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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**NATIVE TITLE AMENDMENT (TECHNICAL AMENDMENTS) BILL 2007**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

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

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

1998 Act	<i>Native Title Amendment Act 1998</i>
2007 Act	<i>Native Title Amendment Act 2007</i>
2007 transitional provisions	Items 89 and 90 of Schedule 2 of the <i>Native Title Amendment Act 2007</i>
Bill	Native Title Amendment (Technical Amendments) Bill 2007
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i>
CATSI Consequential Act	<i>Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006</i>
Committee	Senate Standing Committee on Legal and Constitutional Affairs
Commonwealth Authorities and Companies Act	<i>Commonwealth Authorities and Companies Act 1997</i>
Court	Federal Court of Australia
ILUA	Indigenous Land Use Agreement
Mining Act	<i>Mining Act 1971 (SA)</i>
Native Title Act	<i>Native Title Act 1993</i>
NNTT	National Native Title Tribunal
PBC	Prescribed Body Corporate
Registrar	Native Title Registrar
Representative body	Representative Aboriginal/Torres Strait Islander body
RNTBC	Registered native title body corporate

## AMENDMENTS TO THE NATIVE TITLE AMENDMENT (TECHNICAL AMENDMENTS) BILL 2007

### *Outline*

The purpose of these amendments to the Native Title Amendment (Technical Amendments) Bill 2007 (the Bill) is to respond to the report of the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) following its inquiry into the Bill, to rectify or clarify the drafting of a number of provisions in the Bill, and to make further minor amendments to the *Native Title Act 1993* (Native Title Act).

The amendments to Schedule 1 of the Bill would:

- prevent simultaneous review of registration decisions by the Federal Court of Australia (Court) and the National Native Title Tribunal (NNTT) (implementing Recommendation 2 of the Committee's report)
- provide the reconsideration of registration decisions should be conducted by a member of the NNTT, rather than the Native Title Registrar (Registrar) (implementing Recommendation 3 of the Committee's report)
- address gaps in section 94C, which requires the Court to dismiss applications made in response to future act notices in certain circumstances (implementing part of Recommendation 5 of the Committee's report)
- clarify the scope of amendments to address defective authorisation of applications
- rectify a drafting error in amendments that remove the requirement for amended claims to undergo the registration test again in certain circumstances
- correct an oversight in the bank guarantee provisions
- amend the powers of the Registrar to ensure the Registrar is properly authorised to carry out the new functions conferred by the Bill
- amend the provisions relating to the Register of Indigenous Land Use Agreements (ILUAs) to provide that the contact details for parties to an ILUA may be updated on the Register, and
- make other technical corrections to rectify drafting errors (implementing the remainder of Recommendation 5 of the Committee's report).

The amendments to Schedule 2 of the Bill would add an explanatory note to provisions dealing with the application of the *Commonwealth Authorities and Companies Act 1997* (Commonwealth Authorities and Companies Act) to representative Aboriginal/Torres Strait Islander bodies (representative bodies).

The amendments to Schedule 3 of the Bill would:

- ensure only the Court can determine prescribed bodies corporate (PBCs) (consistent with part of Additional Recommendation 2 of the Committee's Minority Report, and with discussion in the Majority Report)

- put beyond doubt that regulations can specify the bodies corporate or kinds of bodies corporate that may be determined as PBCs
- make it clear that the Registrar of Aboriginal and Torres Strait Islander Corporations is intended to retain a general discretion not to give an opinion on fees charged by PBCs
- rectify oversights in provisions requiring the National Native Title Register to be updated when a PBC replaces another PBC or changes its functions
- rectify an error in the definition of registered native title body corporate (RNTBC), and ensure that the definition covers replacement PBCs and PBCs that change their functions, and
- ensure existing regulations are not affected by changes to the PBC provisions.

The amendments would also insert Schedule 5 into the Bill which would rectify a drafting oversight in the transitional and application provisions of the *Native Title Amendment Act 2007* (2007 Act) relating to the dismissal of unregistered claims.

### **Financial impact statement**

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

## NOTES ON AMENDMENTS

### *Commencement provisions*

#### *Amendment 1*

4.1 Amendment 1 is consequential to Amendments 10 and 13, and would amend the table in Clause 2 of the Bill which sets out when various parts of the Bill commence.

4.2 Amendment 13 would insert items 91A to 91E. These amendments would rectify a drafting error in section 94C of the Native Title Act (implementing Recommendation 5 of the Committee's report). Section 94C provides the Court must, in certain circumstances, dismiss applications made in response to a future act notice. However, due to a drafting oversight, existing section 94C does not cover all applications made in response to future act notices.

4.3 Most of the amendments in Schedule 1 of the Bill commence on proclamation to ensure all parties are aware of, and take into account, the relevant changes to processes made by the Bill. However, the amendment to section 94C merely rectifies a drafting oversight in the provision in the Native Title Act to ensure it operates as was intended. It is appropriate that this provision commence as soon as practicable. Table item 4B would provide that the amendments to section 94C commence on the day after Royal Assent.

4.4 Amendment 10 would insert items 83A, 83B and 83C as a consequence of the changes made by Amendment 13. It is therefore appropriate that table item 3 provide items 83A, 83B and 83C commence at the same time as items 91A to 91E.

4.5 The remainder of the items in the table in Amendment 1 reflect the existing commencement provisions in items 2 to 4 of the table in Clause 2 of the Bill.

#### *Amendment 2*

4.6 Amendment 2 would provide for proposed new item 10A of Schedule 3 (proposed to be inserted by Amendment 38) to commence immediately after the commencement of Schedule 1 of the *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006* (CATSI Consequential Act). This is further explained under Amendment 38. The remainder of Amendment 2 would re-enact existing commencement provisions for certain items in Schedule 3.

#### *Amendment 3*

4.7 Amendment 3 is consequential to Amendment 40, and would insert a new item into the table setting out the commencement information for the Bill. The new item relates to the commencement of proposed Schedule 5, which would be inserted by Amendment 40. Schedule 5 would rectify a drafting oversight in the 2007 Act. The 2007 Act changed the provisions relating to registration of claims. It was intended all claims made or amended following commencement of the 2007 Act would be

captured by the new provisions and that the transitional provisions in the 2007 Act would reapply the registration test to all claims that are currently unregistered. However, some claims were not captured. Schedule 5 would provide that these claims must be considered or reconsidered for registration and that the provisions in force immediately before this Bill commences apply. This will ensure all claims are treated comparably under the amended provisions.

4.8 New item 12 in the table would provide that proposed Schedule 5 commences at the same time as the provisions in item 2 of the table. Item 2 of the table provides that Schedule 1 of the Bill, which contains technical amendments to the Native Title Act, commences on a day to be fixed by proclamation. If at the end of six months after Royal Assent these provisions have not been proclaimed to commence, they will come into effect the following day.

### *Amendments to Schedule 1*

#### *Amendment 4*

4.9 Amendment 4 would omit item 22 of Schedule 1 of the Bill and substitute items 22 and 22A as a consequence of amendments made by Amendment 22.

4.10 Existing item 22 would amend subparagraph 24CL(2)(b)(ii) as a consequence of the provisions in the Bill that provide for a new mechanism for review of registration decisions and renumber the sections of the Native Title Act relating to the review of registration decisions by the Court.

4.11 The Bill currently provides for native title claimants to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. Amendment 22 would amend the Bill to provide that the NNTT, rather than the Registrar, must perform this reconsideration function. This implements Recommendation 3 of the Committee's report on the Bill.

4.12 Amendment 4 would amend item 22 to retain the reference to review of registration decisions by the Court under section 190F but remove the reference to reconsideration of registration decisions by the Registrar.

4.13 Item 22A would insert proposed subparagraph 24CL(2)(b)(ia) which would reflect the fact that a claim may be accepted for registration as a result of reconsideration of the initial registration decision by the NNTT.

#### *Amendment 5*

4.14 Amendment 5 would omit item 31 of Schedule 1 of the Bill and insert items 31 and 31A as a consequence of amendments made by Amendment 22.

4.15 Existing item 31 would amend paragraph 24FE(b)(ii) as a consequence of the provisions in the Bill that provide for a new mechanism for review of registration decisions and renumber the sections of the Native Title Act relating to the review of registration decisions by the Court.

4.16 The Bill currently provides for native title claimants to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. Amendment 22 would amend the Bill to provide that the NNTT, rather than the Registrar, must perform this reconsideration function. This implements Recommendation 3 of the Committee's report on the Bill.

4.17 Amendment 5 would amend item 31 to retain the reference to review of registration decisions by the Court under section 190F but remove the reference to reconsideration of registration decisions by the Registrar.

4.18 Item 31A would insert proposed subparagraph 24FE(b)(iia) which would reflect the fact that a claim may be accepted for registration as a result of reconsideration of the initial registration decision by the NNTT.

#### *Amendment 6*

4.19 Amendment 6 would repeal and replace column 3 of table item 5 in item 69 of Schedule 1 of the Bill. Proposed subsection 52(2) provides that if a condition to be complied with under a determination made under section 36A or section 38 or a declaration made under section 42 is that an amount is to be secured by bank guarantee given by an authorised deposit-taking institution in favour of the Registrar, the Registrar would need to take specific action when certain circumstances occur. The circumstances and required actions are set out in the table under proposed subsection 52(2).

4.20 Table item 5 sets out the circumstance when a compensation determination is made and the amount secured by bank guarantee is more than the amount of compensation determined. The provision in column 3 of table item 5 requires the Registrar to direct the authorised deposit-taking institution to pay the amount secured to the Registrar, pay an amount equal to the amount determined to the ultimate beneficiary, and pay the remainder to the person who secured the amount by bank guarantee.

4.21 The provision in table item 5 currently does not cover the situation where the person who secured the amount by bank guarantee no longer exists. Amendment 6 would oblige the Registrar to apply to the Court for a direction as to the payment of the remainder, where the person who secured the amount no longer exists.

#### *Amendment 7*

4.22 Amendment 7 would repeal and replace column 3 of table item 8 in item 69 of Schedule 1 of the Bill. Proposed subsection 52(2) provides that if a condition to be complied with under a determination made under section 36A or section 38 or a declaration made under section 42 is that an amount is to be secured by bank guarantee given by an authorised deposit-taking institution in favour of the Registrar, the Registrar would need to take specific action when certain circumstances occur. The circumstances and required actions are set out in the table under proposed subsection 52(2).

4.23 Table item 8 sets out the circumstance when the Registrar makes an application to the Court under subsection 52(3). Subsection 52(3) requires the Registrar to apply to the Court for a direction as to the payment of the amount secured by bank guarantee when some or all of the compensation amount is constituted by the transfer of property or the provision of goods or services. The provision in column 3 of table item 8 provides that if the Court orders that an amount be paid to the person (the ultimate beneficiary), the Registrar must direct the authorised deposit-taking institution to pay the amount secured to the Registrar. The Registrar would then pay an amount equal to the amount the Court orders to be paid. If the amount the Court orders is less than the amount secured, the Registrar must pay any remainder to the person who secured the amount by bank guarantee.

4.24 The provision in table item 8 currently does not cover the situation where the person who secured the amount by bank guarantee no longer exists. Amendment 7 would oblige the Registrar to follow the direction of the Court as to the payment of the remainder (if any), where the person who secured the amount no longer exists. Under proposed subsection 52(3), the Court may make an order as to the payment of the secured amount including any amount remaining after payment to the ultimate beneficiary.

#### *Amendment 8*

4.25 Amendment 8 would amend proposed subsection 52(4) in item 69 of the Bill as a consequence of Amendments 6 and 7. Amendments 6 and 7 would provide that the Registrar must apply to the Federal Court for a direction as to the payment of a secured amount in certain situations. Amended subsection 52(4) would provide that the Court has jurisdiction in relation to these matters.

#### *Amendment 9*

4.26 Amendment 9 would amend item 78 of Schedule 1 of the Bill as a consequence of amendments made by Amendment 22.

4.27 Item 78 would omit and substitute paragraph 64(3)(b) as a consequence of the provisions in the Bill that provide for a new mechanism for review of registration decisions. The Bill currently provides for native title claimants to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. Amendment 22 would amend the Bill to provide that the NNTT, rather than the Registrar, must perform the reconsideration function. Amendment 9 would amend paragraph 64(3)(b) to refer to reconsideration by the NNTT rather than reconsideration by the Registrar.

#### *Amendment 10*

4.28 Amendment 10 would insert items 83A, 83B and 83C as a consequence of amendments to section 94C in Amendment 13.

4.29 Amendment 13 would insert Item 91A, which would, in turn, repeal subsection 94C(1)(d). Item 91A would also provide that the criteria currently contained in



paragraph 94C(1)(d) be included in proposed paragraph 94C(1)(c). Items 83B and 83C make amendments to provisions referring to paragraph 94C(1)(d).

4.30 Item 83B would repeal paragraph 66C(1)(d) of the Native Title Act, as that paragraph solely refers to paragraph 94C(1)(d). Paragraph 66C(1)(c) already refers to paragraph 94C(1)(c), which will contain the criteria previously in paragraph 94C(1)(d). Accordingly, it is not necessary for that section to be amended to refer to that provision.

4.31 Item 83A makes an amendment to paragraph 66C(1)(c) to remove the word ‘and’ as a consequence of the repeal of paragraph 66C(1)(d).

4.32 Item 83C would amend paragraph 66C(2)(b) to replace its reference to paragraph 94C(1)(d) with a reference to paragraph 94C(1)(c).

#### *Amendment 11*

4.33 Amendment 11 would amend item 88 of Schedule 1 of the Bill to correct a drafting error and would partially implement Recommendation 5 of the Committee’s report on the Bill. Item 88 would insert proposed section 84D, which would enable the Court to make various orders where there are defects in the authorisation of a claim.

4.34 Subsection 84D(2) would enable the Court to make an order, on its own motion or on application of certain persons, requiring a person who made an application under section 61 to produce evidence to the Court that he or she was authorised to make the application or deal with matters arising in relation to the application. Proposed paragraph 84D(2)(b) inadvertently omits the words ‘on the application of’ at the start of the paragraph. Amendment 11 would insert these words at the beginning of paragraph 84D(2)(b).

#### *Amendment 12*

4.35 Amendment 12 would amend item 88 of Schedule 1 of the Bill. Item 88 inserts proposed subsection 84D(4), which would make clear that the Court may, in certain circumstances, hear and determine an application, despite a defect in the authorisation of the claim, if subsection 84D(3) applies. Subsection 84D(3) sets out the types of defects in authorisation to which this provision would apply.

4.36 It was intended that paragraph 84D(3)(a) would deal with circumstances in which there was a defect in the process that authorised the making of the claim. Paragraph 84D(3)(b) was intended to deal with circumstances in which the claim was properly authorised at the time it was made but the applicant was (at some time subsequent to the making of the application), or is no longer, properly authorised.

4.37 However, proposed paragraph 84D(3)(b) does not make clear that the person in question must have been someone who was, at some point during proceedings, properly authorised to be the applicant.

4.38 Amendment 12 would clarify the scope of paragraph 84D(3)(b) by providing that the Court may hear and determine an application, provided the other requirements are satisfied, if a person has dealt with, or deals with, a matter arising in relation to an application in circumstances where the person was not authorised to do so.

4.39 Amendment 12 would also insert a note following subsection 84D(3) noting that section 251B states what it means to be authorised to make an application and deal with matters arising in relation to the application.

### *Amendment 13*

4.40 Amendment 13 would insert new items 91A to 91E. Items 91A to 91E would give effect to Recommendation 5 of the Committee by rectifying a drafting error in section 94C of the Native Title Act, which was inserted by the 2007 Act. Section 94C provides the Court must, in certain circumstances, dismiss applications made in response to a future act notice. Section 94C sets out the circumstances in which an application will be deemed to be made in response to a future act notice. It was intended this provision would apply to applications made in response to future act notices given under section 29 of the Native Title Act, and also equivalent notices given under the provisions of alternative State and Territory laws.

4.41 The provisions in section 94C effectively deem a claim to be made in response to a future act notice if the claim is made within three months of the ‘notification day’ specified in the notice and the claim is registered within four months of the notification day. This reflects the criteria which a person must satisfy in order to be a ‘native title party’ for the purpose of negotiations under Subdivision P of Division 3 of Part 2 (see paragraph 30(1)(a)), while excluding persons who are native title parties because they had an application over the relevant area prior to the future act notice and persons who hold native title.

4.42 However, future act notices given under section 29 as it was in force prior to commencement of the *Native Title Amendment Act 1998* (1998 Act) did not specify a notification day. Prior to the 1998 Act, a person was a native title party for the purposes of future act negotiations if the claim was registered within two months of the date of the notice given under section 29.

4.43 Similarly, notices equivalent to section 29 given under alternative provisions of a State or Territory law may not include a ‘notification day’. For example, while the *Mining Act 1971* (SA) (the Mining Act), which is a recognised section 43 scheme, includes provision for giving notice to potential claimants and gives registered native title claimants a right to object to future acts, the terms of the South Australian provisions are different to those used in the Native Title Act. The Mining Act provides that persons with a registered native title claim within two months of a future act notice being given will be a native title party for the purposes of negotiations. Notices given under the Mining Act are not required to include a notification day.

### Item 91A

4.44 Item 91A would repeal and substitute paragraphs 94C(1)(b) and (c) and repeal paragraph 94C(1)(d).

4.45 Existing subsection 94C(1) requires the Court to dismiss a claim if the criteria in paragraphs 94C(1)(a) to (e) are met. Existing paragraphs 94C(1)(b) and (c) set out the circumstances in which a claim will be deemed to be made in response to a future act notice. Existing paragraph 94C(1)(d) provides that before the Court can consider dismissing the claim, there must be a decision, agreement or determination about whether or not each act in the relevant future act notice that prompted the filing of the claim in question can be done. Paragraph 94C(1)(d) refers 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.

4.46 The specific criteria in paragraphs 94C(1)(b), (c) and (d) would be replaced by proposed paragraphs 94C(1)(b) and (c). Proposed paragraph 94C(1)(b) would provide that it must be apparent from the timing of the application that it is in response to the relevant future act notice. Proposed paragraph 94C(1)(c) would provide that the future act requirements must be satisfied in relation to each future act identified in the future act notice. Although set out differently, the criteria in paragraph 94C(1)(c) will reflect that previously contained in paragraph 94C(1)(d).

#### Item 91B

4.47 Item 91B would insert subsections 94C(1A) to (1G).

4.48 Proposed subsections 94C(1A), (1B) and (1C) set out in detail when, for the purposes of paragraph 94C(1)(b), it will be apparent from the timing of the application that it is responding to the relevant future act notice. Similarly, proposed subsections 94C(1D), (1E), (1F) and (1G) set out in detail when, for the purposes of paragraph 94C(1)(c), the future act requirements will be satisfied in relation to each future act identified in a future act notice.

4.49 Proposed subsection 94C(1A) deals with applications made in response to a future act notice to which the provisions of Subdivision P of Division 3 of Part 2 of the Native Title Act apply. The term ‘future act to which the current law applies’ is defined in proposed subsection 94C(6) (see item 91C). Proposed subsection 94C(1A) sets out the requirements currently set out in paragraphs 94C(1)(b) to (c) of the Native Title Act.

4.50 Proposed subsection 94C(1B) deals with claims made in response to a future act notice to which the provisions of the Native Title Act prior to the commencement of the 1998 Act apply. The term ‘future act to which the pre-1998 law applies’ is defined in proposed subsection 94C(6) (see item 91D). Subsection 94C(1B) would provide that a claim will be deemed to be made in response to a future act notice given prior to the commencement of the 1998 Act if the future act notice was given in relation to land or waters wholly or partly within the area covered by the application and the person becomes a registered native title claimant in relation to the claim within two months from the date the notice was given. This reflects the criteria which a person was required to satisfy to be a native title party under the pre-1998 law (see paragraph 30(a) of the Native Title Act, as it was in force prior to the 1998 Act), while excluding persons who were native title parties because they had an application over the relevant area prior to the future act notice and persons who hold native title.

4.51 Proposed subsection 94C(1C) would provide for regulations to be made prescribing, for the purpose of paragraph 94C(1)(b), other circumstances in which it is taken to be apparent from the timing of an application that it was made in response to a future act notice. The provision specifically provides that regulations may be made in relation to the alternative provisions of a State or Territory. It is likely the provisions of each alternative State or Territory regime established under section 43 will vary, including the content of future act notices, the time in which persons must become a registered native title claimant to be a native title party for the purposes of negotiations, and the provisions which authorise a future act to be done or determine that a future act cannot be done. The regulation-making power in subsection 94C(1C) would enable regulations to be made specifically prescribing the relevant provisions of alternative provisions.

4.52 Proposed subsection 94C(1D) deals with the circumstances in which the future act requirements will be satisfied in relation to a future act notice to which the current law applies. Paragraphs 94C(1D)(a) to (g) replicate existing subparagraphs 94C(1)(d)(i) to (vii) of the Native Title Act. Paragraph 94C(1D)(h) would enable regulations to prescribe any other circumstances in which the future act requirements will be taken to have been satisfied.

4.53 Proposed subsection 94C(1E) deals with the circumstances in which the future act requirements will be satisfied in relation to a future act notice to which the pre-1998 law applies. Proposed subsection 94C(1E) sets out the provisions in the Native Title Act, as it was in force prior to commencement of the 1998 Act, that had the effect of authorising a future act to be done or determining that a future act could not be done. These requirements are similar to the requirements set out in proposed subsection 94C(1D).

4.54 Similar to proposed subsection 94C(1C), proposed subsection 94C(1F) would provide for regulations to be made prescribing, for the purpose of paragraphs 94C(1D)(h) and 94C(1E)(g), other circumstances in which the future act requirements are taken to be satisfied.

4.55 Proposed subsection 94C(1G) would provide for regulations to be made prescribing circumstances in which the future act requirements will be satisfied in relation to a future act notice given under alternative provisions. Prescribing these circumstances by regulation will give flexibility to specify each of the relevant provisions of alternative provisions that authorises the doing of a future act or determines that a future act may not be done.

#### Item 91C

4.56 Item 91C would insert a definition of ‘future act notice to which the current law applies’ into subsection 94C(6) of the Native Title Act. This definition is relevant for the purposes of proposed subsections 94C(1A) and (1D).

4.57 A ‘future act notice to which the current law applies’ is defined as a future act notice to which the provisions in Subdivision P of Division 3 of Part 2 of the Native Title Act apply. Subdivision P was inserted into the Native Title Act by the 1998 Act. The term ‘future act notice’ is defined in existing subsection 94C(6) to include a

notice given under section 29 of the Native Title Act and a notice of a future act given under alternative provisions of a State or Territory. The provisions of Subdivision P only apply to future act notices given under section 29 of the Native Title Act after the commencement of the 1998 Act.

#### Item 91D

4.58 Item 91D would insert a definition of ‘future act notice to which the pre-1998 law applies’ into subsection 94C(6) of the Native Title Act. This definition is relevant for the purposes of proposed subsections 94C(1B) and (1E).

4.59 A ‘future act notice to which the pre-1998 law applies’ is defined as a future act notice to which the provisions in Subdivision B of Division 3 of Part 2 of the Native Title Act, as it was in force immediately before commencement of the 1998 Act (including as it applies in accordance with Schedule 5 of the 1998 Act) apply.

4.60 Prior to the commencement of the 1998 Act, Subdivision B set out the provisions dealing with future act notices and the right to negotiate. The term ‘future act notice’ is defined in existing subsection 94C(6) to include a notice given under section 29 of the Native Title Act and a notice of a future act given under alternative provisions of a State or Territory. The provisions of Subdivision B will only apply to future act notices given under section 29 of the Native Title Act prior to the commencement of the 1998 Act. Schedule 5 of the 1998 Act sets out the transitional and application provisions for the amendments made by the 1998 Act.

#### Item 91E

4.61 Item 91E would insert a definition of ‘pre-1998 law’ into subsection 94C(6). This definition is relevant for the purposes of proposed subsections 94C(1B) and (1E) and the definition of ‘future act notice to which the pre-1998 law applies’ which would be inserted into subsection 94C(6) by item 91D. ‘Pre-1998 law’ is defined to mean the Native Title Act, as in force immediately before the commencement of the 1998 Act, including as the 1998 Act applies in accordance with Schedule 5 of that Act. Schedule 5 of the 1998 Act set out the transitional and application provisions for the amendments made by the 1998 Act.

#### *Amendment 14*

4.62 Amendment 14 would insert item 91F, which would in turn insert proposed section 96A into Part 5 of the Native Title Act. Part 5 of the Act sets out the powers and functions of the Registrar. The Registrar has the powers given to him or her under Part 5, which includes, for example, powers set out in Part 3 in relation to applications and powers set out in Parts 7, 8 and 8A in relation to the various registers maintained by the Registrar.

4.63 Amendments made to Part 2 of the Native Title Act by the Bill would give the Registrar additional powers and functions. For example, items 6, 17 and 26 of Schedule 1 of the Bill would amend Part 2 to provide the Registrar may assist parties in preparing applications to have an ILUA registered.

4.64 Part 5 of the Act does not specifically give the Registrar powers in relation to Part 2 of the Native Title Act. Proposed section 96A would provide the Registrar has the powers set out in Part 2. This provision is intended to avoid any doubt about whether the Registrar has the powers given to him under Part 2 of the Native Title Act.

#### *Amendment 15*

4.65 Amendment 15 would insert item 91G, which would in turn insert proposed subsection 108(1AA). Section 108 sets out the functions of the NNTT. This amendment is consequential to the changes made by Amendment 22. Amendment 22 would provide that where a claim is not accepted for registration, the applicant may seek to have the NNTT reconsider the decision not to accept the claim for registration. Proposed subsection 108(1AA) would ensure the NNTT is able to perform this function.

#### *Amendment 16*

4.66 Amendment 16 would insert item 91H as a consequence of Amendment 22. Item 91H would insert proposed paragraph 123(1)(cb).

4.67 Section 123 of the Native Title Act enables the President of the NNTT to give directions about the arrangement of business of the NNTT. The Bill currently provides for the Registrar to reconsider a decision not to accept a claim for registration. Amendment 22 would require the reconsideration function to be performed by a single member of the NNTT, rather than the Registrar.

4.68 Proposed paragraph 123(1)(cb) would enable the President to make directions about the person who is to constitute the NNTT for the purposes of reconsidering a decision of the Registrar not to accept a claim for registration.

#### *Amendment 17*

4.69 Amendment 17 would insert item 96A as a consequence of Amendment 22. Item 96A would amend subparagraph 186(1)(g)(i) of the Native Title Act.

4.70 The Bill currently provides for native title claimants to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. Amendment 22 would amend the Bill to require the reconsideration function to be performed by a single member of the NNTT, rather than the Registrar.

4.71 Section 186 sets out the requirements for the Registrar to include certain information on the Register of Native Title Claims when a claim is accepted for registration. Existing paragraph 186(1)(g) provides the Registrar must describe the native title rights and interests in the claim the Registrar considered could be established when applying subsection 190B(6). Item 96A would amend paragraph 186(1)(g) to also refer to the native title rights and interests in the claim the NNTT considered could be established.

### *Amendment 18*

4.72 Amendment 18 would substitute item 97 of Schedule 1 of the Bill as a consequence of amendments made by Amendment 22.

4.73 Existing item 97 would amend paragraph 190A(1)(a) as a consequence of the provisions in the Bill that provide for a new mechanism for review of registration decisions and renumber the sections of the Native Title Act relating to the review of registration decisions by the Court.

4.74 The Bill currently provides for native title claimants to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. Amendment 22 would amend the Bill to provide that the NNTT, rather than the Registrar, must perform this reconsideration function. This implements Recommendation 3 of the Committee's report on the Bill.

4.75 Section 190 sets out the requirement for the Registrar to include details of claims that are accepted for registration on the Register of Native Title Claims. Amendment 18 would amend paragraph 190(1)(a) to make clear that the Registrar must include details of claims accepted for registration by the Registrar in response to notification by the NNTT under section 190E.

### *Amendment 19*

4.76 Amendment 19 would substitute item 99 of Schedule 1 of the Bill as a consequence of amendments made by Amendment 22.

4.77 Existing item 99 would amend paragraph 190A(3)(b) as a consequence of the provisions in the Bill that provide for a new mechanism for review of registration decisions.

4.78 The Bill currently provides for native title claimants to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. Amendment 22 would amend the Bill to provide that the NNTT, rather than the Registrar, must perform this reconsideration function. This implements Recommendation 3 of the Committee's report on the Bill.

4.79 Paragraph 190(3)(b) sets out the requirements for the Registrar to remove details of amended claims from the Register of Native Title Claims if the amended claim is not accepted for registration. Amendment 19 would amend paragraph 190(3)(b) to make clear that the Registrar must remove details of claims not accepted for registration by the Registrar in response to notification by the NNTT under section 190E.

### *Amendment 20*

4.80 Amendment 20 would correct a drafting error in paragraph 190A(6A)(d) in item 102. Item 102 would insert proposed subsection 190A(6A). This subsection would remove the requirement for amended claims to undergo the registration test again in specified circumstances. This is designed to encourage native title claimants

to amend their claims to improve their clarity and quality, with a view to making those claims more easily understood and hence more amenable to resolution.

**4.81** As drafted, the registration test would not be applied to an amended application if *one* of the listed types of changes was made, but the Registrar would be required to re-apply the registration test if *two or more* changes were made to the application.

4.82 The intention of paragraph 190A(6A)(d) was to encourage claimants to amend their application to ensure it remains accurate. It was always intended that any of the types of amendments listed could be made without the Registrar having to reapply the registration test. This amendment would ensure the provision operates as intended.

#### *Amendment 21*

4.83 Amendment 21 would substitute section 190D of item 107. Section 190E of the Bill currently provides for native title claimants to apply to the Registrar to reconsider his or her decision not to accept the claim for registration. Amendment 22 would provide that the reconsideration of registration decisions should be conducted by the NNTT, rather than the Registrar, and would make other consequential amendments. Amendment 21 would amend proposed section 190D as a consequence of Amendment 22. These amendments implement a recommendation of the Committee (Recommendation 3).

4.84 Section 190D currently provides that where the Registrar does not accept a claim for registration, the Registrar must give written notice of his or her decision to the Court and the applicant. The notice must include a statement of the Registrar's reasons. Amendment 21 would amend section 190D to provide that where the Registrar does not accept the claim for registration because the NNTT notifies the Registrar that he or she should not do so, the notice must include the statement of the NNTT's reasons for its decision. In all other circumstances, the Registrar will continue to be required to provide a statement of his or her reasons for the decision not to accept the claim for registration.

4.85 The substance of proposed subsections 190D(2) and (3) replicates the provisions currently in the Bill.

#### *Amendment 22*

4.86 Amendment 22 would substitute section 190E of item 107. Section 190E of the Bill currently provides for the Registrar to reconsider registration decisions. Amendment 22 would amend section 190E to provide that this function must be performed by the NNTT.

4.87 Proposed subsection 190E(1) would provide that where the applicant is given a notice under subsection 190D(1) then, subject to proposed subsections 190E(3) and (4), the applicant may apply to the NNTT to reconsider the claim for registration.

4.88 Proposed subsection 190E(2) sets out the requirements for the application for reconsideration.



4.89 Proposed subsection 190E(3) would provide the applicant may not apply to the NNTT for reconsideration if the applicant has already applied for review of the registration decision by the Court, under subsection 190F(1).

4.90 Proposed subsection 190E(4) would provide the applicant may only apply to the NNTT for reconsideration of the claim once.

4.91 Proposed subsection 190E(5) would provide that for the purpose of reconsidering registration decisions, the NNTT must be constituted by a single member.

4.92 Proposed subsection 190E(6) would provide that a member who reconsiders a registration decision may not take any further part in proceedings related to the claim, unless the parties to the proceeding otherwise agree. This provision would prevent a member from performing other functions under the Native Title Act, including presiding over mediation conferences, or conducting connection reviews or native title application inquiries in relation to the proceedings, unless the consent of all parties to the proceedings is obtained. This provision is similar to the restrictions placed on members who preside over mediation conferences (subsection 136A(5)), members who conduct a connection review (subsection 136GC(8)) and members who conduct or assist at a native title application inquiry (subsection 138C(2)) and is intended to avoid any perception of bias on the part of the member who conducts the reconsideration.

4.93 Proposed subsection 190E(7) would require the NNTT to have regard to any information the Registrar was required to have regard to under subsection 190A(3) to (5) in the initial consideration of the claim for registration. This provision will ensure that even if the Registrar did not have regard to all the information he or she was required to under section 190A, the NNTT will consider this information in reconsidering the claim. Subsection 190E(7) also provides the NNTT may have regard to any other information the NNTT regards as appropriate.

4.94 Proposed subsection 190E(8) would provide that the member reconsidering a claim must use his or her best endeavours to finish reconsidering the claim within certain time periods if, either before the member begins considering the claim or while the member is considering the claim, certain future act notices are given over some or all of the claim area. This is consistent with the timeframes imposed on the Registrar when he or she first considers the claim for registration (see subsection 190A(2) as amended by item 101 of the Bill). Proposed subsection 190E(9) would provide that in all other circumstances, the NNTT must finish reconsidering the claim as soon as is practicable. This is consistent with the requirements on the Registrar when he or she first considers a claim for registration (see subsection 190A(2A) as inserted by item 101 of Schedule 1 of the Bill).

4.95 Proposed subsection 190E(10) would provide that if the NNTT is satisfied the claim satisfies all of the conditions in section 190B (conditions about merit) and section 190C (conditions about procedure), the NNTT must notify the Registrar that the Registrar should accept the claim for registration. Proposed subsection 190E(13) provides that the Registrar must comply with this notice.

4.96 Proposed subsection 190E(11) would provide that if the NNTT is not satisfied the claim satisfies all of the conditions in section 190B (conditions about merit) and section 190C (conditions about procedure), the NNTT must notify the Registrar that the Registrar should not accept the claim for registration. Proposed subsection 190E(13) provides that the Registrar must comply with this notice. The notice must include a statement of the NNTT's reasons for the decision. The statement of reasons must include a statement about whether, in the opinion of the member who reconsiders the claim, the claim satisfies all of the conditions about merit in section 190B and if it is not possible to determine whether the claim satisfies all of the conditions about merit in section 190B because the claim fails to satisfy the conditions about procedure in section 190C. Statements of reasons given by the Registrar when he or she first considers a claim must include these statements (see subsections 190D(2) and (3)).

#### *Amendment 23*

4.97 Amendment 23 would amend subsection 190F(1) of item 107 of Schedule 1 of the Bill. Subsection 190F(1) would provide that if the Registrar gives a notice under subsection 190D(1) that a claim has not been accepted for registration, either on initial consideration by the Registrar or on reconsideration by the NNTT, the applicant may apply to the Court for review of the decision not to accept the claim.

4.98 As drafted, it would be possible for an applicant to seek review by the Court of a registration decision at the same time the decision is being reconsidered by the NNTT. Amendment 23 would provide that an application for review of the registration decision by the Court could only be made if the NNTT is not already reconsidering the claim under section 190E. This amendment does not prevent an applicant from seeking both reconsideration by the NNTT and review by the Court, but rather prevents *simultaneous* review of the registration decision. This amendment implements a recommendation of the Committee (Recommendation 2).

#### *Amendment 24*

4.99 Amendment 24 would amend proposed paragraph 190F(5)(a) as a consequence of the amendments made by Amendment 22.

4.100 The Bill currently provides for the Registrar to reconsider a decision not to accept a claim for registration. Amendment 22 would require the reconsideration function to be performed by a single member of the NNTT, rather than the Registrar.

4.101 Paragraph 190F(5)(a) currently provides that subsection 190F(6) will apply if, among other things, the Registrar does not accept the claim for registration because, in the opinion of the *Registrar*, either the claim does not satisfy all of the conditions about merit in section 190B (subparagraph 190F(5)(a)(i)), or it is not possible to determine whether the conditions about merit have been satisfied because the claim fails to meet the conditions about procedure in section 190C (subparagraph 190F(5)(a)(ii)). However, where a claim is reconsidered for registration, the Registrar may not accept the claim for registration because, in the opinion of the *NNTT*, the criteria in subparagraphs 190F(5)(a)(i) and (ii) are not satisfied.

4.102 Amendment 24 would amend proposed paragraph 190F(5)(a) to refer to the opinion of the Registrar or, if the claim is reconsidered under section 190E, of the member of the NNTT reconsidering the claim.

#### *Amendment 25*

4.103 Amendment 25 would insert proposed subsection 199B(4). Section 199B provides for the Registrar to include certain information on the Register of ILUAs. The Registrar must include on the Register of ILUAs details of an ILUA accepted for registration, including the name of each party to the agreement and the party's contact details (paragraph 199B(1)(b)).

4.104 There is no provision for the Registrar to change details of an agreement that is on the Register of ILUAs. Proposed subsection 199B(4) would enable the Registrar to update the Register to reflect a change in a party's contact address, where the party notifies the Registrar of the change.

4.105 Amendment 25 would assist in ensuring that if a member of the public searches the Register of ILUAs, he or she receives accurate contact details.

#### *Amendment 26*

4.106 Amendment 26 would make a technical correction to item 123 and would partially implement Recommendation 5 of the Committee's report. Item 123 sets out the application provisions for amendments relating to application of the registration test and the new avenue of review of registration decisions – reconsideration by the NNTT.

4.107 Currently item 123 indicates these amendments apply in relation to claims made under section 63 or amended claims made under subsection 64(4) made on or after the commencing day. The effect of this provision is that claims made before the commencing day, but amended after the commencing day, would not gain the benefit of the amendments made in the items listed in item 123.

4.108 Item 123 also incorrectly refers to claims *made* under section 63 or subsection 64(4) of the Native Title Act. Claims are made pursuant to section 61. Section 63 and subsection 64(4) require the Registrar of the Federal Court to provide copies of new or amended applications to the Registrar.

4.109 Amendment 26 would rectify these errors in item 123 by providing that the items listed in item 123 apply to a native title determination application made or amended on or after the commencing day. This amendment would ensure all claims amended after commencement of the Bill will gain the benefit of the provisions in the Bill, including the new mechanism for reviewing registration decisions and the change to the requirement for the Registrar to apply the registration test to all amended claims.

4.110 Amendment 26 would also amend item 123 to apply the item to additional items. The items currently listed in item 123 make amendments in relation to

sections 190A to 190D. Amendments 4, 5, 15, 16 and 17 insert items 22A, 31A, 91G, 91H and 96A. These items would make amendments in relation to sections 190A to 190D as a consequence of Amendment 22. Amendment 26 would amend item 123 to include these item numbers.

#### *Amendment 27*

4.111 Amendment 27 would insert item 132A as a consequence of Amendments 10 and 13.

4.112 Amendment 13 would insert items 91A to 91E. These amendments would rectify a drafting error in section 94C of the Native Title Act (implementing Recommendation 5 of the Committee's report). Section 94C provides the Court must, in certain circumstances, dismiss applications made in response to a future act notice. However, due to a drafting oversight, existing section 94C does not cover all applications made in response to future act notices.

4.113 Amendment 10 would insert items 83A, 83B and 83C as a consequence of the changes made by Amendment 13. Items 83A, 83B and 83C would amend section 66C of the Native Title Act.

4.114 Sections 66C and 94C of the Native Title Act were inserted by the 2007 Act. The application provisions in the 2007 Act provided that sections 66C and 94C applied to applications made under section 61, regardless of whether the application was made before or after the commencing day.

4.115 Similarly, proposed item 132A would apply the changes to sections 66B and 94C made by items 83A to 83C and 91A to 91E to applications made under section 61 regardless of whether the application was made before or after the commencing day. This amendment will ensure that all claims that should have been captured by section 94C, as inserted by the 2007 Act, are captured by the amendments to rectify the error in this provision.

#### *Amendment 28*

4.116 Amendment 28 would substitute item 136. Item 136 is an avoidance of doubt provision relating to the application of items in the Bill to items 89 and 90 of Schedule 2 of the 2007 Act (2007 transitional provisions). The 2007 transitional provisions provide for the Registrar to consider, or reconsider, all unregistered claims for registration. Claims which fail the merits component of the registration test following consideration or reconsideration pursuant to the 2007 transitional provisions will be referred to the Court and the Court may dismiss these claims. Item 136 is intended to make clear that where a claim is not accepted for registration following application of the registration test pursuant to the 2007 transitional provisions, the applicant cannot seek reconsideration of that decision under proposed section 190E of the Bill.

4.117 Item 136 presently refers to the amendment of sections 190A to 190D made in items 22, 23, 31, 32, 78, 84, 97, 98, 99, 101, 102, 103, 104 and 107. However, of the

items listed, only items 101, 102, 103, 104 and 107 amend sections 190A to 190D. The other items make amendments to other sections in the Native Title Act as a consequence of the amendments to section 190A to 190D. Amendment 28 would clarify this drafting oversight.

4.118 Item 136 also refers to the amendment of section 190D. Item 107 of the Bill repeals and replaces section 190D with proposed sections 190D, 190E and 190F. Amendment 28 would state that the amendment of section 190D includes the insertion of proposed sections 190E and 190F, to avoid any doubt.

4.119 The amendment would not change the effect of the provision. The listed provisions would not apply to claims that are being considered or reconsidered pursuant to the 2007 transitional provisions.

4.120 Amendment 28 would also apply item 136 to additional items. The items currently listed in item 136 make amendments in relation to sections 190A to 190D. Amendments 4, 5, 15, 16 and 17 insert items 22A, 31A, 91G, 91H and 96A. These items would make amendments in relation to sections 190A to 190D as a consequence of amendment 22. Item 136 would include these item numbers.

## ***Amendments to Schedule 2***

### *Amendment 29*

4.121 Item 4 of Schedule 2 of the Bill would remove regulatory duplication by ensuring that provisions of the Commonwealth Authorities and Companies Act presently applied to representative bodies do not apply where similar provisions are contained in a representative body's incorporation statute. Amendment 29 would add an explanatory note to this effect (after proposed subsection 203EA(2)) with respect to representative bodies registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) (proposed Note 1). A similar note dealing with representative bodies incorporated under the *Corporations Act 2001* presently included after proposed subsection 203EA(2) would be included as proposed Note 2.

## ***Amendments to Schedule 3***

### Background

4.122 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.** These PBCs are referred to in this Supplementary Explanatory Memorandum as trust PBCs, or
- **under paragraph 56(2)(c), determine that the common law native title holders hold the rights and interests.** Under subsection 57(2), the Court must also in this case determine the PBC which, after becoming a RNTBC, is to perform the functions mentioned in subsection 57(3). These PBCs are referred to in this Supplementary

Explanatory Memorandum as agent PBCs. (A definition of agent PBC was inserted by the 2007 Act).

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

#### *Amendment 30*

4.124 Amendment 30 would narrow the regulation-making power in proposed paragraph 56(4)(c) in item 1 of Schedule 3 to ensure that only the Court can determine a trust PBC that replaces another trust PBC.

4.125 Similar changes are proposed to other regulation-making powers that allow for the determination of replacement PBCs (see Amendments 31, 32 and 34). This is consistent with part of Additional Recommendation 2 of the Committee's Minority Report, and with discussion in the Majority Report.

#### *Amendment 31*

4.126 Amendment 31 would narrow the regulation-making power in proposed paragraph 56(4)(e) in item 1 of Schedule 3 to ensure that only the Court can determine an agent PBC that replaces a trust PBC.

4.127 Similar changes are proposed to other regulation-making powers that allow for the determination of replacement PBCs (see Amendments 30, 32 and 34). This is consistent with part of Additional Recommendation 2 of the Committee's Minority Report, and with discussion in the Majority Report.

#### *Amendment 32*

4.128 Amendment 32 would narrow the regulation-making power in proposed paragraph 56(7)(a) in item 2 of Schedule 3 to ensure that only the Court can determine a trust PBC that replaces an agent PBC.

4.129 Similar changes are proposed to other regulation-making powers that allow for the determination of replacement PBCs (see Amendments 30, 31 and 34). This is consistent with part of Additional Recommendation 2 of the Committee's Minority Report, and with discussion in the Majority Report.

#### *Amendment 33*

4.130 Proposed paragraphs 56(4)(c) and 56(4)(e) (in item 1 of Schedule 3), 56(7)(a) (in item 2 of Schedule 3), and 60(b) (in item 6 of Schedule 3) would allow regulations to provide for the determination of replacement PBCs. It is proposed that these regulation-making powers be narrowed so that only the Court can determine replacement PBCs (see Amendments 30, 31, 32 and 34). While these provisions are also intended to allow for regulations to specify the bodies corporate or kinds of bodies corporate that may be determined, it is not completely clear that they are broad enough to do so. Amendment 33 would therefore insert proposed subsection 59(3) in

item 5 of Schedule 3 to put beyond doubt that regulations may specify the bodies corporate or kinds of bodies corporate that may be determined by the Court as replacement PBCs.

#### *Amendment 34*

4.131 Amendment 34 would narrow the regulation-making power in proposed paragraph 60(b) in item 6 of Schedule 3 to ensure that only the Court can determine an agent PBC that replaces another agent PBC.

4.132 Similar changes are proposed to other regulation-making powers that allow for the determination of replacement PBCs (see Amendments 30, 31 and 32). This is consistent with part of Additional Recommendation 2 of the Committee's Minority Report, and with discussion in the Majority Report.

#### *Amendment 35*

4.133 Proposed subsection 60AC(2) in item 7 of Schedule 3 provides that the Registrar of Aboriginal and Torres Strait Islander Corporations may give an opinion about whether fees charged by RNTBCs may be charged under proposed section 60AB (which allows RNTBCs to charge fees for negotiating certain agreements). Proposed subsection 60AC(4) (also in item 7 of Schedule 3) provides that the Registrar of Aboriginal and Torres Strait Islander Corporations' opinion is not a legislative instrument. This provision is included for the avoidance of doubt as the Registrar of Aboriginal and Torres Strait Islander Corporations' opinion, which does not determine or alter the content of the law, is not of a legislative character.

4.134 Proposed paragraph 60AC(5)(a) (also in item 7 of Schedule 3) would allow for regulations to specify the circumstances in which the Registrar of Aboriginal and Torres Strait Islander Corporations may decline to give an opinion. Proposed subsection 60AC(2) would already give the Registrar of Aboriginal and Torres Strait Islander Corporations a general discretion in this regard. If regulations under paragraph 60AC(5)(a) prescribed certain circumstances in which the Registrar of Aboriginal and Torres Strait Islander Corporations may decline to give an opinion, the Registrar would probably be required to give an opinion in all other circumstances. As it would be difficult to predict all possible circumstances in which the Registrar of Aboriginal and Torres Strait Islander Corporations could reasonably decline to give an opinion, regulations under proposed paragraph 60AC(5)(a) could unduly fetter the Registrar's discretion under proposed subsection 60AC(2) and would thus be unlikely to be made. Amendment 35 would therefore remove proposed paragraph 60AC(5)(a).

#### *Amendment 36*

4.135 Proposed subsection 193(4) in item 8 of Schedule 3 would require the Registrar to update the National Native Title Register where a PBC is replaced by another PBC or changes its functions. Proposed paragraph 193(4)(d) deals with replacement of an agent PBC by a trust PBC. However, because it refers to 'another PBC' rather than 'a PBC' it does not cover situations where an agent PBC changes its functions to those

of a trust PBC (while retaining the same underlying corporation). Amendment 36 would remedy this oversight.

#### *Amendment 37*

4.136 Proposed paragraph 193(4)(d) also refers to a trust PBC being ‘appointed’ to replace an agent PBC. Amendment 37 would amend this paragraph to reflect the fact that a trust PBC that replaces an agent PBC will be determined rather than appointed (see proposed paragraph 56(7)(a)).

#### *Amendment 38*

4.137 Amendment 38 would insert proposed new item 10A in Schedule 3 of the Bill. This item would commence immediately after Schedule 1 of the CATSI Consequential Act commences on 1 July 2007 (see Amendment 2). It would repeal and replace the definition of ‘registered native title body corporate’ to be inserted by item 8 of Schedule 1 of the CATSI Consequential Act. This definition was designed to remedy a technical deficiency in the existing definition in section 253 preventing replacement agent PBCs from becoming RNTBCs.

4.138 The definition in the CATSI Consequential Act refers to a ‘prescribed body corporate’ whose name and address are registered on the National Native Title Register under paragraphs 193(2)(e) or (f) (which will be inserted by item 4 of Schedule 1 of the CATSI Consequential Act). However, paragraph 193(2)(f) refers to *bodies corporate*, not *prescribed bodies corporate*. The definition to be inserted by Amendment 38 would therefore refer to a prescribed body corporate whose details are registered under paragraph 193(2)(e), or a body corporate whose details are registered under paragraph 193(2)(f).

4.139 The definition to be inserted by Amendment 38 would also expressly refer to PBCs whose details are registered on the National Native Title Register under proposed subsection 193(4) (in item 8 of Schedule 3), which would require the Registrar to update the National Native Title Register where a PBC is replaced by another PBC or changes its functions. This would ensure that replacement PBCs and PBCs that change their functions can become or continue to be RNTBCs.

#### *Amendment 39*

4.140 Amendment 39 would substitute item 11 in Schedule 3 of the Bill. Existing item 11 provides that, to avoid doubt, amendments to sections 59 and 60 made by items 5 and 6 of Schedule 3 do not affect regulations made under those sections or anything done under those regulations. However, it does not make similar provision with respect to existing regulations made under section 56. This amendment would remedy this oversight by providing that amendments to section 56 to be made by item 1 of Schedule 3 do not affect regulations made under that section or anything done under those regulations.



## ***Inclusion of Schedule 5***

### *Amendment 40*

4.1 Amendment 40 would insert proposed Schedule 5.

4.2 The transitional provisions of the 2007 Act provide for the Registrar to consider, or reconsider, for registration all claims that were unregistered at the time of commencement of the 2007 Act (see items 89 and 90 of Schedule 2 of the 2007 Act). Claims which fail the merits component of the registration test under this transitional process may be dismissed by the Court. It was intended all claims that were unregistered on the date of commencement of the 2007 Act would be captured by the 2007 transitional provisions.

4.3 Following commencement of the 2007 Act, it has become apparent some unregistered claims made prior to commencement of the 2007 Act have not been caught by the 2007 transitional provisions. The claims not captured are those which were considered for registration under the transitional provisions of the 1998 Act, were accepted for registration, were subsequently amended and then either failed registration when the registration test was reapplied or were not reconsidered for registration prior to the 2007 Act coming into force.

4.4 Similarly, amendments to section 190D made by item 73 of Schedule 2 of the 2007 Act provide that claims that fail the merits component of the registration test may be dismissed by the Court. The application provision in item 88 of Schedule 2 of the 2007 Act provided that the amendments to section 190D in item 73 apply to all claims made on or after the commencement of the 2007 Act. It was intended all claims required to undergo the registration test after the commencement of the 2007 Act (excluding those affected by the 2007 transitional provisions) would be captured by section 190D as amended by the 2007 Act.

4.5 However, it has become apparent that section 190D, as amended by the 2007 Act, will not apply to claims made prior to the commencement of the 2007 Act but amended after that Act came into force, as item 88 of Schedule 2 of the 2007 Act only refers to claims *made* on or after the commencing day. On commencement of this Bill, claims *made or amended* on or after the commencing day that fail the merits component of the registration test will be subject to dismissal by the Court, as a result of the application provision in item 123 of the Bill (including as amended by Amendment 26).

4.6 However, there may be some claims that are amended between the commencement of the 2007 Act and the commencement of item 123 of this Bill that fail the merits component of the registration test. These claims would not be subject to dismissal under section 190D of the Native Title Act, as amended by the 2007 Act but not incorporating amendments made by this Bill. Rather, section 190D as it was in force immediately before commencement of the 2007 Act would apply to these claims.

4.7 Item 1 of Schedule 5 would rectify these unintended oversights. Proposed item 1 would ensure those claims not captured by either the 2007 transitional provisions, or

by section 190D as amended by the 2007 Act, are subject to the same processes as all other claims.

4.8 Subitem 1(1) would provide that this item would apply if the following criteria are met.

- **The application is a native title determination application amended before the commencement of this item.**  
Amendment 1 provides that this item commences at the same time as Schedule 1 of the Bill. Only claims that have been amended prior to the commencement of this Bill are not captured by the provisions in the 2007 Act.
- **The application as amended is not one to which the transitional provisions in items 89 or 90 of Schedule 2 of the 2007 Act applies.**  
If the 2007 transitional provisions apply to the application, it is not necessary for this item to apply to that application.
- **Either:**
  - **the Registrar has decided not to accept the amended claim for registration before the commencement of this item, and the decision of the Registrar is one to which section 190D, as in force immediately before commencement of the 2007 Act, applies, or**  
This criterion will capture claims where the Registrar has decided that the claim does not meet the requirements of the registration test and the claim is not already subject to the provisions in section 190D, as amended by the 2007 Act.
  - **the Registrar has not yet decided whether to accept the claim made in the amended application for registration by the day on which this item commences, and section 190D, as in force immediately before commencement of the 2007 Act, applies.**  
This criterion will capture claims where the Registrar has not commenced considering the claim for registration, or has not completed considering the claim for registration and, if the claim were considered for registration, would not already be subject to section 190D as amended by the 2007 Act.
- **The claim is not on the Register of Native Title Claims on the day on which this item commences.**  
It is possible a claim that was not accepted by the Registrar for registration will be subsequently accepted for registration, for example, as a result of review of the registration decision by the Federal Court. It is important that claims that have been registered are not inadvertently required to undergo the registration test again.

4.9 If all of the criteria in subitem 1(1) are met, subitem 1(2) would provide that the Registrar must either reconsider, or consider, the claim under section 190A, as amended by the 2007 Act but not incorporating the amendments to section 190A made by this Bill. The Registrar must reconsider the amended claim if it has already been considered for registration and consider the claim if the Registrar has not completed consideration of the claim at the time this item commences. Subitem 1(2) would also provide the Registrar must use his or her best endeavours to finish

considering or reconsidering the claim by the end of one year after the day on which this item commences. If the Registrar does not finish considering or reconsidering the claim within one year, the Registrar must complete this as soon as reasonably practicable afterwards. These timeframes are consistent with the timeframes imposed on the Registrar pursuant to the 2007 transitional provisions.

4.10 Subitem 1(3) would provide the Registrar must use his or her best endeavours to finish considering a claim for registration within certain time periods where, either before the Registrar begins considering the claim or while the Registrar is considering the claim, certain future act notices are given over some or all of the claim area. This provision replicates subitems 89(3) and 90(3) of the 2007 transitional provisions, as amended by items 118 and 119 of Schedule 1 of the Bill.

4.11 Subitem 1(4) sets out matters relating to the information which the Registrar must and may have regard to in considering or reconsidering the claim for registration. This provision is equivalent to subitems 89(4) and 90(4) of the 2007 transitional provisions.

4.12 Subitem 1(5)(a) would provide that if a claim does not satisfy all of the conditions in section 190B (conditions about merit) and all of the conditions in section 190C (conditions about procedure), the Registrar must give written notice as required by subsection 190D(1), as amended by the 2007 Act but not incorporating amendments made to that section by this Bill. Subitem 1(5) would also provide that if a claim is not accepted for registration after consideration or reconsideration pursuant to this item, and the Registrar gives written notice of this decision as required by subitem 1(5)(a), other provisions of sections 190A to 190D, as amended by the 2007 Act but not incorporating amendments made to those sections by this Bill, then apply. This will ensure that if a claim fails the merits component of the registration test following consideration or reconsideration pursuant to this item, the claim may be dismissed by the Court.