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The Hon Ken Wyatt AM MP
Minister for Indigenous Australians
Member for Hasluck

Reference: MC21-002877

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your correspondence of 17 June 2021 regarding the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021* (Amendment Regulations). You requested my advice on three questions:

- 1) To who, or which entities, can information collected under this instrument be disclosed?
- 2) What safeguards apply to the collection and disclosure of personal and sensitive information under this instrument by body corporates that are not Australian Privacy Principles (APP) entities?
- 3) 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?

Broader context

The function of prescribed bodies corporate (PBCs) within the scheme of the *Native Title Act 1993* is to provide a mechanism for efficient dealings with native title land (see Part B of the Explanatory Memorandum for the Native Title Bill 1993 at page 31). In fulfilling their important role for the native title community and for land management, they have duties to the common law holders of native title rights and interests. In particular, they have a duty to consult the common law holders in relation to native title and compensation application decisions.

The inclusion of a legislative mechanism for the provision of a certificate by a PBC that confirms that the relevant common law holders (or 'native title holders', as they are commonly referred to) have been consulted about and consented to a particular decision concerning native title land is squarely directed at achieving efficient dealings with native title land. In particular, for native title decisions that are concerned with the doing of a future

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act, such as agreeing to the grant of a mining lease, the provision of a certificate directly supports the outcome of ensuring that persons with a substantial interest in the decision, for example a mining company, have certainty that the required consent was given and the future act can validly be done (see the preamble to the *Native Title Act 1993*).

Regulation 9 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) authorises a PBC to collect information about common law holders whose native title rights and interests it manages for the purpose of preparing such a certificate. The certificate must include “details (including names) of the persons who participated in the process of making the decision” (i.e. the common law holders who the PBC consulted and whose consent it sought). This will necessarily create an inference as to the race of the persons. Regulation 10 requires that the PBC must give a copy of a certificate under regulation 9 to any person who is entitled to it.

Having regard to the nature and functions of PBCs, it is difficult to see how these functions could be conferred in a manner that did not involve the collection of the names of common law holders who participated in the decision making process. The very purpose of the certificate is to certify that the correct common law holders have been consulted, and have given consent, in accordance with the requirements of the legislation. This requires details about those persons to be included in the certificate itself. To achieve this outcome, a PBC must be permitted to collect the details of those persons for this purpose.

To who, or which entities, can information collected under this instrument be disclosed?

Regulation 10 provides that the PBC must give a copy of the certificate to any person who is a common law holder represented by the PBC or who has a substantial interest in the decision to which the certificate relates, for example a mining company in relation to an indigenous land use agreement decision. Such persons must make a request in writing for a copy of the certificate. In addition, the Registrar of Aboriginal and Torres Strait Islander Corporations (Registrar) is entitled to a copy of a certificate for the purposes of the Registrar performing the functions mentioned in section 55A of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (CATSI Regulations) if the Registrar makes a request in writing. Further information about the three categories of persons is set out below.

A person that is a common law holder

‘Common law holders’ is defined in section 56 as the persons proposed to be included in the determination of native title as the native title holders. Regulations 8, 8A and 8B require that before making a native title decision or a compensation application, a PBC must consult and obtain consent to the decision from the relevant common law holders. As a result, it is the details of the common law holders that participated in the native title decision or compensation application decision that will be included on the certificate. It is then appropriate that the common law holders are able to obtain a copy of the certificate.

A lack of transparency about significant native title decisions and compensation application decisions can be a source of conflict between common law holders. Native title disputes, in particular between PBCs and common law holders, impact on governance and the ability of PBCs and common law holders to fulfil their obligations and to exercise their native title rights and interests. Prior to the Amendment Regulations, PBCs could, but were not required to, document how they consulted and obtained the consent of the common law holders. The Amendment Regulations are aimed squarely at addressing concerns raised by stakeholders in the native title system about transparency and accountability in native title decision making.

A person with a substantial interest

‘Substantial interest’ is not defined in the *Native Title 1993* nor the PBC Regulations. In a different context, Deputy President Finkelstein interpreted the phrase “a substantial interest in

the application” in *Universal Music Australia v EMI Music Publishing Australia Pty Ltd* [2000] ACopyT 3.¹ Finkelstein DP stated that the adjective ‘substantial’ meant “that the interest must be something that is real and of substance and not merely minimal or transitory” (at paragraph 11). Finkelstein DP also considered that the person cannot be a ‘stranger’ or ‘busybody’ (at paragraph 6).

Ultimately, the determination of what is, or is not, a substantial interest for the purposes of regulation 10 of the PBC Regulations will be determined by the PBC according to the facts and circumstances of the particular request to the PBC. For example, a proponent that had sought an indigenous land use agreement would likely have a sufficient interest to enable them to obtain a copy of the certificate as evidence of whether consent had been given by the common law holders to the agreement.

Registrar of Aboriginal and Torres Strait Islander Corporations

The Registrar is appointed by the relevant Minister under section 653-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and has the duties, functions and powers provided for under the CATSI Act or another law of the Commonwealth. This means that the Registrar is an agency within the meaning of para (e) of the definition of agency in section 6 of the *Privacy Act 1988*. Accordingly, the Registrar is an APP entity and must comply with the requirements of the APPs as they apply to agencies.

The 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Review) recommended that the Registrar’s compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members.

The functions of the Registrar under new section 55A of the CATSI Regulations are to assess whether or not, in the Registrar’s opinion, a certificate prepared by a PBC for the purposes of regulation 9 of the PBC Regulations complies with that regulation. The assessment would be made on request by a common law holder or a person who has a substantial interest in the decision to which the certificate relates. The Registrar also has the function of notifying the person who requested the assessment and the PBC of the date of the certificate, the decision to which the certificate relates and the Registrar’s opinion as to whether or not the certificate complies with regulation 9 of the PBC Regulations.

What safeguards apply to the collection and disclosure of personal and sensitive information under this instrument by body corporates that are not APP entities?

Some PBCs will be an APP entity for the purposes of the *Privacy Act 1988* and are therefore required to comply with the APPs. If a PBC is not an APP entity it will not be subject to section 15 of the *Privacy Act 1988*, which requires that an APP entity must not do an act, or engage in a practice, that breaches an APP.

Section 6 of the *Privacy Act 1988* provides that an ‘APP entity’ means an agency or organisation. As a company incorporated under the CATSI Act, a PBC is not an agency (see paragraph 6(c)(i) in the definition of ‘agency’). A PBC will, however, be an organisation within the meaning of the *Privacy Act 1988* unless it is a ‘small business operator’ as defined

¹ IMF (Australia) Ltd had sought to be made a party to an application for an order under the *Copyright Act 1968* that would determine the amount of royalty payable by the manufacturers of sound recordings of musical works to the owners of those works.

by section 6D. Subject to certain exceptions, a small business operator is a business with an annual turnover of \$3 million or less. Relevant exceptions include where:

- 1) the business has had an annual turnover of more than \$3 million in a financial year since the later of when it started carrying on the business or the commencement of section 6D (paragraph 6D(4)(a)); and
- 2) where the business is a contracted service provider for a Commonwealth contract (whether or not a party to the contract) (paragraph 6D(4)(e)).

A significant number of PBCs are likely to be small business operators and it would be inappropriate to impose additional regulatory requirements on these PBCs. PBCs are often very small entities without an office or staff that are run by common law holders in remote and regional areas and without ready access to legal and managerial assistance. The imposition of additional regulation, such as requiring them to comply with the APPs, is not appropriate in these circumstances. However, if appropriate, PBCs that are not APP entities could choose to opt into the obligations under the *Privacy Act 1988* under section 6EA.

Collection

The collection of the personal information occurs when a native title decision or compensation application decision is made by a PBC. A native title decision is defined in the PBC Regulations as a decision:

- 1) to surrender native title rights and interests in relation to land or waters; or
- 2) to enter an indigenous land use agreement under Subdivision B, C or D of Division 3 of Part 2 of the *Native Title Act 1993* or an agreement under Subdivision P (right to negotiate) of that Division (also known as a section 31 agreement); or
- 3) to allow a person who is not a common law holder, or a class of persons who are not common law holders, to become members of a PBC; or
- 4) to include one or more consultation processes in the constitution of a PBC; or
- 5) to do, or to agree to, any act that would otherwise affect the native title rights or interests of the common law holders (other than a decision to make a compensation application).

These decisions are significant and affect the communally held native title rights and interests of the common law holders represented by the PBC.

A PBC is *only* authorised under regulation 9 to collect personal information for the purposes of performing a function conferred on it in accordance with subsection 58(f) of the *Native Title Act 1993*; that function being the preparation of a certification in relation to consultation and consent of the common law holders for a native title or compensation application decision. As a result, only the minimum information necessary should be included in the certificate. For the majority of small PBCs, the above decisions are unlikely to be frequently made. As a result, the collection of the information about the common law holders that participated in such decisions is likely to be an infrequent occurrence.

Disclosure

The Review highlighted that “[c]onsultation participants overwhelmingly supported recommendations that RNTBCs [which are also PBCs] be required to keep and maintain registers of decisions and determinations of matters affecting native title rights and interests to improve accountability and transparency to common law holders.... Concerns were raised

as to whether such records should be subject to commercial in confidence requirements or should be made available to the members and to the general public” (at paragraphs 6.61-2). It was ultimately recommended that a Register of Native Title Decisions be set up by PBCs and that it include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations. It was also recommended that the Register be available for inspection by members of the PBC and non-member common law holders, an extract of the Register could be provided to any person having a ‘substantial interest’ in the relevant decision.

The recommendations were implemented in part by the Amendment Regulations with the aim of addressing the concerns of consultation participants about transparency and accountability of PBCs to the common law holders. The scope of disclosure is to a very small group of interested parties, being those outlined above.

A person with a substantial interest in the relevant native title decision or compensation application decision may be an APP entity if they meet the definition outlined above. Lastly, the Registrar is an agency within the meaning of paragraph (e) of the definition of agency in section 6 of the *Privacy Act 1988*. Accordingly, the Registrar is an APP entity and must comply with the requirements of the APPs as they apply to agencies.

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?

Careful consideration was given to the protection of personal information in designing the relevant provisions so as to strike an appropriate balance between the objective of increasing the transparency of decision making by PBCs and the protection of personal information. In this context:

- 1) the information prescribed for inclusion in the certificate has been prescribed as the minimum necessary for effective transparency and accountability;
- 2) access to the certificates is restricted to those with a substantial interest in the decision to which the certificate relates;
- 3) access to the certificates requires a written application to the PBC; and
- 4) eligibility for access to the certificates is determined by the PBC.

APP 3.3 allows an APP entity to collect sensitive information only where consent is given in accordance with APP 3.3(a) or where APP 3.4 applies in relation to the information. APP 3.4(a) applies where the ‘collection of the information is required or authorised by or under an Australian law or court/tribunal order.’ An ‘Australian law’ includes an Act of the Commonwealth, State or Territory or regulations or another instrument made under an Act (see section 6). The intent of the provisions would be undermined if participants in native title decision making could effectively frustrate a PBC’s ability to prepare a certificate by withholding consent to the inclusion of their name in the certificate. This would undermine the key transparency and accountability rationale for the amendments.

I note for completeness that PBCs could collect and disclose this information with the consent of the common law holders concerned. It is the policy of the NIAA that the consent of the common law holders should be obtained where feasible.

Please find enclosed a Supplementary Explanatory Statement, which will be registered on the Federal Register of Legislation that more clearly explains the following matters:

- 1) the nature and the scope of amended regulations 9 and 10 of the PBC Regulations;

- 2) the nature and extent of the information that may be disclosed;
- 3) the persons or entities to whom disclosure is permitted;
- 4) a justification for why the amendments are necessary and appropriate;
- 5) what safeguards are in place to protect this personal information; and
- 6) whether these safeguards are in law or policy.

Thank you for raising this matter.

Yours sincerely

The Hon ~~KEN~~ WYATT AM MP
Minister for Indigenous Australians

30/6 /2021

Encl. (1)

SUPPLEMENTARY EXPLANATORY STATEMENT

Issued by the authority of the Minister for Indigenous Australians

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Native Title Act 1993

Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021

Purpose of the Supplementary Explanatory Statement

The purpose of this Supplementary Explanatory Statement is to clarify the nature and scope of the amendments to regulations 9 and 10 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021* (Amendment Regulations).

Nature and scope of the amendments

The 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Review) highlighted that consultation participants overwhelmingly supported recommendations that prescribed bodies corporate (PBCs) be required to keep and maintain registers of decisions and determinations of matters affecting native title rights and interests to improve accountability and transparency to common law holders. It was recommended that a Register of Native Title Decisions be set up by PBCs and that information be available to members, common law holders, any person having a ‘substantial interest’ in the relevant decision. The recommendations were implemented in part by the Amendment Regulations with the aim of addressing the concerns about transparency and accountability of PBCs by clarifying and strengthening the requirements for PBCs to consult and obtain consent in relation to certain decisions and the making of compensation applications.

Regulation 9 of the PBC Regulations authorises a PBC to collect information about common law holders it represents for the purpose of preparing a certificate that confirms that the correct people have been consulted about and consented to a particular decision concerning native title land. The certificate must include “details (including names) of the persons who participated in the process of making the decision”. Regulation 10 requires that a PBC must give a copy of a certificate under regulation 9 to any person who is entitled to it.

Nature and scope of the information contained in the certificates

The scope of the information that must be included in a certificate is, at minimum, the names of the common law holders that were consulted and gave their consent to the relevant decision. This will necessarily create an inference as to the race of the common law holders.

‘Common law holders’ is defined in section 56 of the *Native Title Act 1993* as the persons proposed to be included in the determination of native title as the native title holders. Regulations 8, 8A and 8B require that before make a native title decision or compensation application, a PBC must consult and obtain consent to the decision from the relevant common law holders.

The information included in the certificates should only be as much as is sufficient to establish the identity of a particular common law holder that participated in the decision. For example, if common law holders have similar names, the inclusion of a relevant apical ancestor may assist with clarifying which common law holders participated in making the decision.

Persons or entities that may be provided a copy of a certificate

A copy of a certificate may be provided to a person if they make a request in writing and are one of the following: a common law holder, a person with a substantial interest in the decision, or the Registrar for Aboriginal and Torres Strait Islander Corporations (CATSI Registrar).

A person that is a common law holders

Native title decision-making is often a process involving a collective. Under section 223 of the *Native Title Act 1993*, the expressions ‘native title’ and ‘native title rights and interests’ means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- 1) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- 2) the Aboriginal people or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- 3) the rights and interests are recognised by the common law of Australia.

The purpose of the certificate is to certify that the correct common law holders have been consulted, and have given consent, in accordance with the requirements of the legislation. It is appropriate that the common law holders are able to obtain a copy of the certificate, which evidences the native title decision. This aims to enhance transparency for common law holders and persons who claim to be entitled to compensation by recording key information about decisions that may affect them, and in particular, their communal interest in land. This will also increase the transparency and accountability of the directors of the PBCs to the common law holders and persons who claim to be entitled for compensation.

A person with a substantial interest in the decision

“A person with a substantial interest in the decision” is not defined in the *Native Title Act 1993* nor the PBC Regulations. In a different context, Deputy President Finkelstein interpreted the term “a substantial interest in the application” in *Universal Music Australia v EMI Music Publishing Australia Pty Ltd* [2000] ACopyT 3. Finkelstein DP stated that the adjective ‘substantial’ meant “that the interest must be something that is real and of substance and not merely minimal or transitory” (at paragraph 11). Finkelstein DP also considered that the person cannot be a ‘stranger’ or ‘busybody’ (at paragraph 6). Ultimately, the determination of what is, or is not, a substantial interest for the purposes of regulation 10 of the PBC Regulations will be determined by the PBC according to the facts and circumstances of the particular request to the PBC. For example, a proponent that had sought an indigenous land use agreement would likely have a sufficient interest to enable them to obtain a copy of the certificate as evidence of whether consent had been given by the common law holders to the agreement.

Registrar of Aboriginal and Torres Strait Islander Corporations

The Review recommended that the Registrar’s compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders. The Registrar is appointed by the relevant Minister under section 653-1 of the *Corporations (Aboriginal and Torres Strait*

Islander) Act 2006 (CATSI Act) and has the duties, functions and powers provided for under the CATSI Act or another law of the Commonwealth. The functions of the Registrar under new section 55A of the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 are to assess whether or not, in the Registrar's opinion, a certificate prepared by a PBC for the purposes of regulation 9 of the PBC Regulations complies with that regulation. The Registrar also has the function of notifying the person who requested the assessment the date of the certificate, the decision to which the certificate relates and the Registrar's opinion as to whether or not the certificate complies with regulation 9 of the PBC Regulations.

Providing for the CATSI Registrar to assess the compliance of the certificate with the requirements of regulation 9 of the PBC Regulations will assist with any complaints that may be made to the Office of the Registrar of Indigenous Corporations about a PBC in relation to particular native title or compensation application decision. These amendments will also assist to address concerns raised in the Review consultation process that PBCs lacked accountability and transparency to common law holders.

Safeguards

Careful consideration was given to the protection of personal information in designing the relevant provisions so as to strike an appropriate balance between the objective of increasing the transparency of decision making by PBCs and the protection of personal information. In this context:

- 1) the information prescribed for inclusion in the certificate has been prescribed as the minimum necessary for effective transparency and accountability;
- 2) access to the certificates is restricted to those with a substantial interest in the decision to which the certificate relates;
- 3) access to the certificates requires a written application to the PBC; and
- 4) eligibility for access to the certificates is determined by the PBC.

The function of preparing a certificate is bestowed on a PBC in accordance with subsection 58(f) of the *Native Title Act 1993*. A PBC is *only* authorised under subregulation 9(5) to collect (within the meaning of the *Privacy Act 1988*) personal information (within the meaning of the *Privacy Act 1988*) about common law holders or persons who claim to be entitled to compensation for the purposes of preparing a certificate. As a result, only the minimum information necessary should be included in the certificate.

Some PBCs will an APP entity for the purposes of the *Privacy Act 1988* and are therefore required to comply with the APPs. Section 6 of the *Privacy Act 1988* provides that 'APP entity' means an agency or organisation. As a company incorporated under the CATSI Act, a PBC is not an agency (see paragraph 6(c)(i) in the definition of 'agency'). A PBC will, however, be an organisation within the meaning of the *Privacy Act 1988* unless it is a 'small business operator' as defined by section 6D. Subject to certain exceptions, a small business operator is a business with an annual turnover of \$3 million or less. Relevant exceptions include where:

- 1) the business has had an annual turnover of more than \$3 million in a financial year since the later of when it started carrying on the business or the commencement of section 6D (paragraph 6D(4)(a)); and
- 2) where the business is a contracted service provider for a Commonwealth contract (whether or not a party to the contract) (paragraph 6D(4)(e)).

If a PBC is not an APP entity it will not be subject to section 15 of the *Privacy Act 1988*, which requires that an APP entity must not do an act, or engage in a practice, that breaches an APP.

PBCs that are not APP entities could choose to opt into the obligations under the *Privacy Act 1988* under section 6EA. In doing this, a PBC would be making a public commitment to good privacy practice that may result in further confidence and trust being derived from operating under the *Privacy Act 1988*.

PBCs could also collect and disclose this information with the prior and informed consent of the common law holders concerned where feasible. However, the intent of the provisions would be undermined if participants in native title decision making could effectively frustrate a PBC's ability to prepare a certificate by withholding consent to the inclusion of their name in the certificate. This would undermine the key transparency and accountability rationale for the amendments.

A person with a substantial interest in the relevant native title or compensation application decision may be an APP entity if they meet the definition outlined above. Lastly, the Registrar is an agency within the meaning of paragraph (e) of the definition of agency in section 6 of the *Privacy Act 1988*. Accordingly, the Registrar is an APP entity and must comply with the requirements of the APPs as they apply to agencies.