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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

NATIVE TITLE AMENDMENT BILL 1997 [NO. 2]

SUPPLEMENTARY EXPLANATORY MEMORANDUM

TO GOVERNMENT AMENDMENTS MOVED IN JULY 1998

(Circulated by authority of the Prime Minister
The Honourable John Howard, MP)

AMENDMENTS TO THE NATIVE TITLE AMENDMENT BILL 1997 [No. 2]

Outline

1. These amendments make further changes to the provisions of the Native Title Amendment Bill 1997 [No. 2]. Some of these amendments were included in the Government amendments moved in the Senate in April 1998 but were either not made by the Senate or there was some doubt about their status after Senate consideration. However, the majority of amendments refine amendments moved by other parties in the Senate in April 1998. The small remainder are new Government amendments.

Financial Impact Statement

2. The Commonwealth has to meet its own liabilities under the *Native Title Act 1993* (NTA) and the Bill. Further the Commonwealth has offered to assist the States and Territories in meeting their costs arising from pre-1994 acts, intermediate period acts and some future acts. It is the Government's view that the confirmation provisions reflect the common law (and therefore would not give rise to compensation); however, section 23J provides a right of compensation for any extinguishment caused by the confirmation provisions.

3. The Bill ensures that just terms compensation is paid for any acquisition of property.

AMENDMENTS TO NATIVE TITLE AMENDMENT BILL 1997 [NO. 2]

Racial Discrimination Act

Government amendment (H1) - Schedule 1, item 3, page 5 (lines 4 and 5)

This amendment replaces section 7 of the NTA. The purpose of this amendment is to clarify any confusion about the interaction of the NTA and the *Racial Discrimination Act 1975* (the RDA). The amendment is intended to replicate in legislation the High Court's comments in *Western Australia* v *The Commonwealth* (1995) 183 CLR 373 about the interaction of the NTA and the RDA.

New subsection 7(1) provides that the NTA is to be read and construed subject to the provisions of the RDA. Subsection 7(2) explains exhaustively what subsection 7(1) means. These subsections are *together* intended to do no more than reflect the position under subsection 7(1) of the current NTA, namely, that nothing in the NTA is intended to affect the operation of the RDA. Like its predecessor, new section 7 is not intended to nullify the specific rules prescribed by the NTA in relation to acts affecting native title (see *Western Australia* v *The Commonwealth* at 484). That is, the RDA cannot interfere with the validity of an act affecting native title, whether it is a past act, intermediate period act or future act, that is valid under the NTA.

In *Western Australia* v *The Commonwealth* the High Court explained the relationship between the NTA and the RDA thus:

> 'The relationship of the *Native Title Act* with the *Racial Discrimination Act* has two aspects: first, the *Native Title Act* validates or permits the validation of past acts that were not of full force and effect because of the operation of the *Racial Discrimination Act*; second the *Native Title Act* affords protection to the holders of native title who heretofore have been protected by (and who may continue to be protected under) the *Racial Discrimination Act*, the regime established by the *Native Title Act* being more specific and more complex than the regime established by the *Racial Discrimination Act*.
>
> The *Racial Discrimination Act*, the only relevant law of the Commonwealth prior to the commencement of the operation of the *Native Title Act*, did not alter the common law relating to native title. Section 10 of the *Racial Discrimination Act* added statutory protection to the common law rights of the holders of native title so that the holders of native title were able to enjoy their title equally with the enjoyment of other title by the holders thereof. Thus the *Racial Discrimination Act* protects native title holders against *discriminatory* extinction or impairment of native title. The *Native Title Act*, on the other hand, protects native title holders against *any* extinction or impairment of native title subject to the specific and detailed exceptions which that Act prescribes or permits.' [at 462 to 463]

The reference by the High Court to a possibility that native title holders may *continue* to be protected by the RDA is explained by footnote 329 which refers to subparagraph 233(1)(c)(ii) of the NTA and Part 6 of the High Court's judgment. Part 6 of the

judgment discusses the operation of subsection 7(1) of the current NTA; the High Court states at 483:

> 'Section 7(1) at least ensures that the *Native Title Act* is not construed as impliedly repealing any of the provisions of the *Racial Discrimination Act*. The latter Act continues to operate on *subjects outside the Native Title Act* in precisely the same way as it operated before the *Native Title Act* came into operation.' (emphasis added)

The continuing operation of the RDA to which their Honours were referring is what is being addressed in new subsection 7(2). Subsection 7(2) makes it clear that the RDA will *only* operate on subjects outside the NTA and *only* be relevant in construing ambiguous terms in the NTA.

This means that the RDA will continue to operate in relation to the performance of functions and the exercise of powers conferred by or authorised under the NTA. This does not *prevent* the performance of functions or the exercise of powers, but may affect *how* those functions are performed and *how* those powers are exercised. For example, in exercising his or her discretionary powers under the Act to employ staff and engage consultants, the Registrar must not act in a way that discriminates on the basis of race and contravenes the RDA.

But in exercising a Ministerial discretion the Commonwealth Minister can make a decision which the Act allows, even though this decision may affect native title rights, may affect them differently to the way it affects other rights, or even if it only affects native title rights. Where the Act allows such decisions, the RDA cannot have the effect of limiting those powers, or rendering such decisions invalid.

Further, future acts are not authorised by the NTA itself. The NTA imposes conditions on the doing of future acts, that if complied with, will be valid. However, the acts themselves are otherwise authorised (for example, by a State land management or mining law). Accordingly, paragraph 7(2)(a) does not mean that the RDA nullifies acts that comply with the NTA, and which the NTA says are valid. Again, if the NTA states that an act can be done, or enables such an act, then even though this may affect native title rights differently to the way it affects other rights, or even if it only affects native title rights, the RDA cannot restrict or invalidate such acts.

The provision also means that if construing an ambiguous term in the NTA in a way that is consistent with the RDA would remove the ambiguity, then it should be so construed. To this extent, the RDA will assist in construing the NTA and determining its operation.

The purpose of new subsection 7(3) is to ensure that subsection 7(1) and 7(2) do not in any way affect the validation of past acts or intermediate period acts in accordance with the NTA. Like its predecessor (subsection 7(2) of the current Act), this provision is otiose and inserted out of an abundance of caution (*Western Australia* v *The Commonwealth* at 484).

Confirmation

Government amendment (H2) - Schedule 1, item 9, page 14 (lines 23 to 28)

This amendment will exclude certain kinds of acts from the definition of 'previous exclusive possession act' contained in section 23B in the Bill. Previous exclusive possession acts are or may be confirmed to extinguish native title.

Acts benefiting indigenous peoples

Acts that consist of the grant or vesting of anything by, or pursuant to, legislation that provides for such grants or the vesting of such things only to, in or for the benefit of Aboriginal peoples or Torres Strait Islanders are already excluded from the definition of previous exclusive possession act (subsection 23B(9) in the Bill). This exclusion will remain (see new paragraph 23B(9)(a)).

The amendment to proposed section 23B will also exclude from the definition of 'previous exclusive possession act':

- the grant or vesting of anything expressly for the benefit of, or to or in a person to hold on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders (new paragraph (9)(b)); and
- the grant or vesting of any thing over particular land or waters, if at the time a thing covered by paragraph (9)(a) or (9)(b) is in effect in relation to the land or waters (new paragraph (9)(c)).

The amendment recognises that not all grants to indigenous communities are made under specific land rights type legislation, and ensures that grants made under general legislation, where the purpose of the grant is to benefit indigenous communities, are not included in the definition of 'previous exclusive possession act'. This will mean that these acts are not covered by the confirmation of extinguishment provisions and the effects of such acts on native title are left to determination by the common law. Grants which are not expressly for the benefit of Aboriginal peoples, but are made in the normal way to a specific person, who happens to be an Aboriginal person, are *not* caught by this exclusion. Such grants are able to be 'previous exclusive possession acts' and may be subject to the confirmation of extinguishment regime.

A note has been included under subsection 26B(9) to draw attention to the fact that the term 'Aboriginal peoples' is defined in section 253.

National parks and the like

The amendment will also exclude from the definition of 'previous exclusive possession act', and thereby the confirmation provisions, acts that involve the establishment of an area for the purpose of preserving its natural environment (new subsection 23B(9A)). The purpose of this provision is to put it beyond all doubt that the confirmation provisions are not intended to apply to the creation of national parks and the like.

Grants where legislation expressly provides no extinguishment

The amendment also excludes from the definition of 'previous exclusive possession act' an act that is done by or under legislation that states that such acts do not extinguish native title (new subsection 23B(9B)). The exclusion of such acts from the definition of 'previous exclusive possession act' removes them from the operation of

the confirmation of extinguishment provisions; it is left to the common law to determine to what extent native title is affected by such acts.

Crown to Crown grants

The amendment also excludes from the definition of 'previous exclusive possession act' an act that is the grant or vesting of an interest to or in the Crown or a statutory unless:

- at common law the *grant or vesting* extinguishes native title; *or*
- if at common law the *grant or vesting* did *not* extinguish native title, the land or waters are *used* in a way that, at common law, extinguishes native title.

In relation to the latter, the act only becomes a 'previous exclusive possession act' when the land or waters are used in a way that at common law extinguishes native title. The use may take place before or after the date of the *Wik* decision, or before or after the provision commences operation.

The Government believes that the grant of a freehold or exclusive possession leasehold to another body politic or to a statutory authority does extinguish native title. Such grants should be treated in the same way as grants to a private person. They are more than the reservation of land for a future public purpose. However, this amendment leaves this issue to be finally determined by the common law. If at common law a Crown to Crown grant extinguished native title, the Bill confirms the extinguishment. If at common law, it is the use of the land granted or vested, and not the grant or vesting itself, that extinguishes native title, the Bill confirms that the native title is extinguished when the land is used.

Paragraph 23B(9C)(b) *only* deals with uses that result in the *extinguishment* of native title. Uses that are consistent with the continued existence of native title are not covered by the confirmation of extinguishment provisions but may be valid under Subdivision J (which deals with acts done pursuant to certain reservations and leases).

Government amendment (H3) - Schedule 1, item 9, page 14 (after line 31), at the end of section 23B

The insertion of new subsection 23B(11) puts it beyond doubt that subsections 23B(9), (9A), (9B), (9C) or a regulation made pursuant to subsection 23B(10) in no way affects the validity of acts to which those subsections or a regulation under subsection 23B(10) apply. 'Valid' is defined in section 253 to include 'having full force and effect'.

Government amendment (H4) and (H5) - Schedule 1, item 9, page 16 (after line 4) and (line 8)

These amendments flow from the insertion of new subsection 23B(9C) by Government amendment (H2). As a result of that amendment, a grant or vesting of land to or in the Crown or a statutory authority will only be a previous exclusive possession act if at common law the grant or vesting extinguished native title *or*, if at common law the grant or vesting did not extinguish native title, the land is used in a way that at common law extinguishes native title.

Government amendment (H4) will *prevent* any argument being made, should it be the case that at common law a grant of an interest in land to the Crown did not extinguish native title but the subsequent use of that land by the Crown did, that the subsequent

use of the land is invalid. Rather, the grant, the *right* to use the land and the *actual* use of the land will be valid if at common law they extinguish native title.

Neither section 23DA nor paragraph 23B(9C)(b) deal with uses that do not extinguish native title. Uses that are consistent with the continued existence of native title are not covered by the confirmation of extinguishment provisions but may be valid under Subdivision J (which deals with acts done pursuant to certain reservations and leases).

Government amendment (H5) will require a State or Territory law that provides for the confirmation of extinguishment by previous exclusive possession acts attributable to the State or Territory to contain a provision to the same effect as new section 23DA. The purpose of this amendment is to ensure that there is no doubt whatsoever about the validity of acts done in the use of land granted to or vested in the Crown or a statutory authority if at common law the use extinguishes native title.

Government amendment (H6) - Schedule 1, item 9, page 17 (lines 15 to 34)

This amendment is to section 23G in the Bill which confirms the partial extinguishment of native title by a previous non-exclusive possession act attributable to the Commonwealth, in particular the grant of a non-exclusive pastoral lease. The amendment replaces subsection 23G(1) with a new provision. New paragraphs 23G(1)(a) and (c) are in substance the same as paragraphs 23G(1)(d) and (c) in the Bill respectively. However, new paragraph 23G(1)(b) is slightly different to its equivalent in the Bill, namely paragraph 23G(1)(a).

Paragraph 23G(1)(a) in the Bill provides that native title is partially extinguished by a previous non-exclusive possession act attributable to the Commonwealth. This reflects the Government's view that at common law the grant of an interest by the Crown extinguishes any native title the continuance of which is inconsistent with the grant: see *Wik Peoples v Queensland* (1996) 187 CLR 1 at 243. That is, native title is extinguished to the extent of any inconsistency with the Crown grant. Of course, it is for a court to determine to what extent native title rights and interests are inconsistent with the grant.

This is still the Government's understanding of the common law. There is however an opposing view of the common law. That view is that the grant of a non-exclusive possession title, such as a non-exclusive pastoral lease of the kind involved in *Wik*, does not *extinguish* native title rights and interest that are inconsistent with the grant; rather, the inconsistent native title rights are merely *suspended* while the non-exclusive possession title is in force. This is not the Government's understanding of the common law.

However, the Government has agreed to leave this issue to be finally determined by the common law.

Paragraph 23G(1)(b) confirms that the grant of a non-exclusive possession agricultural or non-exclusive possession pastoral lease will extinguish any native title rights and interests that are inconsistent with the grant *if that is the position at common law*. If however the position at common law is that a non-exclusive possession agricultural lease or non-exclusive possession pastoral lease does not extinguish any inconsistent native title rights and interests, but merely suspends them while the lease is in existence, then subparagraph 23G(1)(b)(ii) ensures that the inconsistent native rights and interests are *suspended* for the duration of the lease (including as renewed etc).

Whether inconsistent native title is extinguished or suspended will have no effect during the period of the lease, and any renewal. This provision will still provide certainty for lessees because, at the very least, native title rights and interests are suspended to the extent that they are inconsistent with a non-exclusive possession agricultural or non-exclusive possession pastoral lease. This will enable lessees to carry on activities pursuant to their lease without impediment from native title. The future act regime in the NTA will apply, which will ensure that primary production activities can be carried on, and new rights granted, even if native title rights have only been suspended (see sections 24GA, 24GB and 24GC). If a court decides that the inconsistent native title rights and interests are extinguished by a previous non-exclusive possession act, this will be the law and subparagraph 23G(1)(b)(ii) will have no operation.

Government amendment (H7) - Schedule 1, item 9, page 140 (line 24)

This amendment is to section 249C in the Bill which defines the term 'Scheduled interest' which is used primarily in the validation and confirmation of extinguishment provisions, and also in the definition of exclusive agricultural and exclusive pastoral lease.

Section 249C defines the term Scheduled interest to include, among other things, anything set out in Schedule 1 to the NTA other than a mining lease (paragraph 249C(1)(a)). Schedule 1 lists those tenures which the Government considers confer a right of exclusive possession upon the grantee and are wholly inconsistent with the continued existence and enjoyment of native title. The amendment adds further exceptions to paragraph (1)(a) of the definition of 'Scheduled interest'.

The amendment will exclude the following acts from the definition of 'Scheduled interest':

- grants under 'indigenous land rights' type legislation, interests created expressly for the benefit of Aboriginal peoples or Torres Strait Islanders, interests held on trust expressly for the benefit of Aboriginal peoples and Torres Strait Islanders, or grants over such land;
- the creation of national parks and the like;
- acts done by or under legislation that expressly provides that such acts do not extinguish native title;
- a Crown to Crown grant or vesting that has not extinguished native title at common law; and
- anything the grant of which has been excluded by regulation under subsection 23B(10) from the definition of 'previous exclusive possession act'.

The amendment will put it beyond doubt that grants of this kind were not intended to be contained in the Schedule. If such things are found to be in the Schedule, the amendment ensures that they will nonetheless *not* be 'Scheduled interests' for the purposes of the Act. Their exclusion from the definition of 'Scheduled interest' will make it clear that such grants are excluded from the confirmation provisions (which they already are since the amendment picks up the exclusions to the definition of 'previous exclusive possession act' contained in section 23B) and the definition of 'category A intermediate period act'. The exclusion of such grants from the definition

of 'Scheduled interests' also means that they will not be exclusive agricultural or exclusive pastoral leases. This will leave it to the common law to determine the effect of such grants on native title.

The exclusions do not however apply to interests that fall within paragraph (1)(b) of the definition of 'Scheduled interest'. That is, an interest will be a 'Scheduled interest' if it is of a type prescribed by a regulation made under paragraph 249C(1)(b) even if it is one that falls within an exception referred to in paragraph 249C(1)(a).

Indigenous land use agreements

Government amendment (H8) and (H15) - Schedule 1, item 9, page 7 (line 13) and page 45 (after line 5), after section 24EB

Government amendment (H15) inserts new section 24EBA which will provide for:

- parties to an ILUA to reach agreement about the *validation* of a future act (other than an intermediate period act) that has already been done invalidly; and
- parties to an ILUA to reach agreement about changing the *effect* of a validated intermediate period act on native title.

Validation of invalid future acts (other than intermediate period acts) by agreement

Section 24EBA sets out, among other things, the effect of entering on the Register of Indigenous Land Use Agreements the details of an agreement under which the parties have agreed to validate an invalid future act (other than an intermediate period act) that has already been done. (The act could have been done before the amendments commence, or be done at any time in the future.) An ILUA may deal with a matter of this kind (paragraphs 24BB(aa), 24CB(aa) and 24DB(aa) inserted by Government amendments (H9), (H12) and H14).

There are three conditions that must be satisfied in order for the consequences set out in section 24EBA to apply to such acts, that is in order for those invalid acts to be validated by agreement.

The first condition is that the Register of Indigenous Land Use Agreements must contain the details of a body corporate agreement, an area agreement or an alternative procedure agreement that includes a statement to the effect that the parties to that agreement agree to:

- the validating of a future act (other than an intermediate period act) or class of such acts that have already been done invalidly; or
- the validating, subject to conditions, of a future act (other than an intermediate period act) or class of such acts that have already been done invalidly.

There need not have been a judicial determination that a future act or class of future acts was invalid before parties make an agreement to which section 24EBA applies. Indeed, the parties need not agree that native title exists, that the act could have affected native title or that the act is possibly invalid, but may wish to enter into such an agreement to provide certainty

Although 'intermediate period acts' are a type of 'future act', an ILUA may not provide for the *validation* of an intermediate period act, as these are or can only be validated under Division 2A of Part 2 of the NTA.

The second condition is that the Government to which the invalid future act was attributable is a party to the ILUA.

The third condition is that if a person other than the Government party is or may become liable, whether under the ILUA or otherwise, to pay compensation in relation to the future act, that person must also be a party to the ILUA.

If the invalid act or class of invalid acts is attributable to the Commonwealth, subsection 24EBA(2) validates them.

If the invalid act or class of invalid acts is attributable to a State or Territory, they will be valid if either:

- the State or Territory has passed legislation to validate that particular act or class of acts; or
- the State or Territory has legislated in general terms to validate acts or classes of acts which satisfy the conditions set out in section 24EBA.

If an invalid future act is validated, the non-extinguishment principle applies unless the act is the surrender of native title and the agreement includes a statement to the effect that the surrender is intended to extinguish native title (subsection 24EBA(4)). Only body corporate agreements and area agreements may provide for the surrender of native title.

If an invalid future act is validated, the consequences set out in subsections 24EB(4), (5) or (6) apply depending upon whether the ILUA is a body corporate agreement, an area agreement, or an alternate procedure agreement. The consequences set out in subsection 24EB(7) apply regardless of the kind of ILUA involved. These consequences deal with who is entitled to receive compensation for the effect of the act on native title.

The difference between the acts which are subject to section 24EBA, and other acts which may be covered by a general ILUA, is that at the time the act is done, it is invalid because of native title. The agreement is made only after that time. Of course it is preferable that agreements about future acts be made before the act is done, since then the act is always valid.

The purpose of this amendment is to encourage parties to use ILUAs to resolve disputes about the validity of future acts that have already taken place. It is hoped that this provision will obviate the need for any further validation regimes, such as those in Division 2 in the Act and Division 2A in the Bill.

Changing the effect on native title of a validated intermediate period act by agreement

Section 24EBA sets out, among other things, the effect of entering on the Register of Indigenous Land Use Agreements the details of an agreement under which the parties have agreed to change the effect of a validated intermediate period act on native title from that which applies to the act under section 22B in the Bill or the equivalent State or Territory provision. An ILUA (body corporate agreement) or an ILUA (area

agreement) may deal with a matter of this kind (paragraphs 24BB(ab) and 24CB(ab) inserted by Government amendments (H9) and (H12)).

Section 22B in the Bill sets out how native title is affected by a validated intermediate period act attributable to the Commonwealth. Depending on the nature of the act, a validated intermediate period act may completely extinguish native title, partially extinguish native or merely suppress native title. A State or Territory may similarly legislate in respect of intermediate period acts attributable to that State or Territory. The Government recognises however that if parties are agreeable to providing for a different outcome to that stipulated in section 22B, or the relevant State or Territory provision, they should be able to do so.

If the parties are so agreeable, the effect of section 22B, or the relevant State or Territory provision, will be changed if:

- the parties enter into an ILUA (body corporate agreement) or an ILUA (area agreement) to this effect;
- the Government party to which the validated intermediate period act was attributable is a party to the agreement;
- if a person other than the Government party is or may become liable, whether under the ILUA or otherwise, to pay compensation in relation to the future act, that person is a party to the ILUA; and
- the details of the agreement are entered on the Register of Indigenous Land Use Agreements.

The requirement that there be a registered body corporate or area agreement ensures, to the greatest possible, that the agreement is made with the authority of all relevant native title holders.

If these conditions are satisfied, the effect on native title provided for in the agreement, and not the consequences set out in section 22B or the relevant State or territory provision, will apply to the validated intermediate period act (subsection 24EBA(6)). Government amendment (H8) qualifies section 22B so that the effects on native title set out in that section do not apply if subsection 24EBA(6) applies.

This does not mean that parties can agree to change whether or not an intermediate period act is validated. Intermediate period acts are or can be validated only in accordance with Division 2A in the Bill. This amendment will merely enable parties to agree about the effect on native title of an intermediate period act that has been validated.

Government amendment (H9) - Schedule 1, item 9, page 22 (after line 21), after paragraph (a)

This amendment adds to the range of matters with which an ILUA (body corporate agreement) may deal.

The amendment allows for body corporate agreements to deal with future acts that have already been done other than intermediate period acts (new paragraph 24BB(aa)). Most significantly, an act that was done invalidly because of the provisions in the NTA can be validated under section 24EBA (see amendment (H15) below). For example, if it is discovered that the grant of a mining lease should have been subject to the right to negotiate process, but was not, then this may be remedied by an indigenous

land use agreement that meets the conditions set out in section 24EBA. A body corporate agreement between the relevant registered native title body corporate and the State government which deals with compensation, access and other issues may meet these conditions. Such agreements cannot validate intermediate period acts; these acts are or can only be validated in accordance with the regime in Division 2A.

The amendment also allows for body corporate agreements to provide for changing the *effect* on native title of a validated intermediate period act. This does *not* enable parties to validate intermediate period acts by agreement. Rather, a body corporate agreement may provide for a validated intermediate period act to have a different effect on native title to that which applies to the act under section 22B in the Bill or the equivalent State or Territory provision. The agreement will not actually change the effect of section 22B, or the equivalent State or Territory provision, unless details of the agreement are entered on the Register of Indigenous Land Use Agreements and the conditions set out in section 24EBA in relation to agreements of this kind are satisfied (see Government amendment (H15)).

Government amendment (H10) - Schedule 1, item 9, page 23 (after line 30), at the end of section 24BD

This amendment is to section 24BD which sets out who may be a party to an indigenous land use agreement (body corporate agreement). Body corporate agreements may be made in relation to areas where there has been an approved determination of native title. The amendment requires that, if there are any representative bodies for the area concerned and none of them is to be a party to the agreement, the registered native title body corporate for the area must inform at least one of the representative bodies for the area of its intention to enter into the agreement. Notice must be given before the agreement is entered into. Failure to comply with this notice requirement may be grounds for the Registrar declining to register the agreement (see replacement section 24BI inserted by Government amendment (H11)).

The registered native title body corporate may also consult with any of the representative bodies about the agreement.

This amendment does not mean that the representative body must agree to the ILUA or even be consulted.

Government amendment (H11) - Schedule 1, item 9, page 25 (lines 19 to 24)

This amendment replaces section 24BI in the Bill which requires the Registrar to register body corporate agreements unless within one month of notice of the agreement being given by the Registrar under section 24BH, a party to the agreement advises the Registrar that they do not want the agreement registered.

Replacement section 24BI contains a further ground for not registering a body corporate agreement. The Registrar must not register the agreement if a representative body for any of the area covered by the agreement advises the Registrar within one month of notice being given under section 24BH that it was not notified of the agreement as required by paragraph 24BD(4)(a) and the Registrar is satisfied that the notification requirement was not complied with.

Government amendment (H12) - Schedule 1, item 9, page 26 (after line 6), after paragraph (a)

This amendment adds to the range of matters with which an ILUA (area agreement) may deal. The amendment allows for area agreements to deal with future acts that have already been done other than intermediate period acts (new paragraph 24CB(aa)) and to provide for changing the *effect* on native title of a validated intermediate period act (new paragraph 24CB(ab)). This amendment is identical to Government amendment (H9) which is discussed in detail above.

Government amendment (H13) - Schedule 1, item 9, page 28 (after line 11, at the end of section 24CD

This amendment is to section 24CD which sets out who may be a party to an indigenous land use agreement (area agreement). Area agreements may cover land or waters where native title has not yet been determined. The amendment requires that, if there are any representative bodies for the area covered by the agreement and none of those bodies is to be a party to the agreement, a person in the 'native title group' must inform at least one of those bodies of its intention to enter into the agreement. Notice must be given before the agreement is entered into. A person in the native title group may also consult any of the representative bodies about the agreement. The amendment does not mean that the representative body must agree to the ILUA or even be consulted.

Government amendment (H14) - Schedule 1, item 9, page 35 (after line 14), after paragraph (a)

This amendment adds to the range of matters with which an ILUA (alternative procedure agreement) may deal.

The amendment allows for alternative procedure agreements to deal with future acts that have already been done other than intermediate period acts (new paragraph 24DB(aa)). Most significantly, an act that was done invalidly because of the provisions in the NTA can be validated under section 24EBA (see amendment (H15) below). For example, if it is discovered that the grant of a mining lease should have been subject to the right to negotiate process, but was not, then this may be remedied by an alternative procedure agreement that meets the conditions set out in section 24EBA. An alternative procedure agreement may deal with compensation, access and any other issue relating to the act that is to be validated but cannot provide for the extinguishment of native title. Alternative procedure agreements cannot validate intermediate period acts; these acts are or can only be validated in accordance with the regime in Division 2A.

This amendment does not provide for alternative procedure agreements to deal with changing the effect of a validated intermediate period act on native title (*cf.* Government amendments (H9) and (H12) to sections 24BB and 24CB respectively). This is because alternative procedure agreements cannot provide for the extinguishment of native title (section 24DC).

Government amendment (H16) - Schedule 1, item 30, page 131 (lines 7 to 10)

This amendment is to section 199C in the Bill which provides for the removal of details of an ILUA from the Register of Indigenous Land Use Agreements in certain circumstances. One case in which the Registrar must remove the details of an ILUA

from the Register is where the Federal Court, on application by a party to the ILUA or the relevant representative body, orders their removal on a ground set out in subsection 199C(3), namely, that a party was induced to enter into the agreement by reason of fraud, undue influence or duress by another person.

The amendment replaces subsection 199C(3) so that the Federal Court can only order the removal of the details of an ILUA on the ground of fraud, undue influence or duress if it satisfied that the person seeking to have the details removed would not have entered into the ILUA *but for* the fraud, undue influence or duress of another person (whether that other person is a party to the agreement or not).

The amendment also provides that if the Court makes an order to this effect, the Court may also order the person who committed the fraud etc to compensate any party to the ILUA who will suffer loss or damage as a result of the removal of the details from the Register (subsection 199C(4)).

Primary production

Government amendment (H17) - Schedule 1, item 9, page 49 (after line 26), at the end of subsection (1)

This amendment is to section 24GB which provides that certain future acts permitting primary production activities to take place on non-exclusive agricultural and non-exclusive pastoral leases are valid. The amendment will impose a further requirement to be satisfied in order for a future act to be valid under section 24GB. The additional requirement is that the future act could have been validly done at any time before 31 March 1998 if native title had not existed. This does *not* require that the future act was *in fact* done before 31 March 1998; it is enough if it *could* have been done.

Government amendment (H18) - Schedule 1, item 9, page 52 (after line 16), at the end of subsection (1)

This amendment is to section 24GC in the Bill which deals with certain primary production activities carried on while a non-exclusive agricultural or non-exclusive pastoral lease is in force. The purpose of the amendment is to clarify that the range of primary production activities to which section 24GC applies is those that could have been done or authorised in relation to the land or waters concerned at any time before 31 March 1998 under legislation, the lease or other authority (new paragraph 24GC(1)(d)). This does *not* mean that the activity must *in fact* have been carried on, or enabled to have been carried on, before 31 March 1998; it is enough if the activity *could* have been, or could have been enabled to have been done lawfully. For example, an activity satisfies paragraph 24GC(1)(d) if the activity could have been done at any time before 31 March 1998 by obtaining a permit - whether or not the lessee did in fact have a permit at that time. The Government understands that as at 31 March 1998 the legislation applying in relation to pastoral lease land in the relevant jurisdictions contained wide discretions as to what could be done on the land, even if that discretion was seldom exercised.

Government amendment (H19) - Schedule 1, item 9, page 53 (after line 31) at the end of subsection (1)

This amendment is to section 24GD in the Bill which provides that certain future acts permitting off-farm activities that are directly connected to primary production activities are valid. The purpose of the amendment is to exclude the application of section 24GD to a future act that satisfies the following conditions:

- the act takes place in relation to land or waters that are the subject of an approved determination of native title;
- the determination of native title is that the native title holders enjoy a right of exclusive possession to the land or waters concerned; and
- the doing of the off-farm activity is inconsistent with the exercise of the native title rights and interests.

That is, if there has been an approved determination of native title that native title holders enjoy exclusive possession to an area of land or waters, a future act that permits off-farm activities to take place on or in relation to that area will only be valid under section 24GD if the doing of the off-farm activities would not be inconsistent with the exercise of the native title rights and interests.

Government amendment (H20) - Schedule 1, page 145 (after line 32), after item 57

This amendment inserts new item 57A in Schedule 1, which amends the definition of the term 'mine' in section 253. The effect of the amendment is to make it clear that mining does not include the extraction, obtaining or removal of sand, gravel, rocks or soil from the natural surface of land or from the bed beneath waters, provided this is done for a purpose other than the removal of minerals or for mechanical processing. Therefore the removal of surface gravel which is then sifted for road works or other construction purposes does not constitute mining. The purpose of the amendment is to clarify the operation of the provisions in the Act which relate to mining, such as Subdivision P, to ensure these activities are not covered by those provisions. It also clarifies the operation of section 24GE. The amendment to the definition is in the same form as Government amendment (26) that was moved by the Government in the Senate in April.

Water etc.

Government amendments (H21) and (H22) - Schedule 1, item 9, page 56 (line 25) and page 57 (line 9)

These amendments clarify that the term 'management or regulation', in so far as that term is used in the context of managing or regulating water, includes granting access to water or taking water (for example, by granting irrigation rights or permits). This is of course not an exhaustive definition of the term 'management or regulation' where it is used in the context of water.

Renewals

Government amendment (H22A) - Schedule 1, item 9, page 60 (line 17)

This amendment to section 24IC in the Bill ensures that a future act which results in the conversion of a term mining lease into a perpetual mining lease is not a 'permissible lease etc. renewal' under section 24IC.

Government amendment (H23) - Schedule 1, item 9, page 61 (line 18)

This amendment corrects a drafting error in subsection 24ID(3). Subsection 24ID(3) imposes a notification requirement in relation to certain acts covered by Subdivision I (which deals with pre-existing right-based acts and permissible lease etc renewals). The Bill incorrectly imposes the notification requirement on acts covered by paragraph 24IB(b), namely, certain acts done in good faith pursuant to an offer, commitment, arrangement or undertaking made in good faith on or before 23 December 1996. The notification requirement should have been imposed on acts that are covered by paragraph 24ID(1)(b), namely, acts that are valid under section 24ID and extinguish native title. The amendment rectifies this situation.

Government amendment (H24) - Schedule 1, item 9, page 61 (after line 28), at the end of section 24ID

This amendment is to section 24ID which deals with, among other things, permissible lease renewals. The purpose of this amendment is to give native title holders certain procedural rights in relation to the renewal, re-grant, remaking, or extension of the term of a non-exclusive agricultural lease or non-exclusive pastoral lease if the renewed, re-granted, re-made or extended lease is for a longer term than the original lease or the renewed, re-granted, re-made or extended lease is a perpetual lease (new subsection 24ID(4)).

The procedural rights that apply in relation to acts of this kind are those set out in subsection 24MD(6B). That provision will apply to an act caught by subsection 24ID(4) as though the act were a compulsory acquisition of the kind mentioned in subsection 24MD(6B). (The renewal of the pastoral lease etc does not of course involve the compulsory acquisition of native title rights and interests - where they are not inconsistent with the rights granted by the pastoral lease the native title rights and interests can continue.)

Services to the public

Government amendment (H25) - Schedule 1, item 9, page 65 (after line 25), after subsection (1)

This amendment is to section 24KA which provides that certain future acts that involve the construction of, or permitting the construction of, a facility for providing a service to the public are valid. The purpose of this amendment (adding a subsection 24KA(1A)) is to make it clear beyond doubt that section 24KA does *not* apply to a future act that consists of the compulsory acquisition of native title. A future act that involves the compulsory acquisition of native title cannot be done under section 24KA; it could only be done through an ILUA or a non-discriminatory compulsory acquisition under Subdivision M. Some such compulsory acquisitions will need to comply with

subsection 24MD(6A) procedures, and some will need to comply with the right to negotiate in Subdivision P.

Government amendments (H26) and (H28) - Schedule 1, item 9, page 67 (line 2) and (after line 27)

These amendments relate to subsections 24KA(7) and (8) which deal with procedural rights for native title holders in relation to valid future acts that involve the provision of facilities for services to the public.

In relation to such acts, Government amendment (H26) will ensure that registered native title claimants (who may or may not hold native title but have passed the revised registration test) have the same procedural rights as common law native title holders. That is, native title holders and registered native title claimants will have the same procedural rights as, if the act takes place on land that is the subject of a non-exclusive agricultural or non-exclusive pastoral lease, the holder of a lease of that kind or, if the act takes place on any other kind of land, a freeholder.

Where there has been no approved determination of native title it is difficult for Government parties or third persons to comply with procedural obligations that require notification or other things to be done in relation to native title holders because it is often very difficult to identify with certainty all native title holders. Subsection 24KA(8) attempts to overcome this difficulty by saying that where because of subsection 24KA(7) or any other law, native title holders have a right to be notified of an act and there has been no approved determination of native title, it will be sufficient to discharge that obligation if notice of the act is given to all representative bodies and all registered native title claimants for the area concerned.

Government amendment (H28) similarly provides in relation to any *other* procedural right that requires something to be done in relation to native title holders. For example, if because of subsection 24KA(7) a Government party is obliged to consult native title holders before an act is done about any objections the native title holders may have to the doing of the act, and there has been no approved determination of native title, new subsection 24KA(9) will deem that obligation to be discharged if the Government party consults *all* registered native title claimants before the act is done. If there are no registered native title claimants in relation to the area, the obligation to do something in relation to native title holders is deemed to be discharged if all representative bodies for the area concerned are given an opportunity to comment on the act before it is done. Of course, if there is no native title in relation to the land or waters, then such procedural rights do not have to be accorded.

Government amendment (H27) - Schedule 1, item 9, page 67 (after line 12), after subsection (7)

This amendment is to section 24KA which provides that certain future acts that involve the provision of a service to the public are valid and, among other things, confers procedural rights in relation to the act upon native title holders and registered native title claimants (subsection 24KA(7) as amended by Government amendment (H26)) The content of these procedural rights will depend upon the kind of tenure in relation to which the act takes place. The purpose of the amendment is to clarify that if the procedural rights to which native title holders and registered native title claimants are entitled under subsection 24KA(7) includes a right to have certain matters considered,

those matters will include their native title rights and interests (new subsection 24KA(7A)).

Freehold test and offshore

Government amendments (H29) and (H30) - Schedule 1, item 9, page 69 (after line 32), after paragraph (b), before the example and page 70 (after line 9), at the end of subsection 24MB(2)

Government amendment (H29) is to subsection 24MB(1) which contains the freehold test. A non-legislative future act that satisfies the freehold test is valid and attracts the consequences set out in section 24MD. As a result of the amendment, a future act will only pass the freehold test if there is legislation in place, whether Commonwealth, State or Territory legislation, that provides for the preservation or protection of areas or sites that may be in the area to which the future act relates and are of particular significance to indigenous peoples in accordance with their traditions. The purpose of this amendment is to ensure greater protection to the heritage of indigenous peoples. Current legislation meets this requirement.

Government amendment (H30) makes an identical amendment to subsection 24MB(2).

Government amendment (H31) - Schedule 1, item 9, page 71 (line 4)

This amendment to proposed subsection 24MD(2) makes it clear that when native title rights are subject to a non-discriminatory compulsory acquisition process, the non-native title rights in the area concerned, if any, must be acquired, but that this acquisition can be through a compulsory acquisition or by surrender, cancellation, resumption, or otherwise.

The purpose of the amendment is to ensure that the methods under which non-native title rights are acquired are sufficiently broad to cover the whole range of circumstances under which State and Territories in fact acquire those rights. (It would of course be inappropriate to provide for the 'cancellation' or 'resumption' of native title, since native title is not a title granted by the Crown.) The provision merely reflects the fact that, for instance, where a State needs to acquire land on which there is a pastoral lease and where native title exists, to allow the development of new suburb or a road, it will have to acquire all the non-Crown interests.

The normal way in which the pastoralists' rights would be acquired is through a surrender of those rights by the pastoralist or their resumption by the Government. The native title rights in the land could be acquired through agreement (by an ILUA or an agreement of the kind referred to in 24MD(2A)) or by compulsory acquisition. This possibility is referred to in the note at the end of subsection 24MD(2). States may also acquire a pastoralists' rights (through surrender or resumption) in order to 'confer' those rights on Aboriginal people through creation of a living area or reserve, or in order to settle a native title claim by providing native title that is not simply a 'co-existing' right.

This amendment to section 24MD is in the same form as Government amendment (31) that was moved by the Government in the Senate in April.

Government amendments (H32), (H33) and (H34) - Schedule 1, item 9, page 73(lines 15 to 18) and (after line 18), after subsection (6) and (line 21)

The purpose of these amendments is to provide procedural rights to registered native title claimants, native title bodies corporate and representative bodies in relation to future acts that consist of any of the following:

- the compulsory acquisition of native title rights and interests for the purpose of enabling a non-Government party to provide an infrastructure facility;
- the compulsory acquisition of native title rights and interests in land or waters wholly within a town or city where the purpose of the acquisition is to confer rights on a non-Government party; or
- the grant of a mining lease for the sole purpose of permitting the construction of an infrastructure facility associated with mining.

Future acts of this kind are generally valid since they pass the freehold test, but are not subject to the right to negotiate (see subparagraph 26(1)(c)(i) amended by Government amendment (H46) and paragraph 26(1)(c)(iii)). The Government believes that it is not appropriate to subject future acts of this kind to the right to negotiate. They include the provision of infrastructure, such as roads, gas pipelines and the like. Such infrastructure is increasingly being provided by non-Government entities, especially in remote and regional Australia. It is appropriate however that in relation to acts of this kind, which may have the result of extinguishing native title altogether, native title holders be given procedural rights essentially the same as others but which ensure that the special nature of their rights can be taken into account.

Subsection 24MD(6) in the Bill currently provides that in relation to future acts that pass the freehold test but are not subject to the right to negotiate, or are not acts to which sections 26A, 26B or 26C apply (which already give native title holders special procedural rights in relation to the acts to which those sections apply), native title holders have the same procedural rights as a freeholder. New subsection 24MD(6A) gives the procedural rights of a freeholder in relation to future acts of this kind to native title holders *and* registered native title claimants for the area concerned.

In addition, new subsection 24MD(6B) provides that where a future act of this kind consists of, among other things, the compulsory acquisition of native title for the purpose of conferring rights or interests on a non-Government party (see paragraph 24MD(6B)(a)), the consequences set out in that subsection apply in addition to the procedural consequences set out in subsection 24MD(6A). The only compulsory acquisitions to which paragraph 24MD(6B)(a) applies are those for a third party that involve the provision of an infrastructure facility or that relate to land or waters wholly within a town or city (all other non-Government compulsory acquisitions are subject to the right to negotiate). A compulsory acquisition for the purpose of conferring rights on a local government body would not be caught by the expression 'persons other than the Commonwealth, the State or the Territory'.

New subsection 24MD(6B) will also apply to the grant of a mining lease for the sole purpose of the construction of an infrastructure facility associated with mining (paragraph 24MD(6B)(b)). The grant of a mining lease of this kind is exempt from the right to negotiate (see subparagraph 26(1)(c)(i) which is amended by Government amendment (H46)) but the consequences set out in new subsection 24MD(6B) will

apply to grants of this kind in addition to the procedural rights provided in subsection 26MD(6A). The sole purpose test applies to the grant of the right. The fact that an infrastructure facility may, when constructed, also provide services to the local community or others, will not prevent the relevant grant being for the sole purpose of constructing the infrastructure. However if the grant allows both mining and construction of infrastructure, it will not pass the sole purpose test.

The consequences set out in subsection 24MD(6B) are that:

- the Government party responsible for doing the compulsory acquisition or granting the mining lease must notify *all* registered native title claimants, native title bodies corporate and representative bodies for the area concerned that the act is to be done;
- each registered native title claimant and native title body corporate may object to the doing of the act, but only in so far as the act affects their registered native title rights and interests (ie those entered in the Register of Native Title Claims or the National Native Title Register), within 2 months of the notification and have those objections heard by an independent person or body if they so request;
- either the Government party (where the act is a compulsory acquisition) or otherwise the person who requested the act be done (eg a mining company) must consult each registered native title claimant and registered native title body corporate that objected to the doing of the act about ways of minimising the impact of the act on the registered native title rights and interests and, if relevant, about access to the area concerned by either party to the consultations, and about the way in which anything authorised by the act might be done;
- if an objection is pursued, the Commonwealth State or Territory must ensure that the objection is heard by an independent person or body; and
- if the independent person or body makes a determination, or recommendation (see new subsection 24MD(6C)), that the objection be upheld or makes a determination, or recommendation (see new subsection 24MD(6C)), involving conditions relating to native title rights and interests, the determination must be complied with unless the Minister of the Commonwealth, the State or Territory responsible for indigenous affairs is consulted, those consultations are taken into account, and it is in the interests of the Commonwealth, the State or Territory to do so. The concept of interests of the Commonwealth, the State or Territory is defined to include the social or economic benefit for the Commonwealth, the State or Territory (including of Aboriginal peoples and Torres Strait Islanders) and of the interests of the relevant region or locality (subsection 24MD(6C)). It will be for the relevant decision maker to decide what is in the interests of the Commonwealth, the State or Territory in a particular case.

Government amendment (H34) makes a consequential amendment to paragraph 24MD(7)(a) to reflect the new structure of subsections 24MD(6) and (6A).

Government amendment (H35) - Schedule 1, item 9, page 73 (after line 26), at the end of section 24MD

This amendment relates to subsection 24MD(6A) which is inserted by Government amendment (H33) and confers the procedural rights of a freeholder on native title holders and registered native title claimants in relation to future acts that pass the

freehold test but are *not* subject to the right to negotiate or acts to which sections 26A, 26B or 26C apply.

Where there has been no approved determination of native title it is difficult for Government parties or third persons to comply with procedural obligations that require notification or other things to be done in relation to native title holders because it is often difficult to identify with certainty all native title holders. Subsection 24MD(7) attempts to overcome this difficulty by saying that where because of subsection 24MD(6A) or any other law, native title holders have a right to be notified of an act and there has been no approved determination of native title, it will be sufficient to discharge that obligation if notice of the act is given to all representative bodies and registered native title claimants for the area concerned.

Government amendment (H35) similarly provides in relation to any *other* procedural right that requires something to be done in relation to native title holders. For example, if because of subsection 24MD(6A) a Government party is obliged to consult native title holders before an act is done about any objections the native title holders may have about the act and there has been no approved determination of native title, new subsection 24MD(8) will deem that obligation to be discharged if the Government party consults all registered native title claimants before the act is done. If there are no registered native title claimants in relation to the area, the obligation to do something in relation to native title holders is deemed to be discharged if all representative bodies for the area concerned are given an opportunity to comment on the act before it is done.

Government amendment (H36) - Schedule 1, item 9, page 74 (line 24)

This amendment to proposed subsection 24NA(3)(b) in the Bill makes the same change as is made to subsection 24MD(2) by amendment (H31) above. The amendment is in the same form as Government amendment (36) that was moved by the Government in the Senate in April.

Government amendment (H37) - Schedule 1, item 9, page 76 (line 8)

This amendment is to subsection 24NA(8) which confers upon native title holders, in relation to future acts that take place offshore, the same procedural rights that the holders of any corresponding offshore non-native title rights enjoy. This amendment extends those procedural rights to registered native title claimants (who may or may not be native title holders).

Government amendment (H38) - Schedule 1, item 9, page 76 (after line 26), at the end of section 24NA

This amendment relates to subsections 24NA(8) and (9) which deal with procedural rights for native title holders in relation to valid future acts that take place offshore.

Where there has been no approved determination of native title it is difficult for Government parties or third persons to comply with procedural obligations that require notification or other things to be done in relation to native title holders because it is often difficult to identify with certainty all native title holders. Subsection 24NA(9) will help overcome this difficulty by saying that where because of subsection 24NA(8) or any other law, native title holders have a right to be notified of an act and there has been no approved determination of native title, it will be sufficient to discharge that

obligation if notice of the act is given to all representative bodies and registered native title claimants for the area concerned.

Government amendment (H38) similarly provides in relation to any *other* procedural right that requires something to be done in relation to native title holders. For example, if because of the procedural rights conferred on other title holders, a Government party is obliged to consult native title holders before an act is done about any objections the native title holders may have about the act and there has been no approved determination of native title, new subsection 24NA(10) will deem that obligation to be discharged if the Government party consults with *all* registered native title claimants before the act is done. If there are no registered native title claimants in relation to the area, the obligation to do something in relation to native title holders is deemed to be discharged if all representative bodies for the area concerned are given an opportunity to comment on the act before it is done.

Right to negotiate

Government amendments (H39), (H40), (H41), (H42), (H43), (H44), (H45) and (H52) - Schedule 1, item 9, page 21 (line 2), page 60 (line 33), page 60 (after line 33), page 77 (lines 3 to 6), page 77 (before line 7), page 77 (before line 25), page 77 (line 26) and page 88 (after line 5)

The purpose of these amendments is to remove the renewal of mining leases from the scope of the right to negotiate unless the renewed lease is for a longer term than the original lease or confers upon the grantee rights that were not conferred by the original lease. Examples of mining lease renewals that would be subject to the right to negotiate include renewals that increase the area that can be mined under the earlier lease, and renewals that confer new rights to mine not included in the original lease.

As presently drafted, subsection 24ID(1) in the Bill in effect provides that renewals of this kind are valid if they are a 'permissible lease etc renewal' under section 24IC. Government amendment (H40) clarifies the operation of subsection 24ID(1) that renewals of this kind will only be valid if they comply with the right to negotiate if the right to negotiate otherwise applies. Government amendment (H41) inserts a note that refers to the kinds of mining lease renewals to which the right to negotiate will apply as explained above.

Government amendment (H44) is to section 26 which describes the acts to which the right to negotiate will apply. New subsection 26(1A) will, subject to the exclusions contained in subsection 26(2), apply the right to negotiate to 'permissible lease etc renewals' under section 24IC that:

- are done by the Commonwealth, a State or Territory; *and*
- consist of the renewal, re-grant, re-making or extension of the term of a right to mine.

However, an act of this kind will be then be *excluded* from the right to negotiate if it falls within one of the exclusions contained in subsection 26(2). In particular, the act will be excluded from the right to negotiate if it is a renewal to which subsection 26D(1) applies. Subsection 26D(1) is amended by Government amendment (H52).

Subsection 26D(1) presently excludes the renewal, re-grant, re-making or extension of the term of an earlier right to mine if:

- the earlier right to mine was validly created on or before the date of the *Wik* decision or complied with the right to negotiate; and
- the renewed etc right to mine does not cover a greater area than that covered by the earlier right to mine.

The purpose of Government amendment (H52) is to impose further conditions to be satisfied in order for the creation of a right to mine to be exempt from the right to negotiate under subsection 26D(1). The additional conditions are that:

- the term of the renewed mining lease is not longer than the term of the earlier mining lease; and
- the renewed mining lease does not confer rights that were not conferred by the earlier mining lease.

This will ensure that subsection 26D(1) *only* exempts from the right to negotiate those renewals etc of mining leases that confer the same or lesser rights as the existing mining lease.

Government amendments (H39), (H42), (H43) and (H45) make minor consequential amendments to sections 24AA, 24ID, 25 and 26.

Government amendment (H46) and (H47)- Schedule 1, item 9, page 78 (line 5) and (after line 5), at the end of subparagraph (I)

Government amendment (H46) is to paragraph 26(1)(c)(i) which, subject to the exclusions contained in subsection 26(2), provides that the creation of a right to mine is subject to the right to negotiate. The amendment removes the creation of a right to mine from the operation of that paragraph (and thereby from the right to negotiate) if it is one created for the *sole purpose* of constructing an infrastructure facility (which is defined in section 253) associated with mining. The words 'sole purpose' have been used to make it clear that the creation of the right to mine with which the infrastructure facility is associated is *not* removed from the right to negotiate by this amendment. The fact that an infrastructure facility may, when constructed, also provide services to the local community, will not prevent the relevant grant being for the sole purpose of constructing the infrastructure.

This amendment will remove an anomaly in the Bill namely, that the grant of a mining lease that permits the construction of an infrastructure facility associated with mining must go through the right to negotiate but a compulsory acquisition for the purpose of constructing an infrastructure facility associated with mining need not. Grants of this kind, like compulsory acquisitions that are for the purpose of enabling a non-Government party to construct an infrastructure facility, will be subject to the additional procedural rights set out in subsection 24MD(6B) (see Government amendment H33). This is made clear in the note inserted by Government amendment (H47).

Government amendment (H48) - Schedule 1, item 9, page 78 (lines 8 to 15)

This amendment replaces subparagraph 26(1)(c)(iii) which currently subjects certain compulsory acquisitions of native title to the right to negotiate *if* they satisfy certain conditions. The replacement subparagraph 26(1)(c)(iii) will subject certain

compulsory acquisitions of native title to the right to negotiate *unless* they satisfy certain conditions. The conditions are that either:

- the purpose of the acquisition is to confer rights on a Government party *and* the Government party makes a written public statement to that effect before the acquisition takes place; *or*
- the purpose of the acquisition is to provide an infrastructure facility (whether or not the facility is being provided by a Government or non-Government entity).

The provision has been restructured so as to *exclude* acquisitions which confer rights on Government parties (rather than *include* some acquisitions which confer rights on persons other than the Government party); this structural change is simply to assist understanding of the provision.

The requirement in subparagraph 26(1)(c)(iii)(A) that there be a statement in writing has been added by this amendment so that any relevant native title holders will be informed that a compulsory acquisition (other than one involving the provision of an infrastructure facility) is to take place without going through the right to negotiate. Government party includes local governments.

Government amendment (H49) - Schedule 1, item 9, page 79 (lines 1 and 2)

This amendment is to subsection 26(2) which describes a range of acts to which the right to negotiate does *not* apply. The amendment replaces paragraph 26(2)(f) which exempts acts that relate solely to land or waters wholly within a town or city from the right to negotiate. The purpose of this amendment is to *reapply* the right to negotiate to the creation or variation of rights to mine in towns and cities but *remove* the right to negotiate from compulsory acquisitions that take place in a town or city. Where mining takes place in a town or city the provisions under section 43A described below will apply if the State or Territory has an alternative regime in place.

Government amendment (H50) - Schedule 1, item 9, page 79 (line 22)

This amendment is to subsection 26A(3) which sets out the second condition to be satisfied in order for the Commonwealth Minister to make a determination that an act or class of acts is an 'approved exploration etc act'. The purpose of the amendment is to require the Commonwealth Minister to be *satisfied* that the act or acts are unlikely to have a significant impact on the land or waters concerned. Subsection 26A(3) as presently drafted merely requires the Commonwealth to *consider* that the act or acts are unlikely to have a significant impact on the land or waters concerned.

Government amendment (H51) - Schedule 1, item 9, page 84 (line 9)

This amendment is to paragraph 26B(8)(a) and clarifies that the protection and avoidance of sites of significance will be one of the matters in relation to which consultation will be required under paragraph 26B(7)(c) if the Commonwealth Minister makes a determination under section 26B in relation to approved gold or tin mining acts. This amendment will also ensure that the wording of paragraph 26B(8)(a) is consistent with the wording of paragraph 26A(7)(a) which was amended by Government amendment (39) made by the Senate in 1998.

Government amendment (H53) - Schedule 1, item 9, page 88 (lines 12 to 19)

This amendment is to subsection 26D(2) which *excludes* from the right to negotiate certain acts (called 'later acts') that were contemplated and provided for in an

agreement or determination that arose out of an earlier right to negotiate process about a right to explore or prospect. The purpose of this amendment is to clarify the range of later acts to which subsection 26D(2) applies.

The amendment replaces paragraph (b) of subsection 26D(2) with the effect that later acts contemplated in determinations made 36A (ie via a ministerial intervention) or declarations made under section 42 (ie via a ministerial override) are *not* excluded from the right to negotiate. This leaves subsection 26D(2) *only* applying to acts that were contemplated by the parties in an earlier right to negotiate agreement or by the arbitral body in a determination.

The amendment also replaces paragraph (c) of subsection 26D(2) to add a new requirement that the right to negotiate agreement or arbitral body determination referred to in paragraph 26D(2)(b) contains a statement to the effect that if the later act were done, the right to negotiate would not apply to the later act. This will afford greater protection to native title holders by ensuring that the right to negotiate will not be removed from a later act unless the prior right to negotiate agreement or determination expressly says so.

The requirement that any conditions contained in the prior right to negotiate agreement or arbitral body determination have been complied with by the non-native title parties remains (see new subparagraph 26D(2)(c)(ii) and paragraph 26D(2)(d)).

Government amendment (H54) - Schedule 1, item 9, page 99 (after line 23), at the end of section 35

This amendment to section 35 in the Bill makes it clear that negotiations for acts covered by the right to negotiate may continue even after one of the parties has applied to the arbitral body for a determination. The fact that negotiations are continuing should not delay the determination by the arbitral body. The parties are free to reach an agreement until such time as a determination is made under section 36A or 38. If they do reach agreement under paragraph 31(1)(b), the application for the determination is taken to have been withdrawn since an arbitral body determination cannot be made where there is an agreement which completely satisfies paragraph 31(1)(b).

Matters which have been agreed between the negotiating parties, but which do not completely satisfy paragraph 31(1)(b), can be disclosed to the arbitral body, which must take them into account under subsection 39(4) if the negotiating parties consent. This is the same amendment as moved by the Government in the Senate in April 1998 except that it does not contain a cross-reference to section 34A, a section which will now be removed from the Bill.

Government amendment (H55) - Schedule 1, item 9, page 99 (line 28) to page 100 (line 2)

Under subsection 31(1), all parties to the negotiation must negotiate in good faith. This amendment replaces subsection 36(2) and provides that the arbitral body may not make a determination in relation to a future act where it is satisfied, as a result of information provided by a party to the negotiation, that any party (other than a native title party) did not negotiate in good faith with the native title party in relation to the future act.

The affect of the amendment is that the arbitral body will only have to consider whether it has jurisdiction to make a determination if one of the parties raises the issue

of whether one of the other parties did not negotiate in good faith. The exclusion of native title parties from this ensures that the arbitral body cannot be deprived of jurisdiction to make a determination just because the native title party (or one of the native title parties) failed to negotiate in good faith.

The note to the subsection indicates that it would be possible for a further application to be made under section 35 for a determination in relation to the particular future act. This makes it clear that failure to negotiate in good faith will not mean that the whole process must begin again, the process is merely delayed until all parties have genuinely negotiated.

Government amendments (H56), (H57) and (H58) - Schedule 1, item 9, page 100 (lines 5, 11 and 19)

These amendments to section 36 relate to the timing of arbitral determinations and provide that the NNTT must make a determination in relation to a future act within 6 months of receiving an application under section 35 and, if it has not, it must provide reasons to the Commonwealth Minister for not doing so.

When the doing of the future act has not been resolved (either by agreement or arbitral body determination) after 4 months of the section 35 application, the relevant Minister may give written notice to the body requesting a speedy resolution of the determination. The notice may specify a period, but this must be longer than 4 months after receipt by the arbitral body of the application under section 35.

Government amendment (H59) - Schedule 1, item 9, page 101 (after line 2), after subsection 36A(1)

This amendment inserts subsection 36A(1A) which provides that, in the case where an approved State/Territory native title regime is in place, a State/Territory Minister may only make a determination under section 36A where there has been a delay in the making of a determination by the arbitral body about a future act after he or she has consulted the Commonwealth Minister about the determination. The amendment can help ensure that consistent national standards will be applied when future act determinations under section 36A are made.

Government amendments (H60) and (H61) - Schedule 1, item 9, page 101 (line 25) and page 101 (line 26) to page 102 (line 6)

These amendments to section 36B have the effect of ensuring that all negotiation parties and the arbitral body must be notified by the relevant Minister before a section 36A determination is made. They are consequential on the omission of section 34A.

The notice to the arbitral body will require it to give the Minister and each negotiation party a summary of material presented to the arbitral body in the course of its decision making process by a specified day.

Government amendment (H62) - Schedule 1, item 9, page 103 (after line 12), at the end of paragraph (6)(a)

This amendment inserts subparagraph 36B(6)(a)(iii) which provides that when making a determination under section 36A a State or Territory Minister must take into account any consultations with the Commonwealth Minister under subsection 36A(1A) about the making of the determination.

Government amendment (H63) - Schedule 1, item 9, page 105 (after line 27), after subsection (1)

This amendment adds two subsections to section 38, which outlines the kinds of arbitral body determinations. Subsections 38(1A) and (1B) provide for a fourth kind of arbitral body determination, namely one which provides, where the parties agree, for particular matters to be the subject of further negotiations or determined in a specified manner. These must be matters which are not reasonably capable of being determined at the time the determination is made and are not directly relevant to the doing of the act. If the matter is to be determined by arbitration otherwise than by the arbitral body, the parties must agree to the manner of determination or, if they cannot agree, the matter must be determined by the arbitral body.

The example in the note to subsection 38(1A) relates to the determination by an arbitral body that a mining lease may be granted subject to site clearance procedures to be determined by a third person. The example demonstrates that this provision will permit other State and Territory approval processes to run in parallel with native title approval processes.

These provisions will only apply where all the parties to the negotiation agree.

Government amendment (H64) - Schedule 1, item 9, page 106 (lines 30 to 33)

This amendment replaces paragraphs 39(1)(c) and (d) in the Bill with new paragraph 39(1)(c) that requires that, in making a determination about whether or not a future act is to proceed and on what conditions, the arbitral body must have regard to the economic or other significance of the act to:

- Australia and the State/Territory;
- the regional area (there may be employment, local council or other regional issues which are of relevance); and
- local Aboriginal and Torres Strait Islander people (not all of whom may be native title holders).

The amendment ensures that the interests of others living, or with responsibilities, in the area who may be impacted on by the act or how it is done, can be taken into account by the arbitral body.

Government amendment (H65) and (H73) - Schedule 1, item 9, page 113 (line 16) to page 116 (line 22) and Schedule 5, item 11, page 352 (line 8)

This amendment replaces section 43A in the Bill. Like section 43A in the Bill, new section 43A contains a procedure by which a State or Territory can legislate to replace the right to negotiate on certain kinds of tenures with its own scheme, and that scheme will have effect instead of the right to negotiate if the Commonwealth Minister has given his or her approval to the scheme.

If the Commonwealth Minister determines in writing that the alternative provisions of a State or Territory comply with the requirements set out in subsections 43A(4), (6) and (7), those provisions, and not the right to negotiate, will apply to acts attributable to the State or Territory that take place over certain kinds of tenures (subsection 43A(1)). A determination of this kind is a disallowable instrument. The alternative provisions of the State or Territory will apply for as long as the Commonwealth Minister's determination is in force.

The State or Territory thus retains a broad discretion in relation to the detail of their legislative provisions. The criteria set out in section 43A which must be met in order for the Commonwealth Minister to make a determination under the section generally reflect what States and Territories currently provide to other title holders in relation to mining and compulsory acquisitions.

What areas can be subject to an alternative State or Territory regime?

A State or Territory may make alternative provisions that apply in relation to acts that relate *to any extent* to land that is an 'alternative provision area'. The inclusion of the words 'to any extent' in subparagraph 43A(1)(a)(ii) means that the alternative provisions of a State or Territory will apply to an act to which the right to negotiate would have otherwise applied if the act takes place over land that is wholly or partly an 'alternative provision area' (although see subsection 43A(10) discussed below).

Subsection 43A(2) defines the term 'alternative provision area' as land or waters that:

- *at the time the act is done* is subject to a freehold estate or a lease, *and* over which all native title has not been extinguished; *or*
- *was at any time before the act is done* subject to a freehold estate or lease, *and* over which native title has not been extinguished; *or*
- *is, or was before the act is done,* subject to a reservation etc by the Crown in right of the State or Territory under which the land was to be used for a particular purpose and *is* in use for that or a similar purpose; *or*
- *at the time the act is done* is wholly within a town or city as defined in section 251C.

The alternative provisions can therefore apply to land covered by both current and former pastoral leases and land covered by current or former reservations. It also covers land within a town or city but only in relation to acts which are not compulsory acquisitions (eg the creation of a right to mine). Compulsory acquisitions within a town or city are covered by section 24MD (see Government amendment (H33)).

Exclusion of certain compulsory acquisitions

The alternative provisions do not apply to a compulsory acquisition that is for the purpose of conferring rights on a non-Government party and is not for the purpose of constructing an infrastructure facility (namely, compulsory acquisitions to which the right to negotiate applies) if the acquisition involves acquiring native title to land or waters that includes *both* an alternative provision area and an area that is *not* an alternative provision area (subsection 43A(10)). In such cases, the acquisition must go through the right to negotiate.

Notification requirements to be complied with prior to the making of a determination

Subsection 43A(3) requires that, before the Commonwealth Minister makes a determination under section 43A, he or she must:

- notify all representative bodies for the land or waters in relation to which the alternative regime is to apply of the proposed determination; and
- invite them to make submissions about the proposed determination; and
- consider any submissions made in response to that invitation.

What must the Commonwealth Minister be satisfied about before he or she makes a determination under section 43A?

The Commonwealth Minister may only make a determination under section 43A if he or she is of the opinion that the alternative provisions comply with the matters set out in subsections 43A(4) and (6) and that the requirements of subsection 43A(7) are complied with. These are discussed below.

1. Notification and objections

- The alternative provisions must contain procedures for notifying all registered native title claimants, registered native title bodies corporate and representative bodies for the area concerned that an act to which the alternative provisions apply is to be done (paragraph 43A(4)(a)).
- The alternative provisions must give each registered native title claimant and each native title body corporate a right to object, within a specified period after notification, to the doing of the act, but only in so far as the act affects their registered native title rights and interests (paragraph 43A(4)(b)). (Registered native title rights and interests are those which are entered on the Register of Native Title Claims or on the National Native Title Register.)

2. Consultation and mediation

- The alternative provisions must require that, in relation to acts involving a compulsory acquisition, consultation take place between the objectors and the State or Territory (paragraph 43A(4)(c)). The consultations are to address ways of minimising the impact of the act on native title in relation to the land or waters concerned. The alternative provision must also make provision in relation to mediation.
- The alternative provisions must require that, in relation to acts other than compulsory acquisitions (eg the creation or variation of a right to mine), consultation take place between the objectors and the person who requested or applied for the act to be done (paragraph 43A(4)(d)). The consultations are to address ways of minimising the impact of the act on native title in relation to the land or waters concerned, access to the land or waters, and the way in which things authorised by the act are to be done. The alternative provision must also make provision in relation to mediation.

3. Hearing by independent person or body

- The alternative provisions must provide for any objections that are made by a registered native title claimant or native title body corporate to be heard by an independent person or body (paragraph 43A(4)(e)).
- The alternative provisions must provide that *if* an independent person or body makes a determination, or recommendation (see subsection 43A(5)), upholding the objection or makes a determination, or recommendation (see subsection 43A(5)), that contains conditions about the doing of the act that relate to native title, the determination must be complied with unless the Minister of the State or Territory responsible for indigenous affairs is consulted, those consultations are taken into account, and it is in the interests of the State or Territory not to comply with the determination (paragraph 43A(4)(g). The concept of interests of the State or

Territory will be defined to include the social or economic benefit for the State or Territory (including of Aboriginal peoples and Torres Strait Islanders - whether or not they are native title holders) and of the interests of the relevant region or locality (subsection 43A(5)). It will be for the relevant decision maker to decide what is in the interests of the State or Territory in a particular case.

4. Judicial review

- The alternative provisions must provide for judicial review of the decision to do the act (paragraph 43A(4)(f)). This is review of the legality of the decision, as traditionally undertaken by the courts. The review will be in State or Territory courts.

5. Procedural rights of a freeholder

- In relation to compulsory acquisitions, the alternative provisions must confer on registered native title claimants and native title bodies corporate procedural rights that are no less favourable than those to which they would have been entitled had they instead held freehold title (paragraph 43A(4)(h).

6. Compensation

- The alternative provisions must provide for compensation to be payable for the effect of the act on native title (subsection 43A(6)).
- The alternative provisions must provide for any dispute about compensation to be determined by an independent person or body (subsection 43A(6)).

7. Heritage protection legislation

- A law of the Commonwealth, the State or Territory must provide in relation to the preservation and protection of areas or sites that may be of particular significance to indigenous peoples in accordance with their traditions (subsection 43A(7)).

Discretion left to the States and Territories

Notwithstanding that alternative provisions must, in the Commonwealth Minister's opinion, comply with the requirements set out in subsections 43A(4), (6) and (7), the States and Territories have significant discretion in designing a scheme under section 43A. For example, it is left to the States and Territories to determine how notice is to be given; how, when and by which independent person or body objections are to be heard; and whether the independent person or body is required to make determinations or impose conditions in relation to the doing of the act. It is also left to the States and Territories to determine whether different alternative provisions should apply in relation to different kinds of alternative provision areas (subsection 43A(8)).

Revocation of determinations

If at any time the alternative provisions are amended so that they do not comply with paragraph 43A(1)(b) (ie the criteria in subsections 43A(4), (6) and (7)), subsection 43A(9) sets out what action the Commonwealth Minister must take.

Under paragraph 43A(9)(a), the Commonwealth Minister is obliged to notify the relevant State or Territory Minister if he or she is no longer of the opinion that the alternative right to negotiate provisions as amended comply with subsections 43A(4), (6) and (7).

If at the end of 90 days after doing so, the Commonwealth Minister is still not of the opinion that the amended alternative provisions comply with subsections 43A(4), (6) and (7), he or she must revoke the determination that was made under paragraph 43A(1)(b) *unless* the requirements in paragraph 43A(9)(c) are met. The revocation must be in writing.

Paragraph 43A(9)(c) provides that if, at the end of 90 days after notifying the State or Territory Minister in accordance with paragraph 43A(9)(a), the amended alternative provisions do not, in the Commonwealth Minister's opinion, comply with subsections 43A(4), (6) and (7) *but* the Commonwealth Minister is satisfied that the State or Territory Minister is using his or her best endeavours to ensure that the alternative provisions will comply, the Commonwealth Minister may determine an extension of time to enable compliance. The extension determination must be given before the end of 90 days after notification was given under paragraph 43A(9)(a). The extension determination must be in writing and is a disallowable instrument under section 214. If at the end of the extended period, the Commonwealth Minister is still not of the opinion that the amended alternative provisions comply with the criteria in the section, the determination under paragraph 43A(1)(b) *must* be revoked.

Paragraph 43A(9)(c) will require a State or Territory to act expeditiously to ensure that its regime complies with the Commonwealth's requirements in subsections 43A(4), (6) and (7), but also recognises that, because of delays in State or Territory Parliamentary processes, it may not always be possible to amend an alternative regime within 90 days of notice.

Transitional arrangements

The regulations may prescribe transitional arrangements, including any modifications of the NTA, that are necessary as a result of the making, amendment or revocation of a determination under section 43A (subsection 43A(11)).

Government amendment (H73) is a consequential amendment to the note to Schedule 5, subitem 11(13). The note will now refer to regulations made under subsection 43A(11) not under subsection 43A(8).

Government amendment (H66) and (H67) - Schedule 1, item 9, page 116 (lines 27 to 29) and page 117 (line 4)

These are consequential amendments to section 43B which are required as a result of amending the terminology in section 43A from 'leased or reserved areas' to 'alternative provision areas' (see government amendment (H65). These amendments do not change the substantive effect of section 43B.

Government amendments (H68) and (H69) - Schedule 1, item 34, page 133 (lines 8 to 10) and (line 16)

These amendments are to item 34, Schedule 1, in relation to section 214 concerning disallowable instruments. The purpose of the amendments is to make the following items disallowable instruments:

- a determination by the Commonwealth Minister under paragraph 24JB(7)(a) of the way in which notification is to take place concerning national, State and Territory park management plans;

- a determination by the Commonwealth Minister under subparagraph 43(3)(c)(ii) granting an extension of time to enable compliance by a State or Territory alternative regime with the requirements in subsection 43(2);
- a determination by the Commonwealth Minister under subparagraph 43A(9)(c)(ii) to grant an extension of time to enable compliance by a State or Territory alternative regime with the requirements of subsections 43A(4), 43A(6) and (43A(7); and
- a determination by the Commonwealth Minister under paragraphs 43A(9)(b) or 43A(9)(c) to revoke a determination made under paragraph 43A(1)(b).

Government amendment (H70) - Schedule 1, item 42, page 138 (lines 16 to 18)

This amendment replaces item 42 in the Bill which deals with one of the criteria for determining whether the future act (such as the grant of an exploration lease or licence) attracts the expedited procedure. The effect of replacement paragraph 237(a) is that the procedure can only apply if the grant of the lease or licence is not likely to interfere directly with the carrying on of the community or social activities of native title holders.

Government amendment (H71) - Schedule 1, item 50, page 143 (lines 11 to 20)

This amends proposed section 251C in the Bill, which defines the term 'towns and cities' (an expression used in new Division 3 Subdivision P, paragraph 26(2)(f) which deals with the right to negotiate).

The amendment provides that an area in the Northern Territory will only be a 'town or city' if at 23 December 1996 it would have fallen within one of the descriptions contained in paragraphs 251C(3)(a), (b) or (c).

Proposed subsection 251C(3) as it appears in the Bill incorrectly applies the 23 December 1996 limitation to only those areas that fall within the description contained in paragraph (a). This was a drafting error. The amendment ensures that the 23 December 1996 limitation qualifies paragraphs (a), (b) and (c) of subsection 251C(3). Paragraph 251C(a) is also changed to remove 4 'towns' which were gazetted, but were not in fact developed. This is the same amendment as was proposed by the Government in April 1998 but which was made irrelevant by a Senate amendment which removed proposed section 251C entirely.

Government amendment (H72) - Schedule 2, item 71, page 212 (line 25)

This amendment is consequential upon the omission of section 34A.

Statutory access rights

Government amendment (H74) - Schedule 1, item 9, page 120 (line 5), at the end of subsection 44C(1)

This amendment is to section 44C, which deals with the suspension of enforcement of native title rights for the duration of any statutory access rights. Statutory access rights can be exercised where there is a registered claim, and various other conditions are met. The claim will be progressing through the Federal Court or a recognised State/Territory body. This amendment makes it clear that the claimants can seek to enforce their native title rights in the Federal Court or such a body, even if a member

of the claim group has statutory access rights. But they or other persons cannot enforce native title rights in relation to the pastoral lease in other courts or tribunals. If other persons wish to enforce their native title rights, they must do so in the claim proceedings in the Federal Court or recognised body. The Government believes that where the pastoral lessee is already subject to a claim, and required to provide statutory access rights, issues should be dealt with in these proceedings, not other proceedings in other courts.

Even though a registered claimant does not have statutory access rights, the right to negotiate will still be available, where relevant. The operation of section 44C does not have any impact on the availability of the right to negotiate for registered claimants.

Compensation

Government amendment (H75) and (H76) - Schedule 2, item 102, page 223 (before line 10), before paragraph (b) and (after line 10), after subsection (2A)

These amendments are to section 18AB of the *Federal Court Act 1976* and deal with the delegation of the Federal Court's powers to Judicial Registrars of the Federal Court. The purpose of these amendments is to provide a speedy and cost-effective mechanism for the resolution of small compensation claims.

Amendment (H75) will enable the Judges of the Federal Court to make Rules of Court delegating to Judicial Registrars the power to hear and determine an application for compensation made to the Federal Court under subsection 50(2) of the NTA where the amount of compensation claimed is less than $100 000 or some other prescribed amount. Of course, a determination of compensation cannot be made in the absence of a determination of native title. Accordingly, a Judicial Registrar can *only* exercise the power to hear and determine compensation claims if an approved determination of native title has been made in relation to the area concerned which will, under the amended Act, be made by a Judge. The power of delegation in relation to compensation seeks to comply with the requirements set out in the decision of the High Court in *Harris v Caladine* (1991) 172 CLR 84.

Amendment (H76) provides that if Rules of Court to this effect are made, the Judges of the Federal Court may give such directions as they consider appropriate for the purpose of ensuring that compensation applications are determined as expeditiously and cheaply as possible and without unnecessary formality. New subsection 18AB(2C) provides some guidance on the kind of matters that could be dealt with in directions made under new subsection 18AB(2B).

Claims process and sunset clause

Government amendment (H77) - Schedule 5, item 18, page 355 (lines 14 to 17)

This item removes a transitional arrangement in the Bill in relation to the sunset clause which is now redundant.

Representative bodies

Government amendment (H78) - Schedule 3, item 11, page 238 (lines 3 to 23)

This amendment to proposed subsection 203FC(1) in the Bill clarifies the documents which may be subject to a direction by the Minister where a replacement representative body takes over in an area. Paragraph 203FC(1)(b) allows the Minister to make directions requiring the former representative body to give the replacement representative body access to any documents, the documents themselves, or copies of the documents, provided they are reasonably necessary for the replacement body to exercise its powers and perform its functions as a representative body. The making of such copies would be authorised by section 183 of the *Copyright Act 1968*.

The Minister must not so direct a former representative body to allow access, provide documents or provide copies of documents in relation to a claim for native title or compensation unless the claimants have sought assistance in relation to the claim from the replacement body. The Minister must not so direct a former representative body to allow access, provide documents or provide copies of documents in relation to the rights of determined native title holders unless the holders have sought assistance in relation to the claim from the replacement body.

This amendment is in the same form as Government amendment (78) that was moved by the Government in the Senate in April.

Government amendment (H79) - Schedule 3, item 11, page 239 (after line 10), after section 203FC

This amendment is to section 203FCA in the Bill which obliges representative bodies that are dealing with traditional materials or information contained in traditional materials to comply with the wishes of the custodians of that material. Doubt has been raised as to whether, as presently drafted, this obligation applies to a body that has been replaced as the representative body for an area but which continues to deal with traditional materials in the course of complying with directions made under section 203FC for the transfer of documents and records to the replacement representative body. The amendment will ensure that the obligation to deal with traditional materials in accordance with the wishes of its custodians extends to a body that has ceased to be a representative body for an area but continues to deal with traditional materials because of directions made under section 203FC.

Registration test

Government amendment (H80) - Schedule 2, page 200 (after line 9), after item 60

This amendment inserts new item 60A in Schedule 2 and amends section 186 which deals with the contents of the Register of Native Title Claims. The effect of new paragraph 186(1)(g) is that the Register must contain a description of those native title rights and interests that the Native Title Registrar, or person applying an equivalent test in a recognised State/Territory body, considers prima facie can be established.

This is consequential to subsection 190B(6) which permits the registration of some, but not all, claims contained in an application. It is important that other negotiating parties, can readily access information about those registered claims which will be the subject of their negotiations. Due to the operation of subsection 190B(6), this information may not be apparent from the application.

This amendment is in the same form as Government amendment (70) that was moved by the Government in the Senate in April.

Government amendment (H81) - Schedule 2, item 63, page 202 (after line 3), after subsection (3)

This amendment inserts subsection 190(3A) which applies in the case when a description of some but not all of the native title rights and interests in the claim in an application (or an amended application) have been included in the Register of Native Title Claims on the basis that they have prima facie been established. The amendment permits the Registrar to reconsider the application if the applicant provides further information in relation to particular native title rights and interests which, if it had been available at the time the original registration decision was made, would have enabled them to be included in the Register.

Government amendment (H82) - Schedule 2, item 63, page 202 (after line 29), at the end of subsection (1)

This amendment inserts a note to subsection 190A(1) which explains what happens where an application is amended after the claim has already been accepted for registration. The Registrar must consider the claim and, if as a result, further claims are accepted under section 190A, the Register of Native Title Claims will be amended to reflect this.

Government amendment (H83) - Schedule 2, item 63, page 205 (line 22) to page 206 (line 28)

This amendment affects section 190B in the Bill which lists the registration test criteria for dealing with the merits of a claim. The amendment replaces proposed subsections 190B(5) to (10) with new subsections (5) to (9) and is designed to ensure that only credible, well research claims which are likely to be established can be registered.

New subsection (5) concerns the factual basis for the native title claim. It requires that the Registrar must be satisfied that the factual basis for the claim is sufficient to support the assertions upon which the native title claim is based, including:

- the association of the native title claim group and its ancestors with the claim area; and
- the existence of traditional laws or customs observed by the claim group from which the native title derives; and
- the continued holding of the native title in accordance with those laws and customs.

These matters are intended to reflect the elements of native title under the common law as outlined in the High Court's *Mabo (No. 2)* decision.

New subsection (6) contains the 'prima facie' test and requires that the Registrar be satisfied that at least some of the native title rights and interests which are claimed can, on their face, be made out. This criterion will prevent the registration of claims for native title rights and interests which obviously have no prospects. The note at the end of subsection (6) explains that only details of the claimed rights and interests which have satisfied the 'prima facie' test can be entered on the Register of Native Title

Claims. The requirement to negotiate in good faith in the right to negotiate process only applies in relation to these registered rights, and any determination by the arbitral body should only address these registered rights.

New subsection (7) explains the 'physical connection' requirement. The requirement can be satisfied in either of two ways. The first way is that the Registrar is satisfied that at least one member of the claim group has or had a traditional physical connection with any part of the claim area. The second way is that at least one member of the claim group used to have a traditional physical connection with any part of the claim area, and would ordinarily still have such a connection were it not for some action by the lessee or the lessee's agent. This second way of satisfying the criterion will not apply where the access was discontinued because an interest in the area was granted or conferred.

New subsection (8) is the same as proposed subsection 190B(8) in the Bill. It prevents registration of claims where the application documents show or the Registrar knows that the application could not be made because of section 61A. The effect of the subsection is to prevent the registration of claims:

- over areas which are the subject of a previous determination of native title;
- over areas which are covered by a previous exclusive possession act where extinguishment has been confirmed; or
- for exclusive possession over areas which are covered by a previous non-exclusive possession act whose effect has been confirmed.

New subsection (9) prevents registration of claims where the application documents show or the Registrar knows that the claim covers minerals, petroleum or gas which are wholly owned by the Crown, or is a claim for exclusive possession of offshore areas. New subsection (9) also prevents the registration of claims where native title has been otherwise extinguished, except where sections 47, 47A or 47B would apply. Those provisions permit the historical extinguishment of native title to be ignored in the special circumstances set out.

Apart from a minor change in wording to subparagraph 190(7)(b)(iii), this amendment is in the same form as Government amendment (73) that was moved by the Government in the Senate in April.

Government amendment (H84) - Schedule 2, item 63, page 208 (after line 29), after subsection (1)

This amendment inserts subsection 190D(1A) which deals with the situation where the only reason that the Registrar has not registered a claim is the lack of traditional physical connection by any member of the claim group to the area claimed. The amendment provides that the Registrar must inform the applicant:

- of the right to apply to the Federal Court for a review of the his/her decision; and
- that, if the Federal Court is satisfied about the matters in paragraphs 190D(4)(a) and (4)(b), the Court can order the Registrar to accept the claim for registration (see Government amendment (H85)).

Government amendment (H85) - Schedule 2, item 63, page 209 (after line 7), at the end of section 190D

This amendment inserts subsections 190D(4) and (5). Subsection 190D(4) empowers the Federal Court to order that the Registrar accept a claim for registration:

- where the only reason for non-registration was lack of a traditional physical connection by a member of the claim group;
- where the Court is satisfied that, although no living member of the native title claim group has had physical access to the claim area, a deceased parent did have such physical access and would have continued that access but for government action or by a lessee or his or her agent; and
- where the Court is satisfied that prima facie some of the rights and interests claimed in the application can be established.

If traditional physical connection by the deceased parent was prevented because the government gave a third party an interest in the land or waters, subsection 190D(4) will not apply.

If the Court is satisfied about the matters in paragraphs 190D(4)(a) and (4)(b) the Court may order the Registrar to register the claim and the Registrar will then enter a description of the rights and interests in the claim which prima facie can be established in the Register of Native Title Claims. This is a different outcome to other applications to the Court for a review of the Registrar's decision. Where applicants seek a review of the Registrar's decision on grounds other than those set out in subsection 190D(1A), the Federal Court can order the Registrar to review a decision not to register a claim, however, the Registrar is left with a discretion not to register as a result of the review.

In addition, subsection 190D(5) provides that the Court must give parties to the native title determination application (under section 84) an opportunity to be heard about the making of a order under subsection 190D(4). This would allow the relevant State or Territory government to address the Court on the matters on which it must be satisfied under the subsection 190D(4).

Government amendment (H86) - Schedule 5, item 11, page 348 (lines 8 and 9)

This amendment to subitem 11(4) is consequential on the insertion of subsection 23B(9C). The effect of the amended transitional provision is that if the native title determination application was made before **27 June 1996** in relation to land subject to a freehold or to any form of leasehold estate (including tenures described in 23B(9C) and non-exclusive agricultural and non-exclusive pastoral leases), the Registrar must use his or her best endeavours to consider the application under the new section 190A by the end of one year after commencement of the new Act (or as soon as reasonably practicable afterwards).

Miscellaneous

Government amendment (H87) - Schedule 2, page 149 (after line 10), after item 18

This amendment inserts *item 18A* into Schedule 2, adding section 60AA. The purpose of the amendment is to make arrangements so that the Meriam people, who were the

subject of the High Court's *Mabo (No. 2)* declaration, can register a native title body corporate to manage their native title affairs and thereby obtain the statutory advantage of that status, for example in relation to Indigenous Land Use Agreements (see Subdivision B of Division 2).

Under the current Act, registration of native title bodies corporate can only occur where the determination of native title occurs under the processes of the NTA or an approved alternate State/Territory regime. This has the effect of preventing the Meriam people from having a registered native title body corporate, as their native title was recognised by the High Court on 3 June 1992 which was prior to the NTA.

The amendment also ensures that the *Native Title (Prescribed Body Corporate) Regulations 1994*, which apply to other registered native title bodies corporate, apply to the registered Meriam native title body corporate.

Government amendment (H88) - Schedule 2, page 210 (after line 11), after item 70

This amendment inserts items 70A and 70B dealing with the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund.

Item 70A removes the time limitation under this subsection requiring the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (PJC) to inquire and report on a number of matters within 2 years of the commencement of the *Native Title Act 1993*. The amendment ensures that the PJC is able to report on the matters under paragraph 206(d) at any time in the life of the Committee.

Item 70B amends the existing 5 year sunset clause for the PJC to enable it to operate for an additional 5 years. The original 5 year sunset clause ran from the date the PJC was first appointed (23 March 1994) and with the additional 5 years the PJC will now cease operation on 23 March 2004.

Provisions establishing the PJC were included by the Senate in the Native Title Bill in December 1993 to ensure Parliamentary oversight of the implementation and operation of the Act. The operation of the PJC was limited by a sunset provision of five years on the assumption that any 'bugs and flaws' in the Act would have been identified by early 1999 and the implementation phase completed. This assumption can now be seen as overly optimistic. It is arguable that only over the next few years will sufficient experience with the operation of the Native Title Act have been gained for the PJC to make the inquiries it has been given a statutory obligation to undertake.

1996-97-98

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIVE TITLE AMENDMENT BILL 1997 [NO. 2]

SCHEDULE OF THE AMENDMENTS MADE BY THE SENATE TO WHICH THE HOUSE OF REPRESENTATIVES HAS AGREED AND DISAGREED TOGETHER WITH THE SCHEDULE OF AMENDMENTS TO THE BILL MADE BY THE HOUSE OF REPRESENTATIVES

AMENDMENTS MADE BY THE SENATE TO WHICH THE HOUSE OF REPRESENTATIVES HAS AGREED

Validation

Govt (1)

Schedule 1, item 39, page 136 (lines 32 to 34), omit paragraph (8)(b), substitute:

(b) the grant or vesting of any thing expressly for the benefit of, or to or in a person to hold on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; or

Govt (2)

Schedule 1, item 39, page 137 (lines 16 to 18), omit subparagraph (iii), substitute:

(iii) a lease granted expressly for the benefit of, or to a person to hold on trust expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; or

Confirmation

Govt (4)

Schedule 1, item 9, page 19 (after line 21), at the end of Division 2B, add:

23JA Attribution of certain acts

If:

(a) a previous exclusive possession act or a previous non-exclusive possession act took place before the establishment of a particular State, the Jervis Bay Territory, the Australian Capital Territory or the Northern Territory; and

(b) the act affected land or waters that, when this section commences, form part of the State or Territory;

then, for the purposes of this Division, the act is taken to be attributable to:

(c) the State; or