitional commencing day and the end of 30 June 2007.

When recognition terms determined during the transition period cease, the Minister may invite existing representative bodies to apply to renew their recognition for further terms of between one and six years. The Minister may also invite other eligible bodies to apply to be recognised for a one to six year term.

### **Criteria for recognising and withdrawing recognition from representative bodies and extending, varying and reducing representative body areas**

The Bill will remove two criteria that the Commonwealth Minister is presently required to consider before recognising or withdrawing recognition from representative bodies, or extending, varying or reducing representative body areas (whether during or after the transition period). These are: whether the body does or will satisfactorily represent native title holders and persons who may hold native title in its area; and whether the body does or will consult effectively with Aboriginal peoples and Torres Strait Islanders living in its area.

For recognition and extension and variation of areas, the Minister will need to be satisfied that a body satisfactorily performs or would be able to satisfactorily perform representative body functions. Paragraphs 203BA(2)(a) and (b) will continue to require representative bodies to perform their functions in a way that maintains organisational structures and administrative processes that promote: the satisfactory representation of native title holders and persons who may hold native title in their area; and effective consultation with Aboriginal peoples and Torres Strait Islanders living in their area. As at present, the Minister would be required to take these matters into account when considering whether a representative body satisfactorily performs or would be able to satisfactorily perform representative body functions.

For reduction of areas, the Minister will need to be satisfied that a body is not satisfactorily performing its functions in the area to be excised.

For withdrawal of recognition, the Minister will need to be satisfied that a body is not satisfactorily performing its functions, or that there are serious or repeated irregularities in the body's financial affairs. The Minister will no longer need to be satisfied that a representative body that would otherwise meet the criteria for withdrawal of recognition is unlikely to take steps to remedy this situation within a reasonable period.

The Minister will also be able to extend or vary representative body areas on his or her own initiative and without the agreement of representative bodies. Affected representative bodies and members of the public must first be notified of any proposed extension or variation and given an opportunity to make submissions. Representative bodies will also be able to apply to extend their areas into an area for which there is no representative body, and it will be simpler for representative bodies to apply to vary their boundaries.

## **Allowing bodies incorporated under the Corporations Act to be recognised as representative bodies**

The Bill will broaden the range of bodies that can be recognised as representative bodies by providing that a company incorporated under the Corporations Act is an eligible body.

## **Strategic plans and annual reports**

Existing requirements for representative bodies to prepare strategic plans and to prepare annual reports for tabling in Parliament will be removed. However, the Secretary of the Department for Families, Community Services and Indigenous Affairs (the Secretary) will be required to impose conditions on funding provided to representative bodies relating to the production and publication of financial statements (which are presently required to be included in annual reports).

## **Native title service providers**

The Secretary may presently make funding available to a person or body under subsection 203FE(1) to perform representative body functions for an area for which there is no representative body. The Secretary may also make funding available to a person or body under subsection 203FE(2) to perform specified facilitation and assistance functions in relation to a particular matter for which a representative body has refused to provide assistance.

The Bill will provide that persons or bodies funded under subsections 203FE(1) and 203FE(2) (commonly referred to as native title service providers (NTSPs)) can operate in the same way as representative bodies to the extent that this is appropriate.

There are presently two types of impediments to this occurring:

- there are some things that representative bodies can or must do under the Native Title Act that persons or bodies funded under subsections 203FE(1) and (2) cannot do or are not obliged to do, and
- third parties have certain powers and obligations in relation to representative bodies under the Native Title Act that they do not have in relation to persons or bodies funded under subsections 203FE(1) and (2).

## ***Part 1—Amendments***

### *Item 1 – Section 201A (definition of executive officer)*

4.1 This item amends the definition of ‘executive officer’ in section 201A (which contains definitions for the purposes of Part 11). Paragraph (a) of the definition re-enacts the existing definition which is confined to executive officers of representative bodies. Paragraph (b) defines executive officer for the purposes of a body to whom funding is made available under subsections 203FE(1) or (2). This definition is necessary to ensure that executive officers of these bodies are covered by the immunities conferred by section 203FD in the same way as executive officers of representative bodies (see proposed section 203FED to be inserted by item 45).



*Item 2 – Section 201A (definition of transition period)*

4.2 This item repeals and replaces the existing definition of ‘transition period’ in section 201A (which contains definitions for the purposes of Part 11). The existing definition is spent. The new transition period will run from transitional commencing day to the end of 30 June 2007.

*Item 3 – Section 201A*

4.3 This item inserts a definition of ‘transitional commencing day’ in section 201A (which contains definitions for the purposes of Part 11). Transitional commencing day will mean the day on which Schedule 1 commences.

*Item 4 – Section 201A*

4.4 This item inserts a definition of ‘transitionally affected area’ in section 201A (which contains definitions for the purposes of Part 11). Transitionally affected area will have the meaning given by proposed section 201C (see item 6).

*Item 5 – After paragraph 201B(1)(b)*

4.5 Only ‘eligible bodies’ can be recognised as representative bodies (see subsection 203AD(1)). Eligible body is defined in section 201B, with paragraphs 201B(1)(a) – (c) listing types of bodies corporate that are presently eligible bodies. Proposed paragraph 201B(1)(ba) would broaden the range of bodies that can be recognised as representative bodies by providing that a company incorporated under the Corporations Act is an eligible body.

*Item 6 – At the end of Division 1 of Part 11*

4.6 This item inserts proposed section 201C which defines ‘transitionally affected area’. It is anticipated that transitionally affected areas will be existing representative body areas as they stand on transitional commencing day (subsection 201C(1)). However, an existing representative body’s area may be extended, varied or reduced between:

- transitional commencing day and the day on which an invitation is made under section 203A in compliance with proposed subsections 203AA(1) or (2)
- the day on which an invitation is made and the day on which a representative body applies for recognition under section 203AB, or
- the day on which a representative body applies for recognition and the day on which it is recognised under section 203AD.

4.7 Proposed subsection 201C(2) ensures that where this occurs, the existing representative body’s area as extended, varied or reduced will continue to be a transitionally affected area. This in turn guarantees that the representative body will be re-recognised for its new area if it applies to be recognised.

*Item 7 – After subsection 203A(3)*

4.8 This item inserts proposed subsection 203A(3A). This subsection will allow the Commonwealth Minister to specify the term for which a representative body is invited to apply for recognition, whether during or after the transition period. For invitations to existing representative bodies issued during the transition period, the Minister must specify such a term (see proposed subsection 203AA(3) to be inserted by item 8).

*Item 8 – Section 203AA*

4.9 This item repeals and replaces section 203AA which is a spent provision.

4.10 As soon as practicable after the transition period starts, the Commonwealth Minister must make invitations for recognition as a representative body for each transitionally affected area (proposed subsection 203AA(1)).

4.11 Under proposed subsection 203AA(2), invitations for an area may only be made to the body that was the representative body for the area on transitional commencing day. However, if a representative body's area is extended, varied or reduced between transitional commencing day and the time at which invitations are issued, the representative body will be invited to apply for recognition over its new area (see the example following proposed subsection 203AA(2)).

4.12 The invitation must specify the period of recognition offered, which must be between one and six years (proposed subsection 203AA(3)).

4.13 Invitations made during the transition period need not be made at the same time (proposed subsection 203AA(4)).

4.14 The Minister may not invite another body to apply for recognition for an existing representative body's area, or an area that is wholly or partly within such an area, unless the existing representative body does not apply to be recognised in response to an invitation within the period specified in subsection 203A(3) (28 days) or such other period as the Minister allows (proposed subsections 203AA(5) and (6)).

*Item 9 – Subsection 203AB(3)*

4.15 This item repeals and replaces subsection 203AB(3) which is a spent provision.

4.16 Proposed subsection 203AB(3) makes it clear that only an existing representative body can respond to an invitation made to it to apply for recognition (proposed paragraph 203AB(3)(a)).

4.17 Proposed paragraph 203AB(3)(b) would deal with situations where an existing representative body's area has been extended, varied, or reduced between the making of invitations and the time when the representative body applies for recognition. If this occurs, the invitation would be taken to have been made for the new area.

#### 4.18 Example:

- On 1 March 2007, Body A is the representative body for Area A and Body B is the representative body for Area B.
- On 2 March 2007, Body A and Body B apply under section 203AF to vary their boundaries so that Body A becomes the representative body for a slice of Area B.
- On 1 April 2007, invitations are issued to Body A for Area A and Body B for Area B.
- On 2 April 2007, Body A and Body B's boundaries are varied so that Body A becomes the representative body for Area A+ and Body B becomes the representative body for Area B-.
- On 1 May 2007, Body A and Body B apply for recognition in response to the invitations issued on 1 April 2007 (which were for Area A and Area B). Their invitations will be taken to have been made for, respectively, Area A+ and Area B-.

#### *Item 10 – Paragraph 203AC(1A)(b)*

4.19 This item repeals and replaces paragraph 203AC(1A)(b) which is a spent provision.

4.20 Proposed paragraph 203AC(1A)(b) ensures that where an application for recognition is made by an existing representative body, the Commonwealth Minister must recognise the body before the end of the transition period.

#### *Item 11 – Subsection 203AD(1)*

4.21 Subsection 203AD(1) allows the Commonwealth Minister to recognise representative bodies. Its application is not limited to the transition period. This item will amend the subsection to make it clear that different arrangements, as set out in proposed subsection 203AD(1A), apply during the transition period (see item 14).

#### *Item 12 – Subsection 203AD(1)*

4.22 This item provides that an instrument made under subsection 203AD(1) by which a representative body is recognised is a legislative instrument. This provision is included to assist readers.

#### *Item 13 – Paragraphs 203AD(1)(a) and (b)*

4.23 This item removes two criteria that the Commonwealth Minister is presently required to be satisfied about before recognising an eligible body as a representative body under subsection 203AD(1) (whether during or after the transition period). These are: whether the body does or will satisfactorily represent native title holders and persons who may hold native title in its area; and whether the body does or will consult effectively with Aboriginal peoples and Torres Strait Islanders living in its area. Similar changes are proposed to be made to criteria governing withdrawal of

recognition (item 24) and extension, variation and reduction of representative body areas (items 18, 19 and 20).

4.24 The Minister will only need to be satisfied that the eligible body satisfactorily performs or would be able to satisfactorily perform representative body functions (paragraphs 203AD(1)(c) and (d)).

*Item 14 – After subsection 203AD(1)*

4.25 This item inserts proposed subsections 203AD(1A).

4.26 Proposed subsection 203AD(1A) makes it clear that the Commonwealth Minister must recognise an existing representative body that has applied for recognition in response to an invitation made to it during the transition period.

4.27 If a representative body's area has been extended, varied or reduced between the day on which it applied for recognition and the day on which its recognition takes effect, proposed subsection 201C(2) (see item 6) would ensure that the body will be recognised for its area as extended, varied or reduced.

4.28 Example:

- On 1 March 2007, Body A is the representative body for Area A and Body B is the representative body for Area B.
- On 2 March 2007, Body A and Body B apply under section 203AF to vary their boundaries so that Body A becomes the representative body for a slice of Area B.
- On 1 April 2007, invitations are issued to Body A for Area A and Body B for Area B.
- On 1 May 2007 Body A and Body B apply for recognition in response to the invitations issued on 1 April 2007 (which were for Area A and Area B).
- On 2 May 2007 Body A and Body B's boundaries are varied so that Body A becomes the representative body for Area A+ and Body B becomes the representative Body for Area B-. The Minister must recognise Body A for Area A+ and Body B for area B-.

*Item 15 – Subsection 203AD(2)*

4.29 This item repeals and replaces subsection 203AD(2) which deals with when recognition of representative bodies takes effect. It also inserts proposed new subsections 203AD(2A) – (2D) which deal with when recognition of representative bodies cease to have effect, and recognition terms.

4.30 If an existing representative body applies to be recognised during the transition period, its existing recognition will cease at the end of 30 June 2007 (proposed paragraph 203AD(2A)(a)) and its new recognition term will take effect on 1 July 2007 (proposed paragraph 203AD(2)(b)). Its new recognition term ceases as specified in the instrument of recognition (proposed paragraph 203AD(2A)(b)). If an existing representative body does not apply to be recognised during the transition

period, its existing recognition will cease at the end of 30 June 2007 unless withdrawn earlier under section 203AH (proposed subsection 203AD(2C)).

4.31 In other cases, representative body recognitions take effect and cease as specified in the instrument of recognition (proposed paragraph 203AD(2)(a)) and subsection 203AD(2B)).

4.32 Bodies which apply for recognition in response to invitations which specified a recognition term must be recognised for that term (proposed paragraph 203AD(2D)(a)). This will be the case for existing representative bodies recognised during the transition period (see proposed subsection 203AA(3) in item 8). Bodies which apply for recognition in response to invitations which did not specify a recognition term must be recognised for terms of between one and six years (proposed paragraph 203AD(2D)(b)).

*Item 16 – Subsection 203AD(3)*

4.33 Under subsection 203AD(3), the Commonwealth Minister may only recognise an exempt State body as a representative body under certain circumstances. This item will amend this subsection to make it clear that different arrangements, as set out in proposed subsection 203AD(1A) apply during the transition period (see item 14).

*Item 17 – Subsection 203AD(4)*

4.34 This item would repeal and replace subsection 203AD(4). Under the existing subsection, the Commonwealth Minister must not recognise a representative body for an area if there is an existing representative body for all or part of the area. Proposed subsection 203AD(4) would allow the Minister to recognise a representative body for an area provided that its recognition does not *take effect* while there is an existing representative body for all or part of the area. This will ensure that representative bodies can be re-recognised in anticipation of their existing recognition ceasing. It will also ensure that where necessary, a new representative body can be recognised in anticipation of an existing representative body's recognition ceasing. In either case, the new recognition cannot take effect until the existing recognition ceases. This is designed to avoid gaps in recognition that might otherwise occur.

*Item 18 – Section 203AE*

4.35 This item repeals and replaces section 203AE which deals with extension of representative body areas. Proposed new section 203AE will apply where a representative body's boundary adjoins any area for which there is no representative body (proposed subsection 203AE(1)). The Commonwealth Minister will be able to extend the representative body's area by adding any part of the adjoining area if satisfied that after the extension, the representative body would satisfactorily perform its functions in relation to its new area (proposed subsection 203AE(2)). Similar changes are proposed to be made to criteria governing recognition and withdrawal of recognition (items 13 and 24) and variation and reduction of representative body areas (items 19 and 20).

4.36 Representative bodies may apply to extend their areas (proposed paragraph 203AE(3)(a)). If the remaining requirements in proposed section 203AE are met, the Minister may also extend a representative body's area on his or her own initiative (proposed paragraph 203AE(3)(b)).

4.37 Where a representative body's area is proposed to be extended on the Minister's initiative, the Minister must notify the representative body in writing that the extension is being considered (proposed paragraph 203AE(4)(a)). The notice must identify the area to be added, state the reasons why the Minister is considering the extension and invite the representative body to make submissions about the proposed extension within the period specified in the notice (which must be at least 60 days from the day on which the notice is given) (proposed subsection 203AE(5)). The Minister must also notify the public in the determined way that the extension is being considered (proposed paragraph 203AE(4)(b)). The notice to the public must invite the public to make submissions about the proposed extension within the period specified in the notice (which must be at least 60 days from the day on which notice was given to the representative body) (proposed subsection 203AE(6)).

4.38 In deciding whether to extend the area, the Minister may consider certain reports and notices (proposed subsection 203AE(7)). The Minister may also consider other matters (proposed subsection 203AE(8)). The Minister is required to also consider any submissions made by the representative body or the public (proposed subsection 203AE(9)). As soon as practicable after deciding whether to extend the area, the Minister is required to notify the representative body of the decision and the reasons for the decision (proposed subsection 203AE(10)).

4.39 Proposed subsection 203AE(11) provides that extension of a representative body's area takes effect on the day on which the instrument extending the area is made, or on a later day specified in the instrument.

#### *Item 19 – Section 203AF*

4.40 This item repeals and replaces section 203AF which deals with variation of representative body areas. Proposed new section 203AF will apply where two representative bodies have adjoining boundaries (proposed subsection 203AF(1)). The Commonwealth Minister will be able to vary the area for which each representative body is recognised if satisfied that after the variation, each representative body would satisfactorily perform its functions in relation to its new area (proposed subsection 203AF(2)). Similar changes are proposed to be made to criteria governing recognition and withdrawal of recognition (items 13 and 24) and extension and reduction of representative body areas (items 18 and 20).

4.41 Representative bodies may jointly apply to vary their areas (proposed paragraph 203AF(3)(a)). If the remaining requirements in proposed section 203AF are met, the Minister may also vary representative body areas on his or her own initiative (proposed paragraph 203AF(3)(b)).

4.42 Where representative body areas are proposed to be varied on the Minister's initiative, the Minister must notify the representative bodies in writing that the variation is being considered (proposed paragraph 203AF(4)(a)). The notice must identify the proposed variation, state the reasons why the Minister is considering the

variation and invite the representative bodies to make submissions about the proposed variation within the period specified in the notice (which must be at least 60 days from the day on which the notice is given) (proposed subsection 203AF(5)). The Minister must also notify the public in the determined way that the variation is being considered (proposed paragraph 203AF(4)(b)). The notice to the public must invite the public to make submissions about the proposed variation within the period specified in the notice (which must be at least 60 days from the day on which notice was given to the representative body) (proposed subsection 203AF(6)).

4.43 In deciding whether to vary the areas, the Minister may consider certain reports and notices (proposed subsection 203AF(7)). The Minister may also consider other matters (proposed subsection 203AF(8)). The Minister is required to also consider any submissions made by the representative bodies or the public (proposed subsection 203AF(9)). As soon as practicable after making the decision, the Minister is required to notify the representative bodies of the decision and the reasons for the decision (proposed subsection 203AF(10)).

4.44 Proposed subsection 203AF(11) would provide that variations to representative body areas take effect on the day on which the instrument varying the area is made, or on a later day specified in the instrument.

*Item 20 – Subsections 203AG(1) and (2)*

4.45 This item would remove two criteria in subsection 203AG(1) that the Commonwealth Minister is presently required to be satisfied about before reducing a representative body's area under section 203AG. These are: that the body is not satisfactorily representing native title holders or persons who may hold native title in that part of its area which is proposed to be excised; or that the body is not consulting effectively with Aboriginal peoples and Torres Strait Islanders living in that part of its area. Similar changes are proposed to be made to criteria governing recognition and withdrawal of recognition (items 13 and 24) and extension and variation of representative body areas (items 18 and 19).

4.46 This item will also make similar amendments to criteria in subsection 203AG(2) that the Minister must consider when assessing the effect of reducing a representative body's area on the remainder of its area.

*Item 21 – Subsection 203AG(3)*

4.47 Subsection 203AG(3) presently requires the Commonwealth Minister to give a representative body at least 90 days notice within which to make submissions before reducing its area. This item would amend the subsection so that the notice period is reduced to 60 days.

*Item 22 – At the end of section 203AG*

4.48 This item inserts proposed subsection 203AG(8) to provide that reduction of a representative body's area takes effect on the day on which the instrument reducing the area is made, or on a later day specified in the instrument.

*Item 23 – Subsection 203AH(1)*

4.49 This item provides that an instrument made under subsection 203AH(1) by which a representative body's recognition is withdrawn is a legislative instrument. This provision is included to assist readers.

*Item 24 – Subsection 203AH(2)*

4.50 This item repeals and replaces subsection 203AH(2) which deals with discretionary withdrawal of a representative body's recognition.

4.51 It would firstly remove two criteria that the Commonwealth Minister is presently required to be satisfied about before withdrawing a representative body's recognition. These are: that the body is not satisfactorily representing native title holders or persons who may hold native title in its area; or that the body is not consulting effectively with Aboriginal peoples and Torres Strait Islanders living in its area. Similar changes are proposed to be made to criteria governing recognition (item 13) and extension, variation and reduction of representative body areas (items 18, 19 and 20).

4.52 The grounds for withdrawal of recognition will be that a representative body is not satisfactorily performing its functions (an existing ground), or that there are serious or repeated irregularities in the body's financial affairs (a new ground).

4.53 By repealing paragraph 203AH(2)(b), this item will also mean that the Minister will no longer need to be satisfied that a representative body that would otherwise meet the criteria for withdrawal of recognition is unlikely to take steps to remedy this situation within a reasonable period.

*Item 25 – Subsection 203AH(3)*

4.54 Subsection 203AH(3) presently requires the Commonwealth Minister to give a representative body at least 90 days notice within which to make submissions before withdrawing its recognition. This item would amend this subsection so that the notice period is reduced to 60 days.

*Item 26 – At the end of section 203AH*

4.55 This item inserts proposed new subsection 203AH(8) to provide that withdrawal of a representative body's recognition takes effect on the day on which the instrument withdrawing recognition is made, or on a later day specified in the instrument.

*Item 27 – Subsection 203AI(1)*

4.56 Subsection 203AI(1) provides that the Commonwealth Minister must have regard to certain matters in considering, for the purposes of making certain decisions, whether a body: will satisfactorily represent or is not satisfactorily representing persons who hold or may hold native title in its area; or will be able to consult effectively or is not consulting effectively with Aboriginal peoples or Torres Strait Islanders living in its area. Under proposed amendments to criteria governing



recognition, withdrawal of recognition and extension, variation and reduction of representative body areas (see items 13, 24, 18, 19 and 20), the Minister will no longer be required to make such decisions.

4.57 This item therefore repeals and replaces subsection 203AI(1). Proposed subsection 203AI(1) will require the Minister, when considering whether a body will satisfactorily perform or is satisfactorily performing representative body functions, to take into account whether a body's organisational structures and administrative processes will operate or are operating in a fair manner (including in terms of the matters set out in subsection 203AI(2)).

*Item 28 – Paragraph 203BD(a)*

4.58 This item makes a technical amendment to paragraph 203BD(a).

*Item 29 – Paragraph 203CA(1)(d)*

4.59 Paragraph 203CA(1)(d) requires the Secretary to impose conditions on representative body funding relating to the giving of information on the expenditure of the funding. This item amends this paragraph to make it clear that such information includes the production and publication of financial statements. The amendment proposed in item 33 will remove the requirement for representative bodies to prepare and table annual reports in Parliament. This will mean that there is no longer any requirement under the Native Title Act for representative bodies to prepare financial statements, which are required to be included in annual reports. This amendment will therefore ensure that conditions relating to the production and publication of financial reports are otherwise imposed through funding conditions.

*Item 30 – Subsection 203CA(2)*

4.60 This item would repeal subsection 203CA(2) which provides that the Secretary is to consider a representative body's strategic plan when making funding available to the representative body. This follows from the amendment proposed at item 31 which would remove the requirement for representative bodies to prepare strategic plans.

*Item 31 – Section 203D*

4.61 This item would repeal section 203D to remove the requirement for representative bodies to prepare strategic plans.

*Item 32 – Subsection 203DA(1) (second sentence)*

4.62 This item would amend subsection 203DA(1) to take account of the amendment proposed by item 33 (which would remove the requirement for representative bodies to prepare annual reports). Paragraph 203DA(1)(a) requires representative bodies to keep accounting records in a way that enables the preparation of financial statements required by Division 5 of Part 11. Financial statements required to be included in annual reports (paragraph 203DC(1)(a)) are the only financial statements required by Division 5 of Part 11. As the requirement to prepare annual reports will be removed,

there will be no remaining financial statements required by Division 5 of Part 11 (although financial statements will still be required to be produced as a condition of funding – see item 29). This item therefore removes the reference in subsection 203DA(1) to these financial statements. Instead, representative bodies will be required to keep accounting records in a way that allows them to be conveniently and properly audited in accordance with Division 5 of Part 11.

*Item 33 – Sections 203DC and 203DD*

4.63 This item would repeal sections 203DC and 203DD. The repeal of section 203DC would remove the requirement for representative bodies to prepare annual reports. The repeal of section 203DD would be consequential upon this amendment.

*Item 34 – Section 203DE*

4.64 This item would repeal section 203DE as a consequence of the repeal of section 203DC (see item 33).

*Item 35 – Paragraph 203DF(2)(b)*

4.65 This item amends paragraph 203DF(2)(b) which deals with inspection and audit, or investigation, of representative bodies to make it consistent with the criteria for withdrawal of recognition (see item 24).

*Item 36 – Section 203DH*

4.66 This item would make a technical amendment to section 203DH.

*Item 37 – At the end of section 203DH*

4.67 Section 203DH ensures that withdrawal of a representative body's recognition under section 203AH does not affect the undertaking of an inspection and audit or investigation under section 203DF. This item would insert proposed subsection 203DH(2) which makes similar provision where a representative body's recognition for a particular area ceases because the fixed term for which it was recognised has expired.

*Item 38 – Paragraphs 203F(a) and (b) and Item 39 – Paragraph 203F(d)*

4.68 Section 203F requires the Secretary to notify the Commonwealth Minister about certain matters affecting a representative body's performance. These matters mirror criteria for withdrawing recognition from a representative body in paragraph 203AH(2)(a). These items would ensure that these matters reflect the new criteria for withdrawing recognition (see item 24).

*Item 40 – Paragraphs 203FB(3)(b) and 7(b)*

4.69 This item would amend paragraphs 203FB(3)(b) and 7(b) to make them consistent with other references to funding in Part 11, which were amended by the *Aboriginal and Torres Strait Islander Act 2005*.

*Item 41 – After subsection 203FC(1)*

4.70 Subsection 203FC(1) allows the Commonwealth Minister, by written instrument, to direct a former representative body to transfer documents and records to a replacement representative body. This item would insert proposed subsection 203FC(1A) which provides that a direction under subsection 203FC(1) is not a legislative instrument. This provision is included to assist readers.

*Item 42 – Subsection 203FE(1)*

4.71 This item amends subsection 203FE(1) as a consequence of the amendment proposed to be made by item 43.

*Item 43 – After subsection 203FE(1)*

4.72 This item inserts proposed subsection 203FE(1A) which provides that the Secretary may only make funding available under subsection 203FE(1) where in the Secretary's opinion, the function to be funded would not otherwise be performed in an efficient and timely manner. This would clarify that persons or bodies should only be funded under subsection 203FE(1) where it is not feasible to recognise a representative body for an area to perform relevant services.

**4.73** The requirement that funding can only be made available under subsection 203FE(1) where there is no representative body for an area would be retained. However, this requirement would be expressed in proposed paragraph 203FE(1A)(a) rather than in subsection 203FE(1) (which would be relevantly amended by item 42).

*Item 44 – Paragraph 203FE(3)(g)*

4.74 Existing paragraph 203FE(3)(g) requires the Secretary to impose conditions on persons or bodies funded under section 203FE relating to the giving of information on the performance of functions that they are funded to perform. This item amends this paragraph to make it clear that such information includes the production and publication of financial statements. This is consistent with the amendments to be made by item 29 to deal with production and publication of financial statements by representative bodies.

## Item 45 – After section 203FE

### General

4.75 This item deals with the operation of persons or bodies funded under subsection 203FE(1) (203FE(1) bodies) and subsection 203FE(2) (203FE(2) bodies) (together referred to here as NTSPs). It inserts proposed sections 203FEA – 203FED which ensure that, where appropriate, the Native Title Act applies to NTSPs in the same way as it applies to representative bodies.

4.76 Proposed subsections 203FEA(1) and (2) (for 203FE(1) bodies) and proposed subsections 203FEB(1) and (2) (for 203FE(2) bodies) are intended to address most such situations. Some additional situations are dealt with in proposed subsections 203FEA(3) and (4) (for 203FE(1) bodies), proposed subsections 203FEB(3) – (6) (for 203FE(2) bodies), and proposed section 203FED (for both sorts of NTSPs). Proposed section 203FEC deals with situations in which it is not intended that the Native Title Act apply to NTSPs in the same way as it does to representative bodies.

4.77 Proposed subsections 203FEA(1) and (2) and 203FEB(1) and (2) are intended to operate wherever a provision of the Native Title Act gives a representative body a function. In determining whether a provision gives a function, the subsections are intended to have the broadest operation possible and to apply where a provision relates to a function given under another provision.

4.78 Representative body functions are listed in subsection 203B(1). The functions specified in paragraphs 203B(1)(a) – (f) are elaborated upon in the remainder of Part 11. Paragraph 203B(1)(g) gives representative bodies the functions referred to in section 203BJ and such other functions as are conferred by the Native Title Act. These include the functions in Subdivisions B – D of Division 3 of Part 2, which deal with indigenous land use agreements (ILUAs).

4.79 203FE(1) bodies have to date been funded to perform the *full range of representative body functions* for an *area* where there is no representative body. However, by referring to *particular* functions, proposed subsections 203FEA(1) and (2) take account of the fact that 203FE(1) bodies could potentially be funded to perform specified representative body functions only.

4.80 203FE(2) bodies can only be funded to perform specified *facilitation and assistance functions* in respect of a particular *matter* following a review under section 203FB of a representative body's decision not to perform these functions in relation to the matter. For 203FE(2) bodies, proposed subsections 203FEB(1) and (2) can therefore only operate with respect to facilitation and assistance functions that are conferred on representative bodies.

Section 203FEA – Application of this Act to persons or bodies funded under subsection 203FE(1)

*Subsection 203FEA(1)*

4.81 Under proposed subsection 203FEA(1), a 203FE(1) body funded to perform a function for a particular area would have the same obligations and powers when performing that function as a representative body for the area has when performing that function.

4.82 Examples:

- a) Paragraph 24BI(3)(a) gives representative bodies for an area to be covered by a body corporate ILUA a power to notify the Registrar that the requirements of paragraph 24BD(4)(a) (which requires a registered native title body corporate (RNTBC) to inform at least one such representative body of its intention to enter such an ILUA) were not complied with. This power is referable to the performance by a representative body of ‘other functions’ conferred by the Native Title Act (as referred to in paragraph 203B(1)(g)). A 203FE(1) body funded to perform these functions for an area including an area to be covered by such an ILUA would have a similar power to notify the Registrar under paragraph 24BI(3)(a). (A 203FE(2) body would not have a similar power – see below.)
- b) Under section 24CD, representative bodies must or may be a party to area ILUAs in some circumstances (see subparagraph 24CD(2)(c)(ii), paragraph 24CD(3)(b) and paragraph 24CD(4)(b)). These obligations and powers relate to the performance by a representative body of agreement making functions. A 203FE(1) body funded to perform agreement making functions would have similar obligations and powers to be a party to area ILUAs. (A 203FE(2) body would not have similar obligations or powers – see below.)
- c) Paragraph 24CG(3)(a) provides that applications for registration of an area ILUA must have been certified by all representative bodies for an area in performing their certification functions under paragraph 203BE(1)(b) (or else include a statement as mentioned in paragraph 24CG(3)(b)). The requirements in this paragraph are referable to the performance by a representative body of certification functions. If a 203FE(1) body is funded to perform certification functions for an area to be covered by an area ILUA, certification by the body would meet the requirements of this paragraph. (This would not be the case for 203FE(2) bodies – see below.)
- d) Paragraph 24CK(4)(b) gives representative bodies which have certified an application for registration of an area ILUA a power to give the Registrar information about the status of objections to the registration of the ILUA. This power relates to the performance by representative bodies of certification functions. A 203FE(1) body funded to perform certification functions would have a similar power. (A 203FE(2) body would not have this power – see below.)

- e) Subsection 203DA(1) obliges representative bodies to keep accounting records that properly record and explain their transactions and financial position, to the extent that these relate to the performance of their functions or the exercise of their powers. 203FE(1) bodies would have a similar obligation to keep such accounting records in connection with any functions they were funded to perform. (A 203FE(2) body would have similar obligations – see below.)
- f) Subsection 203FF(1) provides that the obligations imposed on a representative body by Divisions 4 and 5 of Part 11 are in addition to requirements imposed by other laws. To the extent that these obligations relate to the performance of representative body functions, this would also be the case for 203FE(1) bodies. (This would also be the case for 203FE(2) bodies – see below.)

*Subsection 203FEA(2)*

4.83 Under proposed subsection 203FEA(2), a third party would have the same obligations and powers in relation to a 203FE(1) body funded to perform a function for a particular area as the third party would have in relation to a representative body for the area that is performing or has performed that function.

4.84 Examples:

- a) The Native Title Registrar has certain obligations to notify representative bodies about the making of body corporate ILUAs (subparagraph 24BH(1)(a)(iii)) and area agreements (subparagraph 24CH(1)(a)(iii)). These obligations relate to the performance by representative bodies of ‘other functions’ conferred by the Native Title Act (as referred to in paragraph 203B(1)(g)). If a 203FE(1) body is funded to perform these functions for an area to be covered by such an ILUA, the Registrar would have a similar obligation to notify the body. (The Registrar would not have this obligation with respect to a 203FE(2) body – see below.)
- b) Paragraph 24CK(4)(b) obliges the Registrar to take into account information provided by a representative body regarding the status of objections to area ILUAs where the representative body certified the application for registration of the ILUA. This obligation relates to the performance by representative bodies of certification functions. If a 203FE(1) body funded to perform certification functions provided such information to the Registrar (as it would be empowered to do because of proposed subsection 203FEA(1)) the Registrar would have a similar obligation to take this information into account. (The Registrar would not have this obligation with respect to a 203FE(2) body – see below.)
- c) Various provisions within the Native Title Act’s future act regime oblige third parties proposing to do future acts to first notify relevant representative bodies (for example, paragraphs 24GB(9)(c), 24HA(7)(a) and 24ID(3)(a)). These obligations relate to the performance by a representative body of notification functions. If a 203FE(1) body is funded to perform notification functions for an area the subject of a proposed future act, third parties would have a similar obligation to notify the body. (Third parties would not have similar obligations to notify 203FE(2) bodies – see below.)

- d) Under paragraph 203DF(1)(a), the Commonwealth Minister has a power to appoint a person to inspect and audit accounts and records kept by a representative body under section 203DA. Accounts and records that must be kept under section 203DA relate to the performance by a representative body of its functions. The Minister could therefore appoint a person under paragraph 203DF(1)(a) to inspect and audit accounts and records kept by a 203FE(1) body to the extent that the accounts and records related to the performance of functions that the 203FE(1) body was funded to perform. (This would also be the case for 203FE(2) bodies – see below.)
- e) Subsection 203FB(1) allows an Aboriginal person or Torres Strait Islander affected by a decision of a representative body not to assist him or her in the performance of its facilitation and assistance functions to apply to the Secretary for a review of the decision. A similar application could be made with respect to a decision by a 203FE(1) body not to assist. (Particular provision is made with respect to the application of subsection 203FB(1) to 203FE(2) bodies – see below.)

4.85 In combination, proposed subsections 203FEA(1) and (2) would address most situations where it is appropriate for a 203FE(1) body to be treated like a representative body. Proposed subsection 203FEA(3) would also ensure that certain provisions of the Native Title Act which, even on the broadest possible reading might not be construed as giving representative bodies a *function*, nonetheless operate with respect to 203FE(1) bodies in the same way as they do to representative bodies. As its terms indicate, subsection 203FEA(3) is *not* intended to result in the reading down of subsections 203FEA(1) or (2).

*Paragraph 203FEA(3)(a)*

4.86 For an alternative procedure ILUA to be made, there must be at least one RNTBC or at least one representative body for the area to be covered by the ILUA (subsection 24DD(2)). Even if a 203FE(1) body was funded to perform all representative body functions for the area (and there were no RNTBCs for the area), an alternative procedure ILUA could not be made. As subsection 24DD(2) does not refer to a representative body function, proposed subsections 203FEA(1) and (2) would not be enlivened. Proposed paragraph 203FEA(3)(a) therefore ensures that subsection 24DD(2) applies to 203FE(1) bodies as though they were the representative body for the relevant area. The reference to representative bodies in paragraph 24DE(2)(b) would also apply to relevant 203FE(1) bodies because of proposed subsection 203FEA(1).

4.87 For subsection 24DD(2) to apply, the 203FE(1) body must be funded to perform the *full range of representative body functions*. As the role assigned to representative bodies under subsection 24DD(2) is significant, it is appropriate to limit its application in this way.

*Paragraph 203FEA(3)(b)*

4.88 Section 203BD allows for representative bodies to perform their facilitation and assistance functions in an adjoining area pursuant to an agreement with the adjoining representative body.

4.89 At present, a representative body wishing to perform facilitation and assistance functions in an adjoining area could not do so if a 203FE(1) body rather than a representative body was funded to perform functions in that area (as there would be no adjoining representative body to enter an agreement with). Similarly, 203FE(1) bodies funded to perform facilitation and assistance functions could not perform functions ‘out of area’ as section 203BD does not apply to them.

4.90 The extent to which proposed subsection 203FEA(1) could apply to section 203BD is unclear. Proposed paragraph 203FEA(3)(b) therefore makes special provision for section 203BD to apply to 203FE(1) bodies. It is intended that every reference to representative body in section 203BD include a reference to a relevant 203FE(1) body.

4.91 For section 203BD to apply, the 203FE(1) body must be funded to perform facilitation and assistance functions, as these are the functions with which section 203BD deals.

*Paragraph 203FEA(3)(c)*

4.92 This paragraph would ensure that bodies formerly funded under 203FE(1) can, like former representative bodies, be directed to transfer documents or records under section 203FC. The reference to ‘former’ representative bodies in section 203FC might otherwise prevent section 203FC from being applied to 203FE(1) bodies by proposed subsections 203FEA(1) and (2). This paragraph would also ensure that former representative bodies (and bodies formerly funded under subsection 203FE(1)) could be directed to transfer documents and records to a 203FE(1) body (as well as to a representative body).

*Paragraph 203FEA(3)(d)*

4.93 This paragraph would ensure that 203FE(1) bodies must, like representative bodies, make all reasonable efforts to comply with the wishes of traditional custodians of traditional materials when performing functions and exercising powers (proposed subparagraph 203FEA(3)(d)(i)). It would also ensure that bodies formerly funded under subsection 203FE(1) must, like former representative bodies, make all reasonable efforts to comply with the wishes of traditional custodians of traditional materials when complying with directions to transfer documents and records under section 203FC (proposed subparagraph 203FEA(3)(d)(ii)). The reference to ‘former’ representative bodies in paragraph 203FCA(1)(b), which imposes this obligation, might otherwise prevent paragraph 203FCA(1)(b) from being applied to 203FE(1) bodies by proposed subsection 203FEA(1).



*Subsection 203FEA(4)*

4.94 Section 203DH provides that the withdrawal of a representative body's recognition does not affect the undertaking of an inspection and audit, or investigation, under section 203DF. Proposed subsection 203FEA(4) makes similar provision with respect to 203FE(1) bodies where funding under section 203FE(1) ceases.

*Subsection 203FEA(5)*

4.95 Proposed subsection 203FEA(5) allows for the regulations to prescribe the way in which other provisions of the Native Title Act apply to 203FE(1) bodies. As its terms indicate, this provision is not intended to result in the reading down of other provisions in section 203FEA.

Section 203FEB – Application of this Act to persons or bodies funded under subsection 203FE(2)

*Subsection 203FEB(1)*

4.96 Under proposed subsection 203FEB(1), a 203FE(2) body funded to perform specified facilitation and assistance functions in relation to a particular matter would have the same obligations and powers when performing those functions in relation to that matter as a representative body has when performing those functions in relation to that matter.

4.97 Examples:

- The provisions considered in examples (a) – (d) under the discussion of proposed subsection 203FEA(1) would not apply to 203FE(2) bodies as they relate to functions other than facilitation and assistance functions.
- The provisions considered in examples (e) and (f) under the discussion of proposed subsection 203FEA(1) would apply to 203FE(2) bodies to the extent that they relate to the performance of specified facilitation and assistance functions in respect of a particular matter.

*Subsection 203FEB(2)*

4.98 Under proposed subsection 203FEB(2), a third party would have the same obligations and powers in relation to a 203FE(2) body funded to perform specified facilitation and assistance functions in relation to a particular matter as the third party would have in relation to a representative body who is performing or has performed those functions in relation to that matter.

4.99 Examples:

- The provisions considered in examples (a) – (c) under the discussion of proposed subsection 203FEA(2) would not apply to third parties dealing with 203FE(2) bodies as they relate to functions other than facilitation and assistance functions.

- The provision considered in example (d) under the discussion of proposed subsection 203FEA(2) would apply to 203FE(2) bodies to the extent that it relates to the performance of specified facilitation and assistance functions in respect of a particular matter.

*Subsections 203FEB(3) and (4)*

4.100 While section 203BD is applied to subsection 203FE(1) bodies by proposed paragraph 203FEA(3)(b), it would not be applied to 203FE(2) bodies by subsections 203FEB(1) or (2). This is appropriate as 203FE(2) bodies are funded to perform facilitation and assistance functions for a matter. It would be inappropriate for a representative body to agree with an adjoining representative body to perform facilitation and assistance functions ‘out of area’ for a matter for which a 203FE(2) body was funded. Proposed subsections 203FEB(3) and (4) make it clear that this is not permitted.

*Subsections 203FEB(5) and (6)*

4.101 Proposed subsections 203FEB(5) and (6) would replicate the effect of proposed paragraphs 203FEA(3)(c) and (d), and proposed subsection 203FEA(4) (see above) for 203FE(2) bodies.

Section 203FEC – Certain provisions do not apply to persons and bodies funded under subsection 203FE(1) or (2)

*Subsection 203FEC(1)*

4.102 Section 203C allows representative bodies to apply to the Secretary for funding. As NTSPs are funded separately under section 203FE, proposed subsection 203FEC(1) makes it clear that NTSPs cannot apply to the Secretary for funding under section 203C.

*Subsection 203FEC(2)*

4.103 Section 203F (as it is proposed to be amended – see items 38 and 39) will require the Secretary to give written notice to the Commonwealth Minister if he or she is of the opinion that a representative body is not satisfactorily performing its functions, or if there are serious or repeated financial irregularities in the representative body’s financial affairs. The Minister may consider such notices, for example, in considering whether to reduce a representative body’s area (see paragraph 203AG(4)(c)) or withdraw recognition from a representative body (see paragraph 203AH(4)(c)). In contrast to the situation for representative bodies, the Minister does not withdraw recognition from NTSPs or reduce their areas. Accordingly, no point would be served by requiring the Secretary to give notice to the Minister under section 203F with respect to NTSPs. If the Secretary was of the opinion that a NTSP was not satisfactorily performing functions, or that there were financial irregularities in the NTSP’s affairs, the Secretary could decide to fund the NTSP to perform functions for a smaller area (in the case of a 203FE(1) body), or decide not to fund it further. The Secretary could also take action to enforce funding

conditions. None of these decisions would require the Minister's involvement. Proposed subsection 203FEC(2) therefore ensures that despite subsections 203FEA(2) and 203FEB(2), section 203F is not applied to NTSPs.

*Subsection 203FEC(3)*

4.104 Subsection 203FB(1) allows an Aboriginal person or Torres Strait Islander affected by a decision of a representative body not to assist him or her in the performance of its facilitation and assistance functions to apply to the Secretary for a review of the decision. Section 203FB will be applied to 203FE(1) bodies performing facilitation and assistance functions by proposed subsection 203FEA(2). However, it would not be appropriate for persons to seek a review of a decision not to assist by a 203FE(2) body. This is because 203FE(2) bodies are already funded following a review of a decision by a representative body not to assist and, being funded for a particular matter, have no decision to make as to who they will assist (in contrast to representative bodies and 203FE(1) bodies). Proposed subsection 203FEC(3) therefore ensures that despite proposed subsection 203FEB(2), section 203FB does not apply to 203FE(2) bodies.

Section 203FED - Liability

4.105 Section 203FD provides that executive officers or members of a representative body are not personally liable for certain proceedings for acts done by them or the representative body in good faith in connection with the performance of the representative body's functions or the exercise of its powers. Because section 203FD refers to particular persons rather than representative bodies, proposed subsections 203FEA(1) and (2) and 203FEB(1) and (2) would not extend this immunity to persons involved in the management of 203FE(1) or (2) bodies. Proposed section 203FED would ensure that persons who are funded under subsections 203FE(1) or (2) and executive officers or members of NTSPs enjoy these immunities.

*Item 46 – Subsection 203FF(2)*

4.106 Subsection 203FF(2) allows representative bodies to combine reports required under Division 5 of Part 11 with other reports that they may be obliged to provide to the Commonwealth Minister under other Commonwealth laws. As all provisions in Division 5 of Part 11 which require reports will be repealed, existing subsection 203FF(2) will become obsolete and will therefore be repealed by this item.

*Item 47 – Section 203FI*

4.107 This item makes a technical amendment to section 203FI.

## ***Part 2 – Application***

### *Item 48 – Definition*

4.108 This item provides that for Part 2 of Schedule 1, commencing day means the day on which Schedule 1 commences.

### *Item 49 – Amendment made by item 7*

4.109 This item provides that the amendment made by item 7 (which deals with invitations to representative bodies) applies to invitations made on or after commencing day.

### *Item 50 – Amendment made by item 12*

4.110 This item provides that the amendment made by item 12 (which deals with instruments recognising representative bodies) applies where the instrument is made on or after commencing day.

### *Item 51 – Amendment made by item 13*

4.111 This item provides that the amendment made by item 13 (which deals with recognition of representative bodies) applies where recognition takes effect on or after commencing day.

### *Items 52 - 57 – Amendments made by items 18 - 27*

4.112 The items to which these items refer amend provisions dealing with recognition, withdrawal of recognition, and extension, variation and reduction of representative body areas. These amendments would apply where the relevant instrument is made on or after commencing day.

### *Item 58 – Amendment made by item 29*

4.113 This item provides that the amendment made by item 29 (which deals with additional conditions that must be imposed on funds provided to a representative body) applies where funds are provided on or after commencing day.

### *Item 59 – Amendments made by items 33 and 34*

4.114 This item provides that amendments made by items 33 and 34 (which repeal provisions dealing with annual reports) apply from the beginning of 1 July 2006. This is intended to ensure that representative bodies are not required to prepare annual reports under the Native Title Act for the 2006-07 financial year.

*Item 60 – Amendments made by items 42 and 43*

4.115 This item provides that amendments made by items 42 and 43 (which deal with when the Secretary can fund a 203FE(1) body) apply where funding is made available to a 203FE(1) body on or after commencing day.

*Item 61 – Amendment made by item 44*

4.116 This item provides that the amendment made by item 44 (which deals with additional conditions that must be imposed on funds provided to NTSPs) applies where funds are provided on or after commencing day.

*Item 62 – Amendment made by item 45*

4.117 This item provides that the amendment made by item 45 (which deals with performance of representative body functions by NTSPs) applies where funding is made available to a NTSP on or after commencing day.

## **Schedule 2 – Claims Resolution Review**

### ***Overview***

The Claims Resolution Review was established by the Attorney-General to consider the process by which native title claims are resolved. The Claims Resolution Review examined the roles of the NNTT and the Court and considered measures for the more efficient management of native title claims. The Claims Resolution Review was an independent review conducted by two consultants, Mr Graham Hiley QC and Dr Ken Levy. On 21 August 2006, the Attorney-General released the report of the Claims Resolution Review and the Government's response to the Review.

The Government accepted most of the recommendations in the report and agreed to implement one of the options for institutional reform outlined in the report. The Government response aims to address the key issues identified in the report as affecting the efficiency and effectiveness of the resolution of native title claims.

Some of the recommendations in the report will be implemented administratively, including by the Court and the NNTT. Schedule 2 allows for those recommendations requiring legislative amendment to be implemented.

### **Greater communication and coordination between the Court and the NNTT**

The NNTT and the Court play key roles in resolving native title claims and it is essential that the two institutions work closely together to provide a range of dispute resolution processes that can be applied as appropriate to claims. A number of the proposed amendments aim to improve communication and coordination between the Court and the NNTT. The changes will encourage both institutions to operate with a common purpose to ensure the more effective and timely resolution of claims. The measures focus on strengthening communication both in relation to particular claims as well as in approaches taken by both institutions to broader case management.

Key proposals include:

- giving the NNTT a right to appear before the Court to provide assistance to the Court
- requiring the Court to take into account certain reports provided by the NNTT when making orders, and
- enabling the NNTT to provide reports about the progress of mediation in a particular State, Territory or region and to provide regional work plans to the Court.

### **Removing the duplication of functions between the Court and the NNTT**

The Claims Resolution Review recognised the potential for duplication of functions between the NNTT and the Court under the existing legislative framework. The Court can currently require parties to participate in Court-annexed mediation while the same parties are also in mediation before the NNTT. This can result in confusion for parties and duplication as a single matter may be mediated by both institutions at

the same time. The Claims Resolution Review recommended that mediation should not be carried out by more than one body at the one time.

The proposed amendments to Division 1B of Part 4 are designed to implement this recommendation by strengthening the presumption that mediation into proceedings under the Native Title Act should take place in the NNTT and removing the duplication of mediation by the NNTT and the Court. The provisions will provide certainty for when and how mediation will occur in the NNTT.

Under section 86B, unless an order is otherwise made, the Court must refer applications under section 61 of the Native Title Act to the NNTT for mediation. Whilst the Court is not given a specific power to conduct mediation into proceedings under the Native Title Act, the Court has power under section 53A of the *Federal Court Act 1976* to utilise mediation and arbitration to resolve any application before the Court, including native title matters. Order 10 Rule 1(2)(h) of the Federal Court Rules also allows the Court to make an order that parties attend before a Registrar for a conference with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken.

The amendments will not preclude the Court from mediating native title proceedings, for example, if mediation in the NNTT has been tried but proved ineffective to resolve the matter, but will ensure that the Court cannot mediate while a matter is before the NNTT for mediation.

### **Improving the effectiveness of NNTT mediation**

The Government also agreed to implement measures to ensure NNTT mediation is as effective and efficient as possible. A number of measures are proposed to achieve this.

#### *Compulsory powers*

The Claims Resolution Review recommended that the NNTT be conferred with statutory powers of compulsion. The NNTT will be empowered to compel parties to attend mediation conferences and to produce certain documents for the purpose of a conference.

#### *Review function*

The NNTT will be given a new function to conduct a review into whether a native title claim group holds native title rights and interests. The Claims Resolution Review recommended this new review function as a means of facilitating parties to reach agreement about the issue of whether a native title claim group holds native title rights and interests, and in particular, issues surrounding the connection the claim group has with the land or waters.

It is expected reviews will be conducted by examining papers and documents relating to connection. There is no facility to hold hearings in a review. If hearings are considered appropriate, it may be preferable to hold a native title application inquiry instead.

Participation in the reviews will be entirely voluntary and there will be no power to compel parties to attend or to produce documents for the purpose of a review.

#### *Native title application inquiries*

The NNTT will be able to conduct a new type of inquiry. This new inquiry power will be additional to the new review function of the NNTT and to the existing inquiry functions in Division 5 of Part 6. The inquiry function will be a valuable tool for facilitating the resolution of native title claims through consent in the mediation process.

The purpose of native title application inquiries will be to examine issues relevant to a determination of native title arising in one or more applications made under section 61. Native title application inquiries may be particularly valuable in examining issues relating to more than one application filed under section 61. For example, inquiries could be used to resolve overlapping claims where more than one claimant application has been filed over the same area.

Participation in a native title application inquiry will be entirely voluntary. The NNTT will be required to make recommendations at the end of a native title application inquiry. While the recommendations will not be binding, parties voluntarily participating in a native title application inquiry may be guided by the recommendations of the NNTT. The Court will be required to consider whether to take into account the transcript of evidence of any native title application inquiry.

#### **Behaviour of parties**

The Claims Resolution Review also recognised that while institutional and administrative changes are necessary, parties to native title proceedings also play an important role in improving the effectiveness of the native title system. Timely resolution of claims requires the cooperation of all parties. Therefore, a number of the amendments focus on the behaviour of parties.

#### *Obligation to act in good faith*

Amendments will require all parties to mediation before the NNTT, and their representatives, to act in good faith in relation to the mediation. The NNTT will be able to report a failure to act in good faith to various entities including:

- Commonwealth, State or Territory Ministers
- the Secretary of Commonwealth departments who fund participants in native title proceedings
- legal professional bodies, and
- the Court.

#### *Dismissal of claims made in response to future act notices*

The Claims Resolution Review found some applications are filed in response to a future act notice for the purpose of obtaining procedural rights, such as the right to



negotiate. The Claims Resolution Review recognised that some applications appear to be filed purely for procedural benefits in circumstances where the applicants appear to have no intention to progress the claim to determination. Amendments are proposed to encourage applicants to seek to resolve claims they have instituted.

### *Dismissal of unregistered claims*

All claimant applications are required to undergo the registration test. Currently, while applications which fail the registration test do not receive the procedural benefits that attach to registered claims (such as the right to negotiate), unregistered applications may still proceed to determination. There is presently no requirement on claimants to amend their claim to meet the requirements of the registration test. The Claims Resolution Review recommended that the Court be empowered to dismiss claims that do not meet the conditions about merit in the registration test.

Amendments will require all claims that are currently unregistered to undergo the registration test again and claims that do not meet the conditions about merit may be dismissed. These amendments focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system.

## ***Part 1–Amendments***

### *Item 1 – After subsection 64(1A)*

4.118 Section 64 deals with the amendment of applications. Item 1 inserts proposed subsection 64(1B) as a consequence of proposed section 87A (see item 35). Section 87A will enable the Court to make a determination of native title in relation to part of a proceeding where certain parties to the proceeding agree to the determination being made. Consequently, subsection 64(1B) will provide that where the Court makes such an order, the application will be deemed to have been amended to remove the area covered by the determination. The amended application will be taken to be the area of land or waters covered by the original application minus the area of land or waters covered by the determination made by the Court pursuant to section 87A. Applications amended under proposed subsection 64(1B) will be exempt from reapplication of the registration test (item 71, proposed subsection 190A(1A)). Claims that were registered before an order was made under section 87A will retain their registered status. The Register of Native Title Claims will be updated to reflect the amended application (see item 69, proposed paragraph 190(3)(a)).

4.119 Item 1 also inserts proposed subsection 64(1C). Subsection 64(1C) will make it clear that proposed subsection 64(1B) will not limit the amendment of claims under other provisions, such as existing subsection 64(1A). Subsection 64(1B) will operate only where the Court makes an order under section 87A.

### *Item 2 – After section 66B*

4.120 Item 2 inserts proposed section 66C. This item is associated with a new provision requiring the Court to dismiss applications made in response to a future act notice where certain conditions are met (see item 36, proposed section 94C). The

purpose of proposed section 66C is to enable the Native Title Registrar to assist the Court in making an order under section 94C by providing information about four specified conditions. The Registrar is not under an obligation to provide the information as in some circumstances the information will not be available to the Registrar. The Court could initiate its own inquiry in the event the Registrar was not able to assist.

4.121 Proposed subsection 66C(2) will strengthen the Registrar's ability to assist the Court by allowing the Registrar to seek certain advice from relevant government authorities. Future act notices are given by the relevant Commonwealth, State or Territory government. Government officials of the relevant Commonwealth, State or Territory will therefore be best placed to provide information about future act notices. The Registrar will be able to ask government officials to provide information about the following two matters.

- **Whether all or part of an area covered by a future act notice includes the application area (paragraph 66C(2)(a)).**

This criterion allows the Registrar to seek information about whether a future act notice falls within an application area. In certain circumstances, an application filed over all or part of an area covered by a future act notice will be deemed to have been made in response to the future act notice. Information provided under this limb of subsection 66C(2) will assist the Court in determining whether the filing of an application followed the filing of a future act notice over the area and also whether any subsequent future act notices have been filed over the same application area. In highly prospective areas, an initial future act notice may prompt the filing of an application but many subsequent future act notices might be filed over the same area. The effect of subsequent future act notices on the Court's ability to dismiss an application is dealt with in proposed subsection 94C(3).

- **Whether any of the criteria in paragraph 94C(1)(d) have been met (paragraph 66C(2)(b)).**

This criterion allows the Registrar to seek information about the status of the initial future act notice as well as any subsequent future act notices. The criteria in proposed paragraph 94C(1)(d) refer to existing provisions in the Native Title Act that would authorise a future act to be done or determine that a future act should not be done. This provision is directed at identifying whether the steps that must be adhered to before a future act can be validly done under Subdivision P of Part 2, Division 3 have been completed for the relevant future act notice.

4.122 Proposed subsection 66C(3) cross-refers to the definition of *future act notice* in proposed subsection 94C(6).

*Item 3 – Subparagraph 84(3)(a)(i)*

4.123 Items 3 to 5 amend section 84 to limit the category of persons who can automatically become a party to proceedings. Section 84 determines who may be a party to a proceeding under the Native Title Act. The existing provisions for becoming a party are very wide and may result in persons becoming a party even though their interest would be adequately protected by the relevant State or Territory

government without their involvement in proceedings. The proposed amendments to section 84 are designed to limit the category of persons who may become a party to proceedings, while acknowledging that determinations of native title made under the Native Title Act are intended to bind all persons, including those who were not parties to the proceedings.

4.124 Existing subparagraph 84(3)(a)(i) allows anyone who is covered by paragraph 66(3)(a) to become a party to proceedings, provided they notify the Court in writing within the relevant notification period. Existing paragraph 66(3)(a) lists the persons or bodies that the Registrar must notify when an application is made. Subparagraph 66(3)(a)(vii) enables the Registrar to notify any person whose interests may be affected by a determination in relation to the application where the Registrar considers it appropriate to notify the person. The effect of existing subparagraph 84(3)(a)(i) is that persons whose interests may be affected by a determination in the proceedings may automatically become a party to the proceedings provided they were notified by the Registrar under subparagraph 66(3)(a)(vii) and they give notice to the Court within a specified period.

4.125 Item 3 amends subparagraph 84(3)(a)(i) to limit the category of persons who can automatically become a party to those covered by subparagraphs 66(3)(a)(i) to (vi). This will mean that those persons to whom the Registrar gives a notice of the application because they are a person whose interests may be affected by a determination in relation to the application will not automatically be able to become a party to the proceedings. The phrase ‘interest that may be affected’ has been held to be very wide and has been found to include, for example, owners of adjacent land with a public right of access over the claimed land, persons licensed to fossick pursuant to legislation and recreational users of the claimed land.

4.126 Transitional provisions will ensure this amendment does not affect the status of persons who are parties to native title proceedings at the time these amendments come into force (see item 78).

*Item 4 – Subparagraph 84(3)(a)(iii)*

4.127 Existing subparagraph 84(3)(a)(iii) allows anyone who has an interest that may be affected by a determination in the proceedings to become a party to proceedings, provided they notify the Court in writing within the relevant notification period that they want to be a party to the proceedings. The amendment will provide that to become a party as of right under subparagraph 84(3)(a)(iii) a person will be required to have an *interest in relation to land or waters* that may be affected by a determination in the proceedings. The phrase ‘interest in relation to land or waters’ is defined in section 253. Case law indicates an ‘interest in relation to land or waters’ is narrower than an ‘interest’. While the definition of an interest in relation to land or waters is still very broad, it does exclude some persons who may otherwise be found to have an interest that may be affected under the existing provisions, such as persons who only have rights of access held by all members of the public.

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4.128 Transitional provisions will ensure this amendment does not affect the status of persons who are parties to native title proceedings at the time these amendments come into force (see item 78).

*Item 5 – At the end of subsection 84(5)*

4.129 Items 3 and 4 will amend section 84 to limit the category of people who can automatically be a party to proceedings. Subsection 86(5) will continue to allow persons who hold a mere interest that may be affected by a determination in the proceedings to be joined as a party with the leave of the Court. However, in addition to being satisfied that the person has an interest that may be affected by the determination, item 5 amends subsection 86(5) to require the Court to be satisfied that it would be in the interests of justice to join a person before joining the person as a party.

4.130 Transitional provisions will ensure this amendment does not affect the status of persons who are parties to native title proceedings at the time these amendments come into force (see item 78).

*Item 6 – Section 86*

4.131 Item 6 is a consequential amendment to the addition of proposed subsection 86(2) under item 7.

*Item 7 – At the end of section 86*

4.132 Items 7 inserts proposed subsection 86(2). Existing section 86 allows the Court to receive into evidence the transcript of evidence in any other proceedings before certain bodies. Proposed subsection 86(2) is intended to ensure the Court takes into account the existence of any transcript of evidence of any native title application inquiry. The new native title application inquiry will enable the NNTT to conduct inquiries into specific applications made under section 61 (see item 57). To assist in maximising the potential utility of any such inquiries, and to avoid unnecessary duplication in the activities of the Court and the NNTT, the Court will be required to consider whether to receive into evidence the transcript of any such proceedings. However, the Court will, under proposed paragraph 86(2)(b), retain a discretion about whether to draw any conclusions of fact from that transcript that it thinks proper and whether to adopt any recommendation, finding, decision or determination of the NNTT in a native title application inquiry.

4.133 Proposed subsection 86(2) will, like existing subsection 86(1), be subject to subsection 82(1) which provides that the Court is bound by the rules of evidence except to the extent that the Court orders otherwise.

***Amendments to Division 1B of Part 4 –Reference to NNTT for mediation***

4.134 The purpose of the proposed amendments to Division 1B of Part 4 is to prevent the duplication of mediation by the NNTT and the Court in relation to proceedings under the Native Title Act.

4.135 Under section 86B, unless an order is otherwise made, the Court must refer applications under section 61 of the Native Title Act to the NNTT for mediation. Whilst the Court is not given a specific power to conduct mediation into proceedings under the Native Title Act, the Court has power under section 53A of the Federal Court Act to utilise mediation and arbitration to resolve any application before the Court, including native title matters. Order 10 Rule 1(2)(h) of the Federal Court Rules also allows the Court to make an order that parties attend before a Registrar for a conference with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken. Therefore, the Court can currently require parties to participate in Court-annexed mediation while the same parties are also in mediation before the NNTT. This results in confusion and duplication as a single matter may be mediated by both institutions at the same time. The Claims Resolution Review recommended that mediation should not be carried out by more than one body at the one time.

4.136 The proposed amendments to Division 1B of Part 4 are designed to implement this recommendation by strengthening the presumption that mediation into proceedings under the Native Title Act should take place in the NNTT and removing the duplication of mediation by the NNTT and the Court. The provisions will provide certainty for when and how mediation will occur in the NNTT.

*Items 8 and 9 – Section 86A*

4.137 These items amend subsections 86A(1) and (2). Section 86A sets out the purpose of mediation in proceedings under the Native Title Act. As mediation into proceedings under the Native Title Act may occur in the Court as well as the NNTT, the proposed amendments will clarify that section 86A only applies to mediation by the NNTT. The purpose of other mediation, for example, by a Registrar of the Court, is not governed by this section.

*Item 10 – Subsection 86B(1)*

4.138 Item 10 is a consequential amendment to the repeal of subsection 86B(2) under item 12.

*Item 11 – Subsection 86B(1)*

4.139 Similar to items 8 and 9, item 11 will clarify that the reference to mediation in subsection 86B(1) refers to mediation by the NNTT.

*Item 12 – Subsection 86B(2)*

4.140 Item 12 repeals subsection 86B(2). Currently, subsection 86B(2) provides that the Court may, on application of a party or of its own motion, make an order that a matter not be referred to mediation. Whilst the Court must make such an order in certain circumstances, there are no restrictions on when the Court may order that a matter not be referred to mediation, provided the Court takes into account certain factors.

4.141 It is proposed subsection 86B(2) be repealed so the general discretion of the Court to make an order that there be no mediation by the NNTT will be removed. This is designed to strengthen the presumption that mediation of native title proceedings should take place in the NNTT.

*Item 13 – Subsection 86B(3)*

4.142 Item 13 is a consequential amendment to the repeal of subsection 86B(2) under item 12.

*Item 14 – Subsection 86B(3)*

4.143 This item amends subsection 86B(3) to provide that where the Court considers that certain circumstances under paragraphs 86B(3)(a), (b) or (c) exist, the Court must order there be no mediation *by the NNTT*, as opposed to simply ordering there be no mediation.

4.144 Where the criteria in subsection 86B(3) are not met, the Court will be required to refer the application to the NNTT for mediation as soon as practicable after the end of the notification period in section 66. This will ensure all matters are promptly referred to the NNTT following the end of the notification period unless an order is made not to refer or where there are clear reasons necessitating a delay in referral.

*Item 15 – Paragraph 86B(3)(a)*

4.145 Existing paragraph 86B(3)(a) sets out one of the circumstances in which the Court must order there be no mediation by the NNTT, namely, where any mediation will be unnecessary. Item 15 amends paragraph 86B(3)(a) to make it clear that the Court must make an order that a matter not be referred to the NNTT for mediation where the Court considers that any mediation, whether by the NNTT or by another mediator, will be unnecessary. This will ensure the Court cannot order that there be no mediation by the NNTT simply because other mediation, for example, by the Court, is available.

*Item 16 – Paragraph 86B(3)(b)*

4.146 Existing paragraph 86B(3)(b) sets out a second circumstance in which the Court must order there be no mediation by the NNTT, namely, where there is no likelihood of parties reaching agreement in mediation. Item 16 amends paragraph 86B(3)(b) to provide that the Court must order that there be no mediation by the NNTT if the Court considers there is no likelihood of the parties being able to reach agreement in the course of mediation *by the NNTT*. This will not preclude the Court from ordering that there be no mediation by the NNTT if the Court considers there is a likelihood of the parties being able to reach agreement in the course of other mediation, for example, by a Court Registrar, or through the use of other alternative dispute resolution tools.

*Item 17 – Subsection 86B(4)*

4.147 Existing subsection 86B(4) sets out the factors the Court must take into account when deciding whether to make an order that there be no mediation. Similar to items

8, 9 and 11, item 17 will amend subsection 86B(4) to clarify that the reference to mediation in subsection 86B(4) refers only to mediation by the NNTT.

*Item 18 – After paragraph 86B(4)(e)*

4.148 Subsection 86B(4) requires the Court to consider a number of factors in deciding whether to make an order that there be no mediation by the NNTT in relation to the whole or the part of a proceeding. Proposed subsection 86BA(1) will give the NNTT the right to appear before the Court and to make submissions to the Court to assist the Court to make a decision that there be no mediation by the NNTT (see item 20). Item 18 inserts proposed paragraph 86B(4)(ea) which will require the Court to take into account any submission provided by the NNTT under proposed subsection 86BA(1).

*Item 19 – At the end of section 86B*

4.149 Item 19 inserts proposed subsection 86B(6). This amendment implements one of the recommendations of the Claims Resolution Review by ensuring mediation cannot be conducted by more than one institution at the same time. Proposed paragraph 86B(6)(a) provides that where all or part of a matter has been referred to the NNTT for mediation, no aspect of the proceeding is to be referred for mediation under the Federal Court Act, unless the Court orders that the mediation by the NNTT cease under section 86C. Irrespective of whether NNTT mediation is into the whole or only part of the proceeding, the Court is precluded from conducting mediation into any aspect of the proceedings at the same time as the NNTT mediation.

4.150 Similarly, proposed paragraph 86B(6)(b) prohibits the Court from ordering that parties attend before a Registrar of the Court for a conference with a view to satisfying the Registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken, where the matter is before the NNTT for mediation. Conferences before Registrars of the Court for this purpose may involve an element of mediation. Proposed paragraph 86B(6)(b) will ensure the intention that the Court not mediate while matters are in the NNTT for mediation is not inadvertently undermined through the use of conferences before Court Registrars.

4.151 The amendments will not prevent the Court from continuing to conduct litigation, including directions hearings, most case management conferences, preservation of evidence hearings and limited evidence hearings, and other forms of alternative dispute resolution, including arbitration under section 53A of the Federal Court Act. The Court will also not be prohibited from ordering parties to attend before a Registrar for the purpose of clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter or otherwise to shorten the time taken in preparation for and at the trial.

*Item 20 – After section 86B*

4.152 Item 20 inserts proposed section 86BA which will give the NNTT a right to appear before the Court in certain circumstances to provide assistance to the Court. The intention of proposed section 86BA is to encourage better communication between the Court and the NNTT in relation to particular claims and implements a recommendation of the Claims Resolution Review. The NNTT can currently provide

reports about the progress of mediation to the Court, and the Court can request such reports be prepared. These amendments will enable the NNTT to further assist the Court.

4.153 The amendments in section 86BA will enable the NNTT to appear before the Court in two circumstances:

- where the Court is considering whether to make an order under subsection 86B(3) that there be no mediation by the NNTT into a particular matter, and
- where a matter is currently before the NNTT for mediation (that is, where a matter has been referred to the NNTT for mediation under section 86B and has not been withdrawn from mediation under section 86C).

4.154 Proposed paragraph 86B(4)(ea) will require the Court to consider any submission made by the NNTT under subsection 86BA(1) when deciding whether to make an order under subsection 86B(3) that there be no mediation by the NNTT (see item 18).

4.155 The right to appear is expressed to be conferred on the NNTT at large. Proposed amendments to section 123 will empower the President of the NNTT to make directions about who may appear on behalf of the NNTT under section 86BA (see item 40). This could include the Registrar, members, consultants or employees of the NNTT.

4.156 Existing subsection 136A(4) provides that words spoken or acts done at mediation conferences are without prejudice. No evidence may be given or statements made in proceedings before the Court about such words spoken or acts done unless the parties otherwise agree. Proposed subsection 86BA(3) is included to avoid any doubt that the NNTT is bound by this restriction when appearing before the Court. The NNTT will be similarly bound by proposed subsection 136GC(7), which places a protection on words spoken or acts done during the course of a review.

4.157 Existing subsection 136A(5) provides that a member who presides over a mediation conference may not, in any other capacity, take any further part in proceedings, unless parties agree otherwise. Items 53 and 57 insert proposed subsections 136GC(8) and 138C(2) respectively, which will place similar restrictions on members conducting a review and members conducting or assisting at an inquiry. Subsections 136A(5), 136GC(8) and 138C(2) would all operate to preclude a member who has presided over a mediation conference, conducted a review or conducted or assisted at an inquiry from exercising the right to appear in relation to the relevant proceedings without the agreement of the parties.

4.158 Proposed subsection 86BA(4) will provide that subsection 136A(5) does not preclude a member who is or has presided over a mediation conference in the matter from appearing before the Court under proposed section 86BA. It may be appropriate for the member mediating the matter to appear before the Court as the mediator will be best placed to inform the Court about the progress of mediation and will also be apprised of the progress of any reviews or inquiries being conducted into the same proceedings. However, if the relevant parties agree, a member involved in a review or an inquiry is able to appear before the Court.



4.159 Proposed subsection 86BA(5) makes clear that the right to appear does not extend to a right for the NNTT to become a party to the relevant proceedings.

*Item 21 – Subsection 86C(1)*

4.160 Section 86C sets out when the Court may order that mediation cease. Similar to the proposed amendments to section 86A, item 21 amends section 86C to clarify that section 86C refers to the cessation of mediation by the NNTT rather than all forms of mediation.

4.161 An order by the Court that mediation by the NNTT cease will not preclude the Court from ordering other mediation in a proceeding (for example, by a Registrar of the Court) so long as the Court orders that mediation by the NNTT is to cease in relation to the whole of the proceeding. This is because under proposed subsection 86B(6), no aspect of the proceeding is to be referred for mediation to the Court while the whole or a part of the proceeding is being mediated by the NNTT (see item 19).

*Item 22 – Paragraph 86C(1)(a)*

4.162 Item 22 amends paragraph 86C(1)(a) to clarify that the Court may, at any time, order mediation by the NNTT cease in relation to the whole or part of the proceeding, if the Court considers any further mediation (whether or not by the NNTT) will be unnecessary. This makes it clear that the Court will not be able to order that mediation by the NNTT cease simply because other mediation, for example, by a Registrar of the Court, is available.

*Item 23 – Paragraph 86C(1)(b)*

4.163 Item 23 amends paragraph 86C(1)(b) to clarify that the Court may, at any time, order that mediation by the NNTT cease in relation to the whole or a part of the proceeding if the Court considers that there is no likelihood of the parties being able to reach agreement in the course of mediation by the NNTT. This will not preclude the Court from ordering that the mediation by the NNTT cease if the Court considers that there is a likelihood of the parties being able to reach agreement in the course of other mediation before a different person or body.

*Item 24 and 25 – Subsection 86C(2)*

4.164 These items amend subsection 86C(2) to clarify that the reference to mediation in the subsection is a reference to mediation by the NNTT.

*Item 26 – Subsection 86C(3)*

4.165 This item amends subsection 86C(3) to clarify that the reference to mediation in the subsection is a reference to mediation by the NNTT.

*Item 27 – Subsection 86C(4)*

4.166 This item amends subsection 86C(4) to clarify that the reference to mediation in the subsection is a reference to mediation by the NNTT.

*Item 28 – Subsection 86C(5)*

4.167 Existing subsection 86C(5) requires the Court to take into account any report provided by the NNTT about the progress of mediation when making an order under section 86C that mediation cease. Proposed amendments to section 136G will expand the NNTT's existing reporting functions to enable the NNTT to provide, in addition to reports about mediation in a particular proceeding, regional mediation progress reports or regional work plans (see item 51).

4.168 Item 28 amends subsection 86C(5) to require the Court to take into account any report or work plan provided to the Court, including the new regional mediation progress reports and regional work plans, when deciding whether to make an order that mediation by the NNTT cease. Information about the priorities of the relevant representative body and the State or Territory government in a particular region may be relevant to the Court's decision whether to remove a matter in that particular region from mediation.

*Items 29 and 30 – Subsections 86D(1) and 86D(2)*

4.169 Existing section 86D sets out the Court's powers to determine questions of fact or law that arise during mediation and to adopt any agreement on facts reached by parties during mediation. Similar to the proposed amendments to section 86A under items 8 and 9, items 29 and 30 amend section 86D to clarify that section 86D refers to the Court's powers in relation to mediation before the NNTT rather than all forms of mediation.

4.170 These amendments do not preclude the Court from exercising similar powers in relation to mediations other than those by the NNTT. In particular, the Court is not precluded from adopting any agreement on facts between the parties where the agreement is reached in mediation other than mediation by the NNTT.

*Item 31 – At the end of section 86D*

4.171 Item 31 inserts proposed subsection 86D(3) to provide a mechanism for the Court to enforce a direction given by the member who is presiding over a NNTT mediation conference where a party fails to comply with that direction. Items 45 and 47 insert proposed subsection 136B(1A) and section 136CA which will empower the presiding member to direct parties to attend mediation conferences and to produce documents for the purpose of a mediation conference. If a party fails to comply with a direction, the presiding member will be able to provide the Court with a report which informs the Court of the non-compliance (see proposed subsection 136G(3B) under item 51). If such a report is given to the Court, proposed subsection 86D(3) will enable the Court be able to make orders in similar terms to the directions that are the subject of the report.

4.172 The Court is required to make an order in similar terms to the direction given by the NNTT. The order need not be identical. For example, it may be that the NNTT directed attendance or production of documents on or by a certain date that has now passed. However, the order must be in similar terms of the NNTT direction.

Proposed subsection 86D(3) does not empower the Court to make orders about NNTT mediation that are entirely unrelated to the original direction made by the NNTT.

*Item 32 – Section 86E*

4.173 This item is a consequential amendment to the addition of subsection 86E(2) in item 33.

*Item 33 – At the end of section 86E*

4.174 Proposed subsection 136G(3A) will expand the NNTT's existing reporting functions to enable it to prepare regional mediation progress reports and regional work plans in certain circumstances (see item 51). Proposed subsection 86E(2) defines the terms 'regional mediation progress report' and 'regional work plans'.

4.175 Regional mediation progress reports will set out the progress of all mediations conducted in relation to areas within a State, Territory or region. Regional work plans will indicate the priority given to progressing each mediation being conducted by the NNTT in relation to areas that are within the relevant State, Territory or region. Regional work plans could also explain the reason why matters are prioritised in a certain way.

4.176 A regional mediation progress report or regional work plan may cover a small area, for example, the area of responsibility of one representative body, or a much larger area, including a region covering more than one State or Territory.

4.177 Section 86E enables the Court to request the NNTT to provide reports on the progress of mediation and to specify when such reports should be provided. Proposed subsection 86E(2) will allow the Court to make a similar request that the NNTT provide a regional mediation progress report or a regional work plan. The Court may specify when the regional mediation progress report or regional work plan should be provided.

4.178 In addition, the NNTT will be able to provide a regional mediation progress report or a regional work plan on its own initiative where the President of the NNTT considers it would assist the Court in progressing proceedings in the relevant State, Territory or region of Australia (item 51, proposed subsection 136G(3A)).

*Item 34 – After paragraph 87(1)(c)*

4.179 Section 87 empowers the Court to make a determination over part of a proceeding where all parties reach agreement. Item 34 inserts proposed paragraph 87(1)(d) as a consequence of proposed section 87A (see item 35). Section 87A will enable the Court to make a determination over part of a claim area where not all parties agree to the determination in specific circumstances. Proposed paragraph 87(1)(d) will provide that before making an order under section 87, the Court must be satisfied that an order cannot be made under section 87A. In some circumstances, it may be possible to make an order under both existing section 87 and proposed section 87A. If an order can be made under section 87A, the order should be made under that provision rather than section 87. This is because an order under

section 87A will give rise to other measures which will assist in promoting expeditious resolution of claims, including automatic amendment of the claim and exemption from the registration test being reapplied to the amended claim.

*Item 35 – At the end of Division 1C of Part 4*

4.180 The purpose of proposed section 87A is to facilitate resolution of part of a claim by agreement where certain interest holders agree to a determination being made. Existing section 87 empowers the Court to make an order over part of a proceedings but only where all parties to the proceeding consent.

4.181 Proposed section 87A will enable the Court to make an order determining native title over part of a claim area where some, but not all of the parties to the proceeding, consent to the order being made. The provision will assist to prevent those parties with interests that only relate to part of the claim area, and other parties with less significant interests in relation to the overall claim, from blocking resolution of the claim in relation to a separate part of the claim area. However, the provision will only apply where the major parties affected by the proposed determination (including persons with registered proprietary interests over that part of the claim area) consent to the determination being made. It will also enable parties who have no interest in the portion of the claim area that is not the subject of a determination to withdraw from the proceedings following the making of the relevant determination. Where an order is made under section 87A, the application will be deemed to have been amended to remove from the application the area covered by the determination made under section 87A (item 1, subsection 64(1B)).

4.182 The Court will only be able to make an order in respect of applications for a determination of native title (proposed paragraph 87A(1)(a)). The new provision will only apply to native title determination applications and will not apply to compensation applications.

4.183 An order under section 87A will only be made where an agreement is reached on a proposed determination of native title (the proposed determination) after the end of the notification period in section 66 (proposed paragraph 87A(1)(b)). This is to ensure all interested parties are given an opportunity to be joined as a party to the proceedings before a determination is made.

4.184 Proposed paragraph 87A(1)(c) lists those parties to the application who *must* be parties to the proposed determination before the Court could make the determination. Non-government respondent parties do not need to be a party to the proposed determination unless they are a party to the proceedings at the time the agreement is made and they:

- are a registered native title claimant, a registered native title body corporate or a representative body in relation to the area that is within the area that is the subject of the determination (the determination area)
- claim to hold native title in any part of the determination area
- hold a proprietary interest in relation to any part of the determination area at the time the agreement is made, or

- are a local government body for any part of the determination area.

4.185 Parties to the proceeding who are not parties to the proposed determination must be given notice of the proposed determination (proposed subsection 87A(3)). These parties may object to the determination being made. The Court is required to take into account any such objections when considering whether to make the determination of native title (proposed subsection 87A(5)).

4.186 The Court may make an order in, or consistent with, the proposed determination but must be satisfied the order is within its power and that it would be appropriate to make the order (proposed subsection 87A(4)). Whether it is appropriate to make the order will depend on the circumstances. A particularly relevant consideration for the Court will be the nature of the interests of parties to the proceeding who are not parties to the proposed determination and the effect of the proposed determination on those parties.

*Item 36 – At the end of Division 3 of Part 4*

#### Section 94B

4.187 Currently, the NNTT may provide the Court with reports about the progress of mediation before the NNTT where the presiding member considers it would assist the Court in progressing the proceeding (subsection 136G(3)). However, the Court is under no obligation to consider the report, except where considering whether to make an order that mediation before the NNTT cease. This can result in an inconsistent approach by individual judges of the Court to considering reports.

4.188 Item 36 inserts proposed section 94B which will require the Court to take into account certain reports provided by the NNTT when deciding whether to make orders. The Court will retain a discretion as to what weight the report should be given.

4.189 Section 94B applies to all orders made by the Court in the course of proceedings. Reports provided by the NNTT may be particularly relevant to orders made at a directions hearing in the proceedings, including orders programming a matter for trial. The progress of mediation may also be relevant if the Court is considering whether to make an order to dismiss the application.

4.190 Proposed section 94B will only apply where an application has been referred to the NNTT for mediation under section 86B. The Court will be required to consider both mediation progress reports (provided under subsections 136G(1), (2) and (3)) and regional mediation progress reports and regional work plans (provided under proposed subsections 136G(2A) or (3A)).

4.191 Transitional provisions will ensure the Court is only required to take into consideration reports provided to the Court on or after the commencing day (see item 83).

## Section 94C

4.192 Item 36 also inserts proposed section 94C. The purpose of section 94C is to enable the Court to dismiss applications that have been lodged to secure procedural rights under the right to negotiate regime and have not been, and are unlikely to be, satisfactorily progressed after the future act that prompted the claim is completed. This amendment focuses on the responsibility of applicants to seek to resolve claims they have instituted. Applications which are not appropriately progressed divert resources from other claims.

4.193 Proposed section 94C will require the Court to dismiss an application, on its own motion or on the application of a party, if certain conditions are met (proposed subsection 94C(1)). The power can only be exercised where all the conditions below are met.

- **The application is for a determination of native title (paragraph 94C(1)(a)).**  
These amendments do not apply to compensation applications.
- **The application was made after the notification day specified in the future act notice but before the end of three months after the notification day (paragraph 94C(1)(b)).**  
The notification day is defined in existing subsection 29(4). Proposed paragraph 94C(1)(b) reflects a presumption that applications made over the relevant area within three months of the notification day are made in response to the relevant future act notice. The three month period is included because existing subparagraph 30(1)(a)(i) provides that a registered native title claimant will be a native title party for the purpose of obtaining procedural rights in relation to a future act notice if the claimant's application was lodged before the end of three months after the notification day.
- **The person who made the application becomes a registered native title claimant before the end of four months after the notification day specified in the future act notice (paragraph 94C(1)(c)).**  
This is relevant because existing paragraph 30(1)(a) provides that a registered native title claimant will be a native title party for the purpose of obtaining procedural rights in relation to a future act notice if the claimant's application is registered before the end of four months after the notification day. The new dismissal power applies to claims that have passed the registration test and are entered on the Register of Native Title Claims (see section 190). Applications that are not accepted for registration within the specified timeframe do not secure procedural rights in respect of the future act. Item 73 includes new provisions for dismissing unregistered applications.
- **For each act identified in the future act notice, one of the listed criteria applies (paragraph 94C(1)(d)).**  
The criteria are references to existing provisions in the Native Title Act that have the effect of authorising a future act to be done or determining that a future act cannot be done. The condition requires there to be a decision, agreement or determination about whether or not each act in the future act notice that is presumed to have prompted the filing of the application in question can be done before the Court can consider dismissing the claim.

- **Either the person who made the application fails to produce evidence in support of the application or to take other steps to resolve the application despite direction by the Court (subparagraph 94C(1)(e)(i)), or the Court considers the person has failed to take steps to resolve the application within a reasonable time (subparagraph 94C(1)(e)(ii)).**

This criterion is included to ensure that claims are only dismissed where the claimant has failed to progress their claim. Proposed subparagraph 94C(1)(e)(i) applies where the Court directs a party to produce evidence or to take certain steps to resolve the claim and the person fails to comply with the direction. Proposed subparagraph 94C(1)(e)(ii) applies where the Court consider the person has failed within a reasonable time to take steps to resolve the claim. The second limb of this criterion does not require the Court to have made an order that the party produce evidence or take other steps. The question of what is a ‘reasonable time’ is a matter for the Court, taking into account all the circumstances relating to the claim.

4.194 The Native Title Registrar will be able to provide information to the Registrar of the Court to assist the Court to establish whether the conditions in paragraphs 94C(1)(a) to (d) have been met (see item 2, section 66C).

4.195 Proposed subsection 94C(3) will provide that the Court must not dismiss an application if there are compelling reasons not to do so. The applicant will be given an opportunity to make submissions on the question of dismissal (proposed subsection 94C(2)). This will enable the applicant to advise the Court if they consider there are compelling reasons why the claim should not be dismissed.

4.196 Proposed subsection 94C(3) recognises that even if the conditions for dismissing a claim are met, there may be good reason for the application to remain on foot. A compelling reason could include where the Court is satisfied a failure to produce evidence upon direction was due to genuine difficulty experienced by the applicant in engaging expert assistance and it is clear the applicant intends to progress their claim.

4.197 In some areas future act notices are regularly issued (for example, in highly prospective minerals regions). To ensure the object of this new provision is not frustrated, section 94C will make clear that the mere fact of subsequent future act notices over the area which have not been completed will not, in itself, constitute a compelling reason against dismissing the application (proposed subsection 94C(3)).

4.198 Proposed subsection 94C(4) is inserted to make clear that the dismissal of a claim does not affect an agreement or determination made in relation to a future act where the applicant’s status as a party to such agreement or determination was expressed to be contingent upon the existence of the application.

4.199 Proposed subsection 94C(5) makes clear that the new dismissal power does not affect the Court’s power under the Federal Court Act to dismiss an application. For example, the Court can presently dismiss a matter for want of prosecution under subsection 20(5) of the Federal Court Act.

4.200 Proposed subsection 94C(6) inserts definitions relevant to section 94C. Section 94C applies where an application is made in response to a future act notice

given under section 29 and where an equivalent notice is given under the provisions of a State or Territory which have been determined by the Commonwealth Minister to be alternative provisions. Proposed section 94C(6) defines ‘alternative provisions’ for the purpose of section 94C.

4.201 Subsection 94C(6) also introduces the definition of a ‘future act notice’, making clear that a future act notice includes not only a notice given under section 29 but also notices given under alternative provisions.

*Items 37 and 38 – At the end of subsection 108(1A) and paragraph 108(1B)(a)*

4.202 Section 108 sets out the functions of the NNTT. Item 37 amends subsection 108(1A) and item 38 amends paragraph 108(1B)(a) to recognise the functions of the NNTT are being expanded by new Division 4AA of Part 6. Proposed Division 4AA of Part 6 empowers the NNTT to conduct a review into whether the native title claim group holds native title rights and interests.

*Items 39 – Paragraph 123(1)(b)*

4.203 Section 123 empowers the President of the NNTT to make directions about the arrangement of the business of the NNTT. Item 39 amends paragraph 123(1)(b) to empower the President to make directions about the persons who are to conduct a review under new Division 4AA of Part 6.

*Item 40 – After paragraph 123(1)(c)*

4.204 Proposed section 86BA will give the NNTT a right to appear before the Court to provide assistance. The right is conferred on the NNTT as an entity. Item 40 inserts proposed paragraph 123(1)(ca) to empower the President to make directions about who may appear on behalf of the NNTT under section 86BA.

*Item 41 – Section 131A*

4.205 Section 131A empowers the President of the NNTT to engage a person as a consultant in relation to any assistance or mediation that the NNTT provides. Item 41 amends section 131A to make clear that a consultant may also be engaged for the purposes of conducting or assisting with the conduct of a review under new Division 4AA of Part 6.

*Item 42 – Section 131B*

4.206 Section 131B imposes a requirement on consultants engaged to provide assistance or mediation under the Native Title Act to disclose any matters giving rise to a conflict of interest. Proposed section 131A will enable the President to engage a consultant for the purpose of conducting a review, as well as to provide mediation and assistance. Item 42 amends section 131B to extend the requirement to disclose conflicts of interest to consultants engaged to conduct a review.



*Items 43 and 44 – Subsection 133(1) and after subsection 133(2)*

4.207 Section 133 currently requires the President of the NNTT to prepare an annual report about the management of the administrative affairs of the NNTT.

4.208 Proposed section 136GB will enable the member presiding over a mediation conference to include in the annual report details about any failure by a Government party or that party's representative to act in good faith in mediation by the NNTT (see item 52). Item 44 will insert proposed subsection 133(2A) to make clear that the annual report may include details about the failure to act in good faith and the reason why the NNTT considers the conduct was not in good faith.

4.209 Item 43 amends subsection 133(1) to broaden the subject matter of the annual report to make it a report about the affairs of the NNTT. This is a consequential amendment to ensure the scope of the NNTT's annual report is sufficiently wide enough to cover details of a breach of the good faith obligation.

***Amendments to Division 4A of Part 6—Mediation conferences***

4.210 The powers of the NNTT in relation to mediation conferences are set out in Division 4A of Part 6 of the Native Title Act. The Claims Resolution Review recommended that the NNTT be given additional mediation powers to improve the effectiveness of NNTT mediation. The amendments to this Division are intended to implement the recommendation by giving the NNTT the following powers in relation to applications referred to it by the Court for mediation:

- to direct a party to attend a mediation conference
- to direct a party to produce documents for the purpose of mediation, and
- expanded powers to report to the Court about matters relevant to proceedings in mediation before the NNTT

*Item 45 – Before subsection 136B(1)*

4.211 Section 136B deals with the parties to a mediation conference conducted by the NNTT. The member presiding over a mediation conference is already empowered by subsection 136B(1) to direct that only one or some parties attend particular conferences. However, the presiding member currently has no ability to require parties to attend conferences. Item 45 inserts subsection 136B(1A) to enable the presiding member to direct a party to attend a conference.

4.212 Subsection 136B(1A) will be supplemented by proposed subsection 136G(3B) which will enable the NNTT to report a failure by a party to comply with an NNTT direction made under subsection 136B(1A) (see item 51). On receipt of a report, the Court will be empowered to make an order in similar terms to the direction given by the presiding member (item 31, proposed subsection 86D(3)). The Court will retain its existing powers to impose sanctions for a breach of a Court order.

4.213 Proposed amendments to subsection 86C(5) will also ensure the Court must consider reports provided by the NNTT following a breach of an NNTT direction

when determining whether to make an order that NNTT mediation cease (see item 28).

4.214 Therefore, failing to comply with a direction by the NNTT to attend a mediation conference can potentially result in the application of measures by the Court to enforce the direction, including through its existing powers to impose costs orders. It could also result in a cessation of NNTT mediation if the Court is satisfied the relevant conditions are met under section 86C.

*Item 46 – At the end of section 136B*

4.215 The Claims Resolution Review recommended that parties be placed under a statutory obligation to act in good faith in native title mediations. Item 46 inserts proposed subsection 136B(4) which will require all parties and their representatives to act in good faith in relation to the conduct of mediation before the NNTT.

4.216 The Claims Resolution Review also recommended that the Government give consideration to preparing a code of conduct for parties involved in native title mediations. The Government is giving further consideration to this issue.

4.217 Proposed sections 136GA and 136GB enable the NNTT to make reports about alleged breaches of the obligation to act in good faith to various entities depending on the type of party (or representative) and to the Court (see item 52).

*Item 47 – After section 136C*

4.218 This item inserts proposed section 136CA which will provide the NNTT member presiding over a mediation conference with a new power to direct that parties produce documents to the presiding member within a specified time frame. This power will only apply to the member in his or her capacity as a member presiding over a mediation conference. A member will not be able to compel production of documents for the purposes of a review (see item 53, proposed Division 4AA of Part 6) or in the conduct of a native title application inquiry (see proposed amendments to Division 5 of Part 6).

4.219 The presiding member may only make a direction compelling production of a document where the member considers the document is in the possession, custody or control of the party. Therefore, parties will not be able to be compelled to create documents not already in existence. Equally, the document must be of a nature that would assist parties to reach agreement on a matter that is relevant to the purpose of mediation. Parties will not be required to produce documents that are subject to legal professional privilege.

4.220 Similar to proposed subsection 136B(1A) (see item 45), subsection 136CA will be supplemented by proposed subsection 136G(3B) which will enable the NNTT to report a failure by a party to produce a document where directed to by the NNTT (item 51). On receipt of a report, the Court will be empowered to make an order in similar terms to the direction given by the presiding member (see item 31, proposed subsection 86D(3)). The Court will retain its existing powers to impose sanctions for a breach of a Court order.

4.221 Proposed amendments to subsection 86C(5) will also ensure the Court must consider reports provided by the NNTT following a breach of an NNTT direction when determining whether to make an order that NNTT mediation cease (see item 28).

4.222 Therefore, failing to comply with a direction by the NNTT to produce a document can potentially result in the application of measures by the Court to enforce the direction, including through its existing powers to impose costs orders. It could also result in cessation of NNTT mediation if the Court is satisfied the relevant conditions are met under section 86C.

*Item 48 – After section 136D*

4.223 This item inserts proposed section 136DA to provide a mechanism for the NNTT to refer questions about whether a party should continue to be a party to proceedings to the Court. At the very least, a person is required to have an interest that may be affected by a determination in the proceedings in order to become a party to proceedings (subsection 84(5)). It will at times become apparent during the course of a mediation that a party either no longer has, or never had, an interest that may be affected. This may be because, for example, the claimants amend their application to reduce the area of land or waters claimed and the relevant party's interest no longer falls within the claim area. Where the NNTT becomes aware during the course of mediation that there is a question as to whether a party should remain as a party to the proceedings, proposed section 136DA will enable the NNTT to refer the question to the Court.

4.224 The NNTT can only exercise its power under section 136DA while a proceeding remains in mediation before the NNTT. Proposed subsections 136DA(3) and (4) set out who may refer a question to the Court and when the question may be referred.

4.225 Existing subsection 136A(4) provides that in proceedings before the Court, unless parties otherwise agree, no evidence can be given or statements made about words spoken or acts done at mediation conferences. Proposed subsection 136DA(2) creates a limited exception to the 'without prejudice' protection that generally applies to words spoken or acts done at mediation. It provides that for the purposes of the Court determining the question of whether the party should remain as a party to proceedings, the without prejudice protection does not apply. This means the NNTT can advise the Court of words spoken or acts done during mediation if they are relevant to determining if a party has an interest that may be affected. Equally, the relevant party is not bound by subsection 136A(4) for the purpose of defending any attempt to remove them as a party.

4.226 Proposed subsection 136DA(5) provides that mediation may continue following a referral if the presiding member considers it would be appropriate to continue.

4.227 The Court can, pursuant to existing subsection 84(8), dismiss a party at any time during proceedings, including where the Court is satisfied the person never had, or no longer has, interests that may be affected by a determination in the proceedings

(subsection 84(9)). The Court may exercise its existing powers to rationalise the party list following a referral by the NNTT under section 136DA.

4.228 Proposed subsection 136DA(6) makes clear that for the purpose of determining whether an existing party should continue to be a party to the proceedings, the party must have an interest that may be affected by a determination in the proceedings.

*Item 49 – Subsection 136G(2)*

4.229 Item 49 amends subsection 136G(2) as a consequence of Item 32 which amends section 86E.

*Items 50 and 51 – After subsection 136G(2) and after subsection 136G(3)*

4.230 The NNTT has at times prepared detailed regional work plans and regional mediation progress reports in conjunction with the relevant representative body for the area and the State or Territory government. Item 50 inserts proposed subsection 136G(2A) to formally expand the NNTT's existing reporting powers to enable the NNTT to provide, following a request by the Court under proposed subsection 86E(2), a regional mediation progress report or a regional work plan to the Court. Regional mediation progress reports and regional work plans are defined in proposed subsection 86E(2) (see item 33).

4.231 Similarly, item 51 inserts proposed subsection 136G(3A) which will enable the NNTT to provide regional mediation progress reports and regional work plans to the Court on the NNTT's own initiative where it considers the report or work plan would assist the Court in progressing proceedings in a State, Territory or region of Australia (proposed subsection 136G(3A)).

4.232 It would be appropriate for the NNTT to prepare regional work plans and regional mediation progress reports with input and guidance from major parties to claims in the region and their representatives. The State or Territory government and the representative body will generally be involved in most proceedings in a particular region. As a result, parties will face competing demands for their time and resources where there are a number of claims in a particular region. The new reporting function will enable the NNTT to inform the Court about the priorities being given to particular claims in a State, Territory or region.

*Item 52 – At the end of Division 4A of Part 6*

Section 136GA

4.233 Proposed subsection 136B(4) imposes a statutory obligation on parties and their representatives to act in good faith in relation to the conduct of mediation before the NNTT (see item 46). Item 52 inserts proposed sections 136GA and 136GB which will enable the member presiding over a mediation conference to make reports to the Court and to various entities where the presiding member considers a party or their representative did not, or is not, acting in good faith in relation to the conduct of a mediation.

4.234 Under proposed subsection 136GA(1) the presiding member may make a report about persons who do or did not act in good faith:

- to the relevant Minister where the relevant person is a person representing the Commonwealth, a State or Territory, or
- to the Secretary of the relevant Department where the person or their representative receives funding to participate in native title proceedings from the Commonwealth. This provision will apply to non-government respondents who receive funding from the Commonwealth under section 183 (currently administered by the Attorney-General) and claimants where represented by a representative body who receives funding under section 203C, or a person or body performing the functions of a representative body that is provided with funds under section 203FE, for the purpose of, among other things, assisting persons who may hold native title in mediations related to native title applications. Sections 203C and 203FE are currently administered by the Minister for Families, Community Services and Indigenous Affairs.

4.235 No direct consequence results from a report to a Minister or the Secretary of a Department. Addressing allegations of bad faith will be left to the discretion of the Minister or the Secretary.

4.236 Where the NNTT considers a legal practitioner has acted, or is acting, in bad faith, subsection 136GA(2) will enable the presiding member to make a report to the relevant legal professional body. Similar to reports to the Minister or the Secretary, addressing allegations of bad faith will be left to the discretion of the legal professional body.

4.237 Existing subsection 136A(4) provides that in proceedings before the Court, unless parties otherwise agree, no evidence can be given or statements made about words spoken or acts done at mediation conferences. Proposed subsection 136DA(2) creates a limited exception to the 'without prejudice' protection that generally applies to words spoken or acts done at mediation. It provides that the without prejudice protection does not apply to any report provided by the NNTT to a legal professional body under subsection 136GA(2). This is to ensure the legal professional body is not prevented from pursuing disciplinary action on receipt of a report if this would involve a proceeding before the Court.

4.238 The presiding member may also make a report to the Court if it considers the party has breached the obligation to act in good faith (subsection 136GA(4)). Similar to subsection 136GA(3), subsection 136GA(4) provides that subsection 136A(4) does not apply to a report provided to the Court under this section. The presiding member is not required to make a report to the Court where a report is provided to another entity under subsections 136GA(1) or (2).

4.239 Reports provided under section 136GA must include details of the failure to act in good faith and information about the context in which the conduct occurred (proposed subsection 136DA(5)). This will facilitate the person receiving the report to determine if the allegation of bad faith should be pursued further.

4.240 Proposed subsection 136GA(6) provides that when a report is made to government, a legal professional body or to the Court, a copy of the report must be provided to the person to whom the report relates.

4.241 Proposed subsections 136GA(7) and 136GA(8) enable a report to be provided on the initiative of the presiding member. Proposed subsection 136GA(7) provides that, where the presiding member is not a consultant engaged under section 131A, a report may only be provided under section 136GA on the initiative of the presiding member. However, where the presiding member is a consultant, proposed subsection 136GA(8) provides that a report can only be provided on the initiative of the presiding member where a presidential member must agree.

4.242 Proposed subsection 136GA(9) confers a discretion on the presiding member to continue mediation if the member considers it would be appropriate to continue.

### Section 136GB

4.243 Proposed section 136GB will provide that where the presiding member considers a Government party, or the party's representative did not, or is not, acting in good faith, the annual report of the NNTT may include details about the failure to act in good faith. The intention of these amendments is to ensure that Government parties are publicly accountable for their actions, and the actions of their representatives, in the course of native title mediations.

4.244 Proposed subsection 136GB(2) will require the presiding member to inform the Government party or the party's representative before including information in the annual report about a failure to act in good faith.

4.245 Items 43 and 44 amend section 133 as a consequence of proposed section 136GB to ensure reports about breaches of the good faith obligation may be included in the NNTT's annual report.

### ***Proposed Division 4AA—Review on whether there are native title rights and interests***

#### *Item 53 – After Division 4A of Part 6*

4.246 The purpose of proposed Division 4AA of Part 6 is to provide the NNTT with a new function to conduct a review into whether a native title claim group holds native title rights and interests. The Claims Resolution Review recommended this new review function as a means to achieve more effective mediation. It will facilitate parties to reach agreement about the issue of whether a native title claim group holds native title rights and interests, and in particular, issues surrounding the connection which the claim group may have with the relevant land or waters.

4.247 It is expected reviews will be conducted by examining papers and documents relating to connection. There is no facility to hold hearings in a review. If hearings are considered appropriate, it may be preferable to consider holding a native title application inquiry instead.

4.248 Participation in the reviews will be entirely voluntary and there will be no power to compel parties to attend or to produce documents for the purpose of a review.

#### Section 136GC – Review on whether there are native title rights and interests

4.249 Proposed subsection 136GC(1) enables the President of the NNTT to refer for review by the NNTT the issue of whether a native title claim group who is a party in a proceeding holds native title rights and interests in relation to land or waters within the area that is the subject of the proceeding. ‘Native title rights and interests’ are defined in subsection 223(1). The most significant question in determining whether the claim group holds native title rights and interests will often be whether the claim group has a connection with the land or waters (see paragraph 223(1)(b)). The Claims Resolution Review found that a significant proportion of the time taken to mediate native title matters relates to connection.

4.250 Subsection 136GC(2) will provide that the issue may only be referred for a review where the issue arises in the course of mediation by the NNTT in the proceedings and where the presiding member recommends the review be conducted. The Court must have referred the application to the NNTT for mediation under section 86B before a review can be conducted.

4.251 Under proposed subsection 136GC(3), the presiding member may only recommend a review be conducted if the member considers, after consultation with the parties to the proceeding, that the review of the issue would assist parties to reach agreement on any of the matters mentioned in subsection 86A(1). These matters are essentially those that are relevant to a determination of native title. The requirement for the presiding member to consult with the parties will require the presiding member to notify the parties. It will not require the presiding member to be satisfied that all parties to the proceeding consent to the review or that all parties agree to participate. The review will be voluntary and no one will be compelled to participate or provide documents. However, it would be necessary for the presiding member to be satisfied at least one party would be prepared to provide relevant documents for the purpose of the review before recommending that an issue be referred for review.

4.252 Proposed subsections 136GC(4) and (5) provide that a review must be conducted by a member of the NNTT (which includes a consultant engaged under section 131A) and that the member conducting the review may be assisted by another member or by a member of staff of the NNTT. A review into subsection 223(1) matters is likely to involve assessment of anthropological or historical material. In some circumstances it may be appropriate for the NNTT to engage a consultant with anthropological or historical expertise for the purpose of the review.

4.253 Proposed subsection 136GC(6) provides that a party to the proceedings may give documents or information to the member conducting the review for the purposes of the review (‘participating party’). It will be essential to have at least one participating party to a review, although it may only be necessary to have one such participating party. In many instances, this participating party will be the claimants. Parties will not be compelled to give the documents or information to the member conducting the review. The new power for the NNTT to compel production of documents does not apply to the review function since the member presiding over

mediation is only able to compel the production of documents for the purpose of mediation conferences (see item 47, proposed section 136CA).

4.254 Proposed subsection 136GC(7) provides that in a proceeding before the Court, unless the participating parties otherwise agree, evidence may not be given and statements may not be made concerning words spoken or acts done in the course of the review. This imposes the same ‘without prejudice’ protection to words spoken and acts done in the course of a review as currently applies to words spoken and acts done during the course of a mediation (see subsection 136A(4)).

4.255 Proposed subsection 136GC(8) provides that, unless parties otherwise agree, a member who conducts, or assists in, a review may not, in any other capacity, take any further part in the proceeding. This provision will limit the ability of a member conducting a review to appear before the Court in proposed section 86BA. It will also prohibit the member conducting the inquiry from conducting a native title application inquiry into the same proceedings or from presiding over a mediation conference, unless parties otherwise agree. The agreement of all parties participating in the review is needed, rather than all parties to the relevant proceedings. A similar limitation is placed on members presiding over a mediation conference (subsection 136A(5)) and will also apply to members who conduct or assist at a native title application inquiry (see item 57, proposed subsection 138C(2)).

4.256 Proposed subsection 136GC(9) enables the presiding member to continue mediation while a review is being conducted where he or she considers it would be appropriate to do so. As a review will be conducted largely on the documents and will require little direct involvement of parties, it may be appropriate to continue mediation while the review is underway.

4.257 Proposed subsections 136GC(2) and (10) make clear that a review can only be conducted while the proceedings that are the subject of the review are before the NNTT for mediation. If the Court orders that mediation by the NNTT should cease under section 86C at any time during the course of a review, the review must cease. This is appropriate as the review function is a tool to facilitate parties in reaching agreement during the course of mediation by the NNTT.

4.258 Proposed subsections 136GC(11) and 136GC(12) provide that consultants engaged to conduct a review or to preside over a mediation are bound by the provisions in Division 4AA of Part 6 in the same way that members of the NNTT are bound by those provisions.

#### Section 136GD – Member conducting a review may prohibit disclosure of information

4.259 Proposed section 136GD enables the member conducting the review to make directions limiting the disclosure of information given, or statements made, during the course of the review, or the contents of any document produced in the course of the review. Such directions may be made on the member’s own initiative or on application by a participating party. As the production of documents for the purpose of a review is voluntary, it would generally be appropriate for the NNTT to make orders limiting disclosure requested by a party on provision of documents.



4.260 Section 136GD is similar to existing section 136F which relates to information disclosed in the course of mediation conferences.

4.261 Proposed amendments to section 176 will make clear that contravention of a direction prohibiting disclosure of information under proposed section 136GD is an offence with a maximum penalty of 40 penalty units (see item 68).

#### Section 136GE – Reports

4.262 Proposed section 136GE sets out the relevant requirements for the member conducting the review to report about the findings of the review. Proposed subsection 136GE(1) will require the member conducting the review to provide a written report setting out the findings of the review to the participating parties and the member presiding over the mediation. The report may assist the presiding member in progressing mediation in relation to the issues addressed by the review.

4.263 Proposed subsection 136GE(2) will provide that the member conducting the review may also provide the report to other parties in the proceeding. Depending on who the participating parties are, it may be appropriate for the member conducting the review to provide a copy of the report to other parties in the proceedings to facilitate the mediation. For example, if the only participating party is the claimant who provided connection material to the review, it may be valuable for the other parties to the proceeding to also see the report.

4.264 The member conducting the review may also provide the report to the Court. For example, in some circumstances it may be appropriate for the Court to consider the findings to avoid the duplication of resources. Under existing subsection 86(1)(c), the Court may adopt the findings of the review. The Court has the discretion to decide what weight it will place on these findings.

4.265 The reports will be subject to the ‘without prejudice’ protection set out in subsection 136GC(7) as well as any limitations placed on disclosure of documents and information under section 136GD.

4.266 Under proposed subsection 136GE(3), the member conducting the review may provide a written report to the presiding member of the mediation prior to the conclusion of the review where this would assist in progressing the mediation. The progress report may facilitate the mediation by assisting to clarify issues at an earlier stage prior to the finalisation of the review.

#### *Items 54, 55 and 56 – Division 4B of Part 6*

4.267 Section 136H of Division 4B of Part 6 provides for regulations to make provision for how assistance or mediation is to be provided by the NNTT. As a consequence of the new review function of the NNTT (see item 53), item 55 will amend subsection 136H(1) so that the regulations may make provision in relation to the way any review under Division 4AA of Part 6 is to be conducted. Item 56 will amend subsection 136H(2) to make it clear that the regulations must not be inconsistent with Division 4AA of Part 6. Item 54 will amend the heading of Division 4B of Part 6 to include a reference to the new review function.

### ***Subdivision AA—Native title application inquiries***

4.268 Division 5 of Part 6 sets out the inquiries the NNTT may conduct. Currently, the NNTT may conduct special inquiries at the direction of the Minister under section 137. The NNTT may also conduct general inquiries into certain subjects set out in section 139, such as inquiries into right to negotiate applications.

4.269 Item 67 inserts new subdivision AA into Division 5 of Part 6 to create a new type of inquiry that may be conducted by the NNTT called *native title application inquiries*. This new inquiry power will be in addition to the new review function of the NNTT under item 53 and is intended to provide an additional tool to facilitate the resolution of native title claims through consent in the mediation process.

4.270 The purpose of native title application inquiries will be to examine issues relevant to a determination of native title arising in one or more applications made under section 61. Native title application inquiries may be particularly valuable in examining issues relating to more than one application filed under section 61. For example, inquiries could be used to resolve overlap issues where more than one claimant application has been filed over the same area.

4.271 Participation in a native title application inquiry will be entirely voluntary. The NNTT will be required to make recommendations at the end of a native title application inquiry. While the recommendations will not be binding, parties voluntarily participating in a native title application inquiry may be guided by the recommendations of the NNTT. Unlike reviews under proposed section 136GC, the Court will be *required* to consider whether to take into account the transcript of evidence of any native title application inquiry.

### ***Item 57 – After Subdivision A of Division 5 of Part 6***

4.272 Item 57 inserts new Subdivision AA into Division 5 of Part 6 to enable a new type of inquiry to be conducted by the NNTT (native title application inquiries).

### **Section 138A – Application**

4.273 Proposed section 138A limits the application of Subdivision AA to circumstances where the Court has referred all or part of a proceeding to the NNTT for mediation under section 86B and the proceeding or the part of the proceeding before the NNTT for mediation raises a matter or an issue relevant to the determination of native title under section 225. Native title application inquiries are intended to facilitate mediation by the NNTT.

4.274 Mediation into claimant applications and non-claimant applications will almost certainly raise matters and issues relevant to the determination of native title as defined in section 225. Native title application inquiries will not be able to be held into compensation applications.

4.275 A native title application inquiry can be held into any issue or matter relevant to the determination of native title so long as resolution of the issue or matter is likely to lead to some positive action being taken towards resolving the application to which the inquiry relates. Inquiries should only be conducted into issues or matters that are

sufficiently important to justify an inquiry. It may be appropriate to conduct an inquiry into, for example, who the appropriate claimant is in areas where there are overlapping claims. An inquiry may also be appropriate where there is a disagreement within a particular claim group.

#### Section 138B – Native title application inquiries

4.276 Proposed subsection 138B(1) empowers the President of the NNTT to direct the NNTT to hold a native title application inquiry:

- at the President’s own initiative, or
- at the request of a party to a proceeding, or
- at the request of the Chief Justice of the Court.

4.277 Proposed subsection 138B(2) sets out the criteria on which the President must be satisfied before directing an inquiry be held. The President must be satisfied that resolution of the issue or matter that is the subject of the inquiry would be likely to lead to some positive steps being taken towards resolving the proceedings.

4.278 The President may only direct an inquiry be held if the applicant or applicants in the proceedings that will be affected by the inquiry agree to participate in the inquiry. The native title application inquiry process is entirely voluntary. However, the applicant or applicants in an affected application are required by proposed paragraph 141(5)(a) to be a party to the inquiry. Therefore, it is important that the applicants’ consent be obtained prior to conducting an inquiry. Furthermore, it is unlikely a native title application inquiry would have an effective outcome if the applicant does not participate in the inquiry process.

4.279 The President may only direct a native title application inquiry be held if the relevant matter is in mediation before the NNTT. Proposed subsection 138B(3) provides that a request that an inquiry be held may be made before the Court refers the whole or part of the proceeding to the NNTT for mediation under section 86B. In some circumstances it may become apparent to the Court that an inquiry would be valuable before a matter is referred to the NNTT for mediation, including during the notification process. Proposed subsection 138B(3) enables the Chief Justice or a party to the proceedings to request an inquiry be conducted in these circumstances. However, a formal referral of the relevant proceedings under section 86B would be necessary before the President can direct an inquiry be held. The Chief Justice is only able to request that an inquiry be conducted. The discretion to direct the inquiry remains with the President, as the inquiry will have resource implications for the NNTT.

4.280 It is intended that the President should only direct a native title application inquiry where all of the matters that are to be the subject of the inquiry are currently before the NNTT for mediation.

#### Section 138C – Tribunal to hold inquiry

4.281 Proposed section 138C requires the NNTT, where directed by the President to do so, to hold an inquiry into a matter or issue relevant to the determination of native

title under section 225. Proposed subsection 138C(1) introduces the definition of a 'native title application inquiry'.

4.282 Proposed subsection 138C(2) provides that, unless parties otherwise agree, a member who conducts, or assists in, an inquiry may not, in any other capacity, take any further part in the proceeding. This provision would limit a member conducting a native title application inquiry from appearing before the Court in proposed section 86BA (see item 20). It also prohibits the member conducting the inquiry from conducting a review into the same proceedings or from becoming a mediator in the same proceedings, unless parties otherwise agree. This provision is necessary to avoid any appearance of bias and mirrors existing subsection 136A(5) (in relation to members presiding over mediation conferences) and proposed subsection 136GC(8) (in relation to members conducting a review under proposed Division 4AA of Part 6 – see item 53).

#### Section 138D – Notice to be given to certain persons before inquiry is held

4.283 Proposed section 138D imposes requirements on the President to give notice to certain persons prior to commencing a native title application inquiry. The President must inform:

- the Commonwealth Minister
- the relevant State or Territory Minister
- the Chief Justice of the Court
- the representative body, or a person or body performing the functions of a representative body, for the area concerned
- the applicant in relation to any application that is affected by the inquiry, and
- any other person who is a party to the proceedings that relate to the application.

4.284 The NNTT is not required to notify the public about a native title application inquiry, unlike a special inquiry conducted pursuant to section 137 (see section 138). Native title application inquiries relate to specific matters and issues that arise in the course of a proceeding and will normally only be relevant to the party or parties to those proceedings. Special inquiries under section 137 can potentially cover much broader issues of public significance, therefore necessitating public notification.

4.285 Proposed subsection 138D(2) sets out the information that must be contained in the notice. The notice must:

- state that the NNTT intends to hold an inquiry
- set out the matters or issues that the inquiry will examine
- state that the inquiry must not begin before the end of seven days after the day on which the notice is given, or the latest day on which notice is given if notice is given to different persons on different days (proposed subsection 138D(3)), and
- indicate who may become a party to a native title application inquiry are (proposed subsection 141(5)).

4.286 It is necessary to indicate when the inquiry can commence and who can become a party to a native title application inquiry to ensure that any person, besides the applicant or applicants of any affected applications, are given an opportunity to become a party to the inquiry by applying to the NNTT in writing.

4.287 Proposed subsection 138D(3) is intended to ensure that persons who wish to become a party to the inquiry have sufficient time to indicate this to the NNTT before the inquiry commences. There is no requirement that the inquiry must commence immediately after the notification period and the NNTT may consider it appropriate in some circumstances to delay commencement.

#### Section 138E – Relationship to mediation and review on whether there are native title rights and interests

4.288 Proposed section 138E sets out the relationship between a native title application inquiry, mediation into the applications which are the subject of that inquiry and any reviews being held into the same applications under proposed Division 4AA of Part 6.

4.289 Proposed subsection 138E(1) provides that, where an inquiry is held and mediation is also being conducted into an application that is the subject of the inquiry, the presiding member may continue mediation if he or she considers it is appropriate. The question of whether it is appropriate to continue mediation may depend on factors such as:

- how many of the parties to the proceedings are parties to the native title application inquiry
- whether mediation can continue on other issues pending resolution of the issue or matter that is the subject of the inquiry, and
- the resource implications for parties involved in inquiries and mediation conferences at the same time.

4.290 Proposed subsection 138E(2) prohibits the NNTT from conducting a review under Division 4AA of Part 6 at the same time the NNTT is conducting a native title application inquiry into the relevant application. Reviews under proposed subsection 136GC(1) can potentially cover the same issues that are the subject of a native title application inquiry. It would be counter-productive to have the same institution examining the same or similar issues in two forums at the same time.

#### Section 138F – Cessation of inquiry

4.291 Proposed subsection 138F(1) requires that an inquiry must cease if the Court makes an order that NNTT mediation cease in relation to the whole of the proceeding that is the subject of the inquiry, or in relation to the part of the proceedings where the inquiry relates to that part of the proceedings. A native title application inquiry can only commence where the application that is the subject of the inquiry has been referred to the NNTT for mediation. It is therefore appropriate that where the matter is no longer before the NNTT for mediation as a result of an order by the Court under section 86C that the inquiry cease.

4.292 Proposed subsection 138F(3) provides the President with the discretion to order that an inquiry cease if a party to the inquiry no longer agrees to participate in the inquiry. Whether it is appropriate for the inquiry to cease following the withdrawal of a party will depend on the nature of the inquiry. For example, where the inquiry is examining the relationship between the native title rights and interests claimed and a particular third party respondent's interests, and the third party respondent no longer agrees to participate in the inquiry, it may be appropriate to cease the inquiry. However, where the inquiry is examining a dispute within a claim group and a third party respondent no longer agrees to participate, it is likely to be appropriate to continue with the inquiry.

4.293 Whether it is appropriate to continue the inquiry or cease will also depend on the stage the inquiry is at when the party no longer agrees to participate. For example, if the inquiry is nearing conclusion when a party withdraws, it may be appropriate to continue the inquiry, rather than to cease it immediately.

#### Section 138G – Inquiries may cover more than one proceeding

4.294 Proposed section 138G makes clear that a native title application inquiry can be conducted into more than one proceeding where both proceedings have been referred to the NNTT for mediation. It provides that Division 5 of Part 6 applies in relation to the inquiry as if each proceeding were a separate inquiry. This means that each of the proceedings that are the subject of a single inquiry must be referred to mediation under section 86B before the inquiry can commence. If the Court orders mediation cease in relation to one proceeding, the inquiry must cease in relation to that proceeding but may continue in relation to the other proceedings.

#### *Item 58 – At the end of section 141*

4.295 Item 58 inserts proposed subsection 141(5) which sets out who the parties to a native title application inquiry are. The applicant in relation to any application that is affected by the inquiry is required to be a party to the inquiry. A native title application inquiry is unlikely to be effective if the persons who have made the native title determination application are not parties to the inquiry.

4.296 The relevant State or Territory Minister is entitled under paragraph 141(5)(b) to become a party on application in writing. State and Territory governments play a key role in native title proceedings and it is important that the relevant Minister be able to participate in an inquiry where desired.

4.297 The Commonwealth Minister is entitled under paragraph 141(5)(c) to become a party to any native title application inquiry at any stage during the course of an inquiry, irrespective of whether the Commonwealth is a party to the relevant applications that are the subject of the inquiry. This is consistent with the Minister's current ability to intervene in any proceedings before the Court in a matter arising under the Native Title Act (see section 84A). This is important to ensure the Commonwealth may maintain a role in ensuring consistency in the native title system.

4.298 The NNTT has a discretion to allow any other person to become a party to a native title application, provided the person indicates in writing that they wish to

become a party. There is no ability for the NNTT to compel a person to become a party to a native title application inquiry.

*Item 59 – Section 142*

4.299 Section 142 provides that the NNTT must ensure every party to an inquiry is given a reasonable opportunity to present his or her case, subject to subsection 151(2) and section 154. Section 154 provides that inquiries are generally held in public. Proposed section 154A creates an exception to section 154, by providing that generally native title application inquiries will be held in private (item 62). Item 59 amends section 142 as a consequence of item 62 to provide that section 142 is also subject to proposed section 154A.

*Item 60 – Section 152*

4.300 Section 152 gives parties to inquiries a right to appear at hearings and conferences, subject to section 154. Section 154 provides that inquiries are generally held in public. Proposed section 154A creates an exception to section 154, by providing that generally native title application inquiries will be held in private (see item 62). Item 60 amends section 152 as a consequence of item 62 to provide that section 152 is also subject to proposed section 154A.

*Item 61 – At the end of section 154*

4.301 Section 154 provides that hearings for inquiries being held by the NNTT are generally to be in public. Item 61 inserts proposed subsection 154(5) to make clear this general rule is subject to an exception for native title application inquiries.

4.302 Other inquiries to which section 154 applies are more likely to involve issues of broader public interest and significance, for example, special inquiries under section 137. It is appropriate that these inquiries be conducted in a public forum. Native title application inquiries involve issues arising out of specific native title applications. They may also examine culturally sensitive issues such as overlapping claims or inter-Indigenous disputes. As a general rule, such inquiries would be more appropriately held in private.

*Item 62 – After section 154*

4.303 Existing section 154 provides that hearings held during the course of an inquiry should generally be held publicly. Item 62 inserts proposed section 154A which will provide that hearings for native title application inquiries should generally be held in private. Unless the NNTT orders otherwise, hearings in the course of native title application inquiries should be in private (subsection 154A(1)).

4.304 The NNTT may give directions as to the parties that may be present at a hearing if the NNTT is satisfied it would be appropriate to make such a direction (subsection 154A(2)). It may be appropriate to limit the parties who may be present at a hearing where, for example, the hearing involves overlapping claims where culturally sensitive information is needed to determine the appropriate claimants for a particular area.

4.305 The NNTT may order that a hearing for a native title application inquiry be held in public (subsection 154A(3)). Before making such an order the NNTT must have due regard to the cultural and customary concerns of Aboriginal people and Torres Strait Islanders (subsection 154A(5)).

4.306 Proposed subsection 154A(4) reflects an existing provision governing general inquiries in circumstances where participation through other means of communication (such as by telephone) occurs (see subsection 154(2)).

*Item 63 – Section 155*

4.307 Item 63 makes a consequential amendment to section 155 to make reference to new section 154A (see item 62).

*Item 64 – At the end of section 156*

4.308 Existing subsection 156(2) enables the NNTT to summon a person to appear before the NNTT to give evidence and produce documents. Item 64 inserts proposed subsection 156(7) which will provide that subsection 156(2) does not apply to native title application inquiries. Native title application inquiries are intended to be an entirely voluntary process which parties to proceedings may avail themselves of in order to facilitate resolution of the claim. Persons who agree to voluntarily participate may not be compelled to give evidence.

*Item 65 – After section 163*

4.309 This item inserts proposed section 163A which sets out the relevant reporting requirements after the holding of a native title application inquiry. Proposed subsection 163A(1) requires the NNTT to make a report about the matters or issues covered by the inquiry, namely those issues set out in the notice required under proposed section 138D.

4.310 Proposed subsection 163A(2) enables the NNTT to make recommendations in its report, while making clear that any such recommendations are not binding between any of the parties to the inquiry. It is hoped that where parties agree to participate in an inquiry, they will be prepared to consider accepting the recommendations resulting from the inquiry.

4.311 The report made by the NNTT will be given to the parties to the inquiry and a copy provided to the Court (see item 67).

*Item 66 – Section 164*

4.312 Item 66 makes an amendment to section 164 as a consequence of item 67.

*Item 67 – At the end of section 164*

4.313 Section 164 provides that determinations and reports by the NNTT following an inquiry must be in writing and provided to each of the parties to the inquiry. Item 67 inserts proposed subsection 164(2) which provides that, where a report is



made following a native title application inquiry, in addition to providing a copy of the report to the parties to the inquiry, the NNTT must also provide a copy of the report to the Court.

4.314 Item 7 will amend section 86 to provide that the Court must consider whether to receive into evidence any transcript of evidence from a native title application inquiry and may adopt any recommendation made by the NNTT following an inquiry. Receiving the report of the inquiry will assist the Court in determining whether to receive into evidence the transcript of evidence from an inquiry and whether to adopt any recommendations of the inquiry.

*Item 68 – Subsection 176(1)*

4.315 Section 176 prohibits the disclosure of material in contravention of a direction made by the NNTT under various sections of the Native Title Act. Item 53 inserts proposed section 136GD which will enable the NNTT to prohibit disclosure of material in the context of a review under proposed Division 4AA of Part 6. Item 68 amends subsection 176(1) to provide that contravention of a direction prohibiting disclosure of material under proposed section 136GD is also an offence under section 176. Contravention of a direction prohibiting disclosure is an offence with a maximum penalty of 40 penalty units.

*Item 69 – Paragraph 190(3)(a)*

4.316 Section 190 sets out the requirements for the Native Title Registrar in relation to the Register of Native Title Claims. Item 71 inserts proposed subsection 190A(1A) which will provide that where the Court makes a determination over part of a claim area under proposed section 87A, the Registrar need not reapply the registration test. Claims that were on the Register before the order was made under section 87A will remain registered following the amendment to the application. To ensure the Register is updated to reflect the details of claims amended following an order under section 87A, paragraph 190(3)(a) will be amended to include a requirement for the Registrar to amend the Register, notwithstanding that the registration test has not been reapplied.

4.317 The existing requirement that the Register be amended where an amended application is otherwise accepted for registration is retained.

*Items 70 and 71 – Subsection 190A(1) (note) and after subsection 190(1A)*

4.318 Subsection 190A requires the Native Title Registrar to apply the registration test to all new claimant applications and all amended claimant applications. The requirement to undergo the registration test can be a disincentive to claimants to amend their application. Proposed section 87A will enable the Court to make an order determining native title over part of a proceeding where some, but not all, parties to the proceeding agree to the determination.

4.319 Item 70 inserts proposed subsection 190A(1A) which will provide that an application need not undergo the registration test again where the application is amended as a result of an order made under section 87A. This amendment will ensure

claimants are not discouraged from agreeing to a determination over part of a claim area on the ground that the application may lose its registered status if the registration test was reapplied.

4.320 There may be circumstances in which it is appropriate for the Registrar to reapply the registration test. For example, if the claim was unregistered prior to the order being made under section 87A, the applicant may want the Registrar to reconsider the claim in order to obtain registration.

4.321 The exception under subsection 190A(1A) will apply to all claims, regardless of whether the claim was on the Register prior to the order under section 87A. However, the consequential amendment in item 69, requiring the Registrar to amend the Register to reflect the amended application, will only apply to applications that were registered before the amendment was made. This is to prevent claims that were unregistered prior to the order under section 87A obtaining registered status as a result of the order.

4.322 Item 70 makes a consequential amendment to the note under subsection 190A(1) to reflect item 71.

*Item 72 – After subsection 190D(1A)*

4.323 Section 190A requires the Registrar to apply the registration test to consider all claimant applications and all amended claimant applications. Existing subsection 190D(1) provides the Registrar may only accept a claim for registration if the claim meets all of the conditions about merit contained in section 190B and all of the conditions about procedural and other matters contained in section 190C. Amendments inserted by item 73 will enable the Court to dismiss, in certain circumstances, claims that do not meet the conditions about merit in section 190B.

4.324 Subsection 190D(1) provides that if the Registrar does not accept a claim for registration the Registrar must provide the applicant and the Court with a statement of reasons for the decision. Item 72 inserts proposed subsection 190D(1A) which will require the Registrar to identify in the statement of reasons whether the claim satisfies all the conditions about merit in section 190B and whether it was not possible to determine if the claim satisfies all the conditions about merit because the application did not satisfy the procedural conditions of the registration test. This will assist the Court in determining whether the conditions required to dismiss a claim under proposed section 190D(7) are met (see item 73).

*Item 73 – At the end of section 190D*

4.325 Existing section 190A requires the Registrar to apply the registration test to all claimant applications and to all amended claimant applications. Subsection 190D(1) provides the Registrar may only accept a claim for registration if the claim meets all of the conditions about merit contained in section 190B and all of the conditions about procedural and other matters contained in section 190C. Currently, while unregistered applications do not receive certain procedural benefits that attach to registered claims (such as the right to negotiate), unregistered applications may still proceed to determination. There is presently no requirement on claimants to amend their claim

to meet the requirements of the registration test. The amendments inserted by item 73 are intended to provide a greater focus on the responsibility of applicants to take steps to improve the quality of their claims, recognising that poor quality claims are a burden on the native title system.

4.326 Item 73 inserts proposed subsections 190D(6) and (7) which will enable the Court to dismiss an application which has not passed the merit conditions of the registration, if the Court is satisfied the application is unlikely to be amended in a way that would enable the application to pass the test.

4.327 The new dismissal power will apply where the Registrar does not accept the claim for registration because it has failed all the merit conditions of the registration test and the applicant has either not sought a review of the Registrar's decision or, having sought a review, the Court has determined the review application without requiring the Registrar to accept the claim for registration (proposed subsection 190D(6)).

4.328 The proposed amendments are only designed to dismiss claims that fail to meet a basic standard of merit. It is not intended that claims that merely have a procedural defect (but have passed the merits component of the registration test) be dismissed under the proposed amendments. However, in recognition that some claims are so procedurally defective as to render it impossible to determine whether the claim has merits, proposed subparagraph 190D(6)(a)(ii) extends the application of the new dismissal power to cases where the Registrar could not make a decision in relation to the merits component of the registration test because of procedural defects.

4.329 To assist the Court in determining whether the conditions set out in proposed subsection 190D(6) apply, item 72 inserts proposed subsection 190D(1A) which will require the Registrar to include, in the statement of reasons given to an applicant under subsection 190D(1), a statement identifying whether the claim satisfies all the merit conditions as well as whether it was not possible to determine if the claim satisfies all merit conditions because it did not satisfy the procedural conditions of the registration test.

4.330 Proposed paragraph 190D(6)(b) limits the application of proposed subsection 190D(7) to circumstances where the applicant has not applied to the Court to have the Registrar's decision reviewed or where the applicant makes an application for review but the Court fails to make an order under subsection 190D(4) that the Registrar accept the claim for registration. This will ensure the applicant is afforded an opportunity to have the Registrar's decision reviewed before the Court is able to order dismissal under proposed subsection 190D(7). The relevant time period for review of the decision of the Registrar not to accept the claim for registration is currently set out in the Federal Court Rules. Order 78 Rule 12 of the Federal Court Rules provides an application for review must be filed within 42 days of notification of the Registrar's decision.

4.331 The new power conferred upon the Court to dismiss the application is discretionary (proposed subsection 190D(7)). The Court may make an order to dismiss an application if satisfied of the following conditions.

- **The application has not been amended since the registration test was applied and the application is not likely to be amended in a way that would result in the application being accepted for registration (paragraph 190D(7)(a)).**

Subsection 64(4) and subsection 190(3) operate to ensure that an application which is amended is generally required to undergo the registration test again. If the Court considers the application has been amended since consideration by the Registrar or is likely to be amended in a way that would lead to a different outcome once considered by the Registrar, it would be appropriate for the Court to await the outcome of the reapplication of the registration test before considering whether to dismiss the application. This ensures applicants of claims that fail the registration test are given an opportunity to amend their application in order to meet the requirements of the registration test before being dismissed.

- **There is no other reason why the application should not be dismissed (paragraph 190(7)(b)).**

This criterion will ensure that applications are not dismissed where there is good reason for a claim remaining in the system, despite being unregistered. For example, the Court may consider that an application should not be dismissed if, despite being unregistered, the claim is close to reaching resolution.

4.332 Items 88 to 90 apply these provisions to all claims. Claims that are unregistered at the time these provisions commence will be considered, or reconsidered as the case may be, for registration.

#### *Item 74 – Section 222*

4.333 The term ‘native title application inquiry’ will be defined in section 253. Section 222 lists the definitions in Part 15 of the Native Title Act and shows the location of the definition within the Part. Item 74 is a consequential amendment to section 222 to insert the expression ‘native title application inquiry’ into the list of definitions and to indicate that it is defined in section 253.

#### *Item 75 – Section 253*

4.334 Section 253 contains definitions of terms used in the Native Title Act. Item 75 amends section 253 to include a definition of ‘native title application inquiry’. Native title applications inquiries are defined in proposed section 138C.

### ***Part 2—Application and transitional provisions***

4.335 Part 2 of the Schedule sets out the application and transitional provisions for Schedule 2.

#### *Item 76 – Definitions*

4.336 Item 76 defines the commencing day as the day Schedule 2 commences.

*Item 77 – Application—item 2*

4.337 Item 2 inserts proposed section 66C which will enable the Registrar to provide information to assist the Court in determining whether an application should be dismissed under proposed section 94C (see item 36). Item 77 provides that proposed section 66C applies to an application under section 61, regardless of whether it is made before or after the commencing day.

4.338 Item 36 provides for the dismissal of claims made in response to future act notices. The Claims Resolution Review recommended these claims be dismissed as a means of reducing the number of claims already in the native title system. It is therefore appropriate that these amendments apply not only to applications filed after these amendments come into force, but also to claims already in the system.

*Item 78 – Application—items 3 to 5*

4.339 Items 3 to 5 amend section 84 to limit the category of persons who can automatically become a party to proceedings. Item 78 provides that these amendments apply only in relation to a proceeding that commences on or after the commencing day. It is not intended that these amendments will affect the status of persons who are parties to proceedings instituted before the commencing date.

4.340 The amended provisions relating to joinder of parties do not apply to persons who apply to become a party after the commencing date where the proceedings were instituted before the commencement date. In this circumstance, it would be unjust to apply different tests for joinder to parties who apply before commencement than to those who apply after commencement.

*Item 79 – Application of changes to Division 1B of Part 4 of the Native Title Act 1993*

4.341 Items 8 to 17 amend the provisions in section 86B relating to the referral of proceedings to the NNTT for mediation. Item 19 provides that where a matter is before the NNTT for mediation, the Court is prohibited from conducting its own mediation into the matter. Items 21 to 30 make clear that relevant references to mediation in section 86C (dealing with cessation of mediation) and section 86D (outlining the Court's powers in relation to mediation) generally refer to mediation by the NNTT.

4.342 Item 79 provides that these amendments apply in relation to proceedings that commence on or after the commencing day.

*Item 80 – Transitional provisions relating to those changes*

4.343 Item 80 applies transitional arrangements in relation to the amendments to Division 1B of Part 4. The transitional arrangements apply to applications under section 61 made before the commencing day where that application is not determined before the commencing day.

4.344 Subitem 80(1) provides that if a proceeding or part of a proceeding is to be referred to the NNTT for mediation under section 86B on or after the commencing

day, the amendments to section 86B in items 8 to 17 and 19 apply. Items 8 to 17 make clear that the Court must refer a matter to the NNTT for mediation as soon as practicable after notification unless one of the circumstance set out in subsection 86B(3), as amended, exists, in which case the Court must make an order that there be no mediation by the NNTT.

4.345 Item 19 provides that if the whole or part of a proceeding is referred to the NNTT for mediation under subsections 86B(1) or (5), the Court must not mediate or order parties attend before a Court Registrar for certain purposes until an order is made under section 86C that mediation into the whole of the proceeding cease.

4.346 Subitem 80(3) provides that if, at commencing day, a matter is in mediation before both the NNTT and the Court, the Court must, within six months after the commencing day, either order that:

- mediation by the NNTT cease, or
- mediation under the Federal Court Act cease.

4.347 Subitem 80(3) will give the Court, the NNTT and the parties to the proceeding six months in which to determine which body should mediate the matter. It will ensure that six months after the commencing day, no proceeding will be in mediation before both the NNTT and the Court at the same time.

4.348 Items 21 to 30 make clear that references to mediation in section 86C (dealing with cessation of mediation) and section 86D (outlining the Court's powers in relation to mediation) generally deal only with mediation by the NNTT. Subitem (5) provides that these amendments apply in relation to any proceeding, or part of a proceeding, if:

- the proceeding, or the part of the proceeding, has been referred to the NNTT for mediation (whether before or after commencing day), and
- no order has been made before the commencing day that mediation by the NNTT cease under section 86C, and
- no order is made under subitem 80(3) that mediation by the NNTT cease.

#### *Item 81 – Application—items 18 and 20*

4.349 Item 20 inserts proposed section 86BA which will enable the NNTT to appear before the Court to provide assistance, including to assist the Court in determining whether to make an order that there be no mediation by the NNTT into a particular matter. Item 18 amends section 86B(4) to require the Court to consider submissions made by the NNTT when determining whether an order should be made that there be no mediation by the NNTT.

4.350 Item 81 provides that these amendments apply in relation to all proceedings, irrespective of whether the proceeding commences before or after the commencing day.

*Item 82 – Application—item 35*

4.351 Item 35 inserts proposed section 87A which will enable the Court to make an order determining native title over part of a proceeding where some, but not all, parties to the proceeding agree that the order should be made. Item 82 provides that this amendment applies in relation to all applications under section 61, irrespective of whether the application is made before or after the commencing day.

*Item 83 – Application—item 36*

4.352 Item 36 inserts proposed section 94B which will require the Court to take into account certain reports provided by the NNTT when deciding whether to make orders. Subitem 83(1) provides that proposed section 94B applies in relation to a report that is provided to the Court on or after the commencing day. Item 83 makes clear that the Court will not be *required* to consider reports provided prior to the commencing day.

4.353 Item 36 also inserts proposed section 94C which requires the Court, in certain circumstances, to dismiss claims made in response to future act notices. Subitem 83(2) provides that proposed section 94C applies to an application under section 61, regardless of whether it was made before or after the commencing day. The Claims Resolution Review recommended these claims be dismissed as a means of reducing the number of claims already in the native title system. It is therefore appropriate that these amendments apply not only to applications filed after these amendments come into force, but also to claims already in the system.

*Item 84 – Application—item 44*

4.354 Item 44 amends section 133 to provide that the NNTT's annual report may include information about certain breaches of the obligation to act in good faith in relation to mediation by the NNTT. Item 84 provides that this amendment only applies in relation to annual reports made on or after the commencing day.

*Item 85 – Application—item 48*

4.355 Item 48 inserts proposed section 136DA which will enable the NNTT to refer to the Court the question of whether a party should cease to be a party to a particular proceeding. Item 85 provides that this amendment applies to all applications under section 61, regardless of whether it was made before or after the commencing day.

*Item 86 – Application—item 52*

4.356 Item 46 inserts proposed subsection 136B(4) which will impose an obligation on participants in native title mediations to act in good faith. Item 52 inserts proposed sections 136GA and 136GB which will enable the NNTT to make reports to various entities about breaches of this obligation. Item 86 provides that the NNTT may only make reports under sections 136GA and 136GB where the failure to act in good faith occurs on or after the commencing day.

*Item 87 – Application—items 57 to 65*

4.357 Items 57 to 65 amend Division 5 of Part 6 to enable the NNTT to conduct a new form of inquiry, namely a native title application inquiry. Item 87 provides that an application under section 61 may be the subject of a native title application inquiry where the application is referred, whether before or after the commencing day, to the NNTT for mediation under section 86B.

*Item 88 – Application—item 73*

4.358 Item 73 inserts proposed subsections 190D(6) and (7) which will enable the Court to dismiss applications which have not passed the merit conditions of the registration test and are unlikely to be amended so they will pass the test. Item 88 provides that these amendments apply to applications made on or after the commencing day. Item 88 also limits the application of item 73 to applications that a native title claim group has authorised to be made. This means that the amendments inserted by item 73 do not apply to, for example, non-claimant applications or compensation applications.

*Item 89 – Transitionals—applications made after 1998 amendments*

4.359 Item 89 makes provision for the Registrar to apply, or reapply as the case may be, the registration test to all applications that a native title claim group has authorised to be made if:

- the application was made before the commencing day but on or after the day Schedule 2 to the *Native Title Amendment Act 1998* commenced, and
- the application is not on the Register of Native Title Claims on the commencing day.

4.360 The Registrar is required to reconsider the claim for registration within one year of the commencing day or as soon as practicable afterwards. Whether it is practicable to reconsider all claims for registration within one year of the commencing day may depend on the resources, not only of the NNTT but also of the applicants and their representative bodies.

4.361 Subitem 89(4) requires the Registrar to:

- notify the applicant the Registrar is going to reconsider, or consider, the claim for registration, and
- have regard to any additional material provided to the Registrar after the application is made.

4.362 Subitem 89(5) provides that if a claim does not satisfy all of the conditions in sections 190B (conditions about merit) and section 190C (conditions about procedure and other matters):

- the Registrar must give written notice as required by subsection 190D(1), and
- the other provisions, including proposed subsections 190D(6) and (7) which provide for dismissal of unregistered claims in certain circumstances, apply.



*Item 90 – Transitionals—applications made before 1998 amendments*

4.363 Item 89 makes provision for the Registrar to apply, or reapply as the case may be, the registration test to all applications that a native title claim group has authorised to be made if:

- the application was made before the day on which Schedule 2 to the *Native Title Amendment Act 1998* commenced, and
- the claim was not considered by the Registrar under the transitional provisions that applied to the registration test to claims filed before the 1998 amendments to the Native Title Act, or the claim was considered under those transitional provisions but not accepted for registration, and
- the claim is not one that, because it was amended on or after the 1998 amendments, was considered under section 190A (which requires reapplication of the registration test to all amended applications) and is on the Register of Native Title Claims on the commencing day.

4.364 The Registrar is required to reconsider the claim for registration within one year of the commencing day or as soon as practicable afterwards. Whether it is practicable to reconsider all claims for registration within one year of the commencing day may depend on the resources, not only of the NNTT but also of the applicants and their representative bodies.

4.365 Subitem 90(4) requires the Registrar to:

- notify the applicant the Registrar is going to reconsider, or consider, the claim for registration, and
- have regard to any additional material provided to the Registrar after the application is made.

4.366 Subitem 90(5) provides that if a claim does not satisfy all of the conditions in sections 190B (conditions about merit) and section 190C (conditions about procedure and other matters):

- the Registrar must give written notice as required by subsection 190D(1), and
- the other provisions, including proposed subsections 190D(6) and (7) which provide for dismissal of unregistered claims in certain circumstances, apply.

## **Schedule 3 – Prescribed Bodies Corporate**

### *Overview*

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

- under paragraph 56(2)(b), determine a PBC to hold the native title rights and interests in trust for the common law native title holders (common law holders) – these PBCs are referred to in this explanatory memorandum as trust PBCs, or
- under paragraph 56(2)(c), determine that the common law holders hold the rights and interests. Under subsection 57(2), the Court must also in this case determine the PBC which, after becoming a registered native title body corporate (RNTBC), is to perform the functions mentioned in subsection 57(3). These PBCs are referred to in this explanatory memorandum as agent PBCs.

In October 2006, the Attorney-General and the Minister for Families, Community Services and Indigenous Affairs released the PBC Report. The Australian Government accepted all of the PBC Report's recommendations, which include measures intended to achieve the following broad outcomes:

- improve the ability of PBCs to access and utilise existing sources of assistance, including from representative bodies
- improve the flexibility of the PBC governance regime to accommodate the specific interests and circumstances of the native title holders
- better align existing sources of potential assistance with PBC needs, and
- encourage State and Territory government involvement in addressing PBC needs.

Most recommendations will be implemented administratively, or through regulations made under existing powers in the Native Title Act. Items 2 – 5 of Schedule 3 would allow for two recommendations that require amendments to the Native Title Act to be implemented.

#### *Item 1 – Subparagraph 24MD(6B)(c)(iii)*

4.1 This item makes a technical amendment to subparagraph 24MD(6B)(c)(ii), to rectify an omission in the reference to a registered native title body corporate.

#### *Item 2 – Paragraph 58(e)*

4.2 This item will enable implementation of a measure in the PBC report to remove the statutory requirement for PBCs to consult with the common law holders on all agreements and decisions affecting native title (Recommendation 5). The PBC Report considered the existing requirements imposed a very significant burden on some PBCs and that compulsory consultation should only be applied to decisions to surrender native title rights and interest in land or waters.

4.3 Consultation requirements are imposed on PBCs by regulations made under section 58 (Native Title (Prescribed Bodies Corporate) Regulations 1999). Existing subparagraph 58(e)(i) limits the power to make regulations for agent PBCs, such that the common law holders would have to be consulted about and agree to agreements in relation to native title. This limitation is not applied to trust PBCs.

4.4 This item removes subparagraph 58(e)(i). Proposed paragraph 58(e) would allow the regulations to provide for agent PBCs to enter native title agreements that are binding on the common law holders if the agreements have been made in accordance with processes set out in the regulations (as is presently required by subparagraph 58(e)(ii)).

*Item 3 – After section 59*

4.5 This item implements a measure in the PBC Report to enable an existing PBC to be determined as a PBC for subsequent determinations of native title in circumstances where the native title holders covered by all determinations agree to this (recommendation 7).

4.6 The report considered this measure may encourage economies of scale by allowing PBC infrastructure and resources to be utilised by more than one group of native title holders. To implement the measure, amendments will also be required to the PBC Regulations.

4.7 This item inserts proposed section 59A, which would allow an existing PBC to be determined by the Court as a PBC for subsequent native title determinations if *all* common law holders concerned agree. An existing trust PBC could only be determined as a trust PBC (not an agent PBC) for subsequent determinations (proposed subsection 59A(1)). Conversely, an existing agent PBC could only be determined as an agent PBC (not a trust PBC) for subsequent determinations (proposed subsection 59A(2)). A definition of agent PBC would be inserted by item 4.

4.8 Proposed subsection 59A(3) allows regulations to prescribe how the consent of the common law holders for the existing PBC, and the consent of the common law holders proposing to use the existing PBC, may be obtained.

*Item 4 – Section 253 and Item 5 – Section 253 (definition of agent prescribed body corporate)*

4.9 Item 4 would insert a new definition of ‘agent prescribed body corporate’ in section 253. This definition will be inserted by Schedule 1 of the *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006* (CATSI Consequential Act) when it commences on 1 July 2007. The effect of item 4, together with item 5, is to incorporate the definition into the Native Title Act in the period before 1 July 2007.

### *Reasons for the new definition*

4.10 Subsection 56(4) and section 60 allow for regulations to provide for a PBC to be replaced by another PBC. However, a technical error in the definition of RNTBC in section 253 (which refers to subparagraph 193(2)(d)(iii)) would presently prevent a replacement PBC that is an agent PBC from becoming an RNTBC. This is because subparagraph 193(2)(d)(iii) refers to trust PBCs and PBCs that are ‘determined under section 57’. This definition would cover trust PBCs regardless of whether they were determined in connection with a native title determination under section 56 or came into existence because they replaced another PBC. However, it would only cover agent PBCs determined in connection with a native title determination under section 57. Consequently, an agent PBC that came into existence because it replaced another PBC would not fall within the definition.

4.11 RNTBCs have important functions under the Native Title Act and PBC Regulations that PBCs do not have – for example, being a party to agreements and receiving future act notices. To address this issue, the CATSI Consequential Act will replace the reference to a PBC determined under section 57 in subparagraph 193(2)(d)(iii) with a reference to an agent PBC and insert a definition of agent PBC in section 253. The definition of agent PBCs will cover all agent PBCs regardless of when they were determined or otherwise came into existence.

## **Schedule 4 – Funding under section 183 of the Native Title Act 1993**

### *Overview*

Section 183 provides that the Attorney-General may grant assistance to non-claimant parties to an inquiry, mediation or proceeding related to native title, and to non-claimant parties negotiating indigenous land use agreements. Schedule 4 expands the scope of section 183 to enable the Attorney-General to grant assistance to non-claimant parties to develop standard form agreements, or review existing standard form agreements, relating to the normal negotiation and expedited procedure of the right to negotiate process for mining related acts. This amendment allows assistance to be approved for legal and other costs associated with the development of standard form agreements or review of existing standard form agreements.

### *Item 1 – Subsection 183(2A)*

4.1 This item inserts proposed subsection 183(2A) under which application may be made to the Attorney-General for the provision of assistance in relation to the development of a standard form agreement, or review of an existing standard form agreement, to facilitate negotiation in good faith as mentioned in paragraph 31(1)(b). Assistance may also be sought in relation to the development of a standard form agreement, or review of an existing standard form agreement which, if agreed to by a grantee party in relation to a future act to which Subdivision P applies, would make it more likely that the Government party doing the act would consider it an act attracting the expedited procedure in section 32.

### *Item 2 – Application*

4.2 This item provides that the amendment made by item 1 of this Schedule applies to the development of a standard form of agreement, or the review of an existing standard form of agreement, that occurs on or after the day on which this Schedule commences.