



AUSTRALIAN
SENATE

Senate Standing Committee for the
Scrutiny of Delegated Legislation

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17 June 2021

The Hon Ken Wyatt AM MP
Minister for Indigenous Australians
Parliament House
CANBERRA ACT 2600

Via email: DLOWyatt@pmc.gov.au

Dear Minister,

Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021 [F2021L00292]

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instrument, and the committee seeks your advice in relation to these matters.

The committee has corresponded informally with the National Indigenous Australians Agency in relation to this instrument and thanks the agency for its ongoing assistance and engagement with the committee's concerns. The committee now seeks your advice in relation to the below issues which remain unresolved.

Privacy

Senate standing order 23(3)(h) requires the committee to scrutinise each legislative instrument as to whether it trespasses unduly on personal rights and liberties, including the right to privacy.

This instrument amends the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017, the Native Title (Indigenous Land Use Agreements) Regulations 1999 and the Native Title (Prescribed Bodies Corporate) Regulations 1999 in relation to the requirements for prescribed bodies corporate to consult and obtain consent in relation to certain decisions and the making of compensation applications.

Sub-regulation 9(5) of the instrument provides that "the body corporate may collect (within the meaning of the *Privacy Act 1988*) personal information (within the meaning of that Act) about common law holders or persons who claim to be entitled to compensation for the purposes of preparing a certificate." The explanatory statement provides examples of personal information in this context, including 'health information'.

The committee understands that sub-regulation 9(5) is included to allow prescribed body corporates to collect information for the purposes of preparing a 'certificate in relation to consultation and consent' (regulation 9 certificate) without needing to obtain the consent of the individuals named in it. This includes personal and sensitive information, as defined in the Privacy Act, including health information about a person and information about a person's race.

The committee understands that some of the body corporates collecting this information for regulation 9 certificates are Australian Privacy Principles (APP) entities which are regulated by the Privacy Act. However, the committee understands that not all relevant body corporates are APP

entities and it is unclear what, if any, safeguards apply to their collection and use of personal and sensitive information under this instrument.

It is also unclear to the committee who, or which entities, can access regulation 9 certificates which contain personal and/or sensitive information about individuals, given that item 53 of Schedule 1 to the instrument provides that common law holders, or a person who has a 'substantial interest' in the decision to which the certificate relates is entitled to access it.

The committee's view is that provisions which enable the collection, use and disclosure of personal information may trespass on an individual's right to privacy, and should generally be included in primary legislation, rather than delegated legislation. Where an instrument nevertheless contains such provisions, the committee expects that the explanatory statement should clearly explain the nature and scope of the provisions.

The explanatory statement should also address the nature and extent of the information that may be disclosed and the persons or entities to whom disclosure is permitted. The committee also expects the explanatory statement to justify why the provisions are necessary and appropriate, and what safeguards are in place to protect this personal information, and whether these safeguards are in law or policy. Explanatory statements should also indicate whether the safeguards in the *Privacy Act 1988* apply, particularly when only some of the entities are APP entities.

In light of the above, we would appreciate your advice as to:

- **who, or which entities, information collected under this instrument can be disclosed to;**
- **what safeguards apply to the collection and disclosure of personal and sensitive information under this instrument by body corporates that are not APP entities; and**
- **given the sensitive nature of the information authorised to be collected and disclosed under this instrument, whether consideration was given to including additional privacy safeguards on the face of the instrument.**

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **1 July 2021**.

Finally, please note that, in the interests of transparency this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation