Australian Government

Attorney-General's Department

Legal Services and Native Title Division

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23 April 2007

Ms Jackie Morris
Acting Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Morris

Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007

I refer to your letter of 30 March 2007 inviting a submission from the Attorney-General's Department to the inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment (Technical Amendments) Bill 2007. I am pleased to enclose a submission, which this Department has prepared jointly with the Department of Families, Community Services and Indigenous Affairs.

The material concerning Native Title Representative Bodies and Prescribed Bodies Corporate (sections 4 and 5 of the attached submission) was prepared by the Department of Families, Community Services and Indigenous Affairs. This is because the provisions of the *Native Title Act 1993* relating to such bodies fall within the portfolio responsibilities of the Minister for Families, Community Services and Indigenous Affairs. If you wish to discuss those aspects of the submission relating specifically to Native Title Representative Bodies or Prescribed Bodies Corporate, please contact:

> Mr Greg Roche
> Branch Manager, Land
> Department of Families, Community Services and Indigenous Affairs
> PO Box 17
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The remainder of the material within the submission has been prepared by the Attorney-General's Department.

We look forward to providing the Committee with further information and assistance throughout the course of the inquiry. If you wish to discuss any aspect of our submission or the inquiry, please do not hesitate to contact me.

Yours sincerely

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Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007

Submission from the Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs

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1 INTRODUCTION

1.1 The Native Title Amendment (Technical Amendments) Bill 2007 (the Bill) includes proposed amendments to the *Native Title Act 1993* relating to three of the six elements of the Government's native title reform package. The Bill includes measures to:

- make minor and technical amendments to the Native Title Act to improve the existing processes for native title litigation and negotiation
- make minor amendments to certain provisions relating to representative Aboriginal/Torres Strait Islander bodies (native title representative bodies or NTRBs), and
- partially implement two of the recommendations made in the Report to Government on the Structures and Processes of Prescribed Bodies Corporate (PBC Report).

1.2 The amendments in this Bill complement the amendments made by the *Native Title Amendment Act 2007*. The Bill, together with the Native Title Amendment Act, comprises the bulk of the legislative elements of the reform package, although some amendment to subordinate legislation will also be necessary.

1.3 The reforms in the Bill form an important part of the Government's plan for practical reform to improve the performance of the native title system. This submission outlines the background to the reform package, and includes details on all elements of the package, as well as the Bill.

2 BACKGROUND

Package of reforms to improve performance of the native title system

2.1 On 7 September 2005, the Attorney-General, the Hon Philip Ruddock MP, announced a proposed package of reforms to improve the performance of all elements of the native title system. The native title system is inherently complex, involving a broad range of institutions and stakeholders, and a number of different processes for the recognition and protection of native title rights. The package of reforms recognises the inter-connected nature of the system and aims to improve all key elements to ensure they may contribute to effective and efficient outcomes. The reforms were developed as a package to ensure that, in addressing any one aspect, a bottleneck is not created elsewhere in the system.

2.2 The reforms have been advanced through a consultative and participatory process. The consultation process for specific elements of the reforms relating to the Bill is outlined later in this submission. Details of the consultations undertaken in multilateral and bilateral forums in relation to the reform package generally were outlined in the submission by the Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs (FaCSIA) to the Senate Legal and Constitutional Affairs Committee (the Committee) in its inquiry into the Bill for the Native Title Amendment Act (our previous submission).

2.3 A number of components of the legislative elements of the reform package were implemented through the Native Title Amendment Act. Most of the remaining legislative aspects of the reforms will be implemented through the amendments in this Bill. However, some elements, particularly the reforms arising out of the review of prescribed bodies corporate (PBCs), will require changes to subordinate legislation.

2.4 The six elements of reform comprise the following.

A review of the institutional framework for resolving claims (the Claims Resolution Review)

2.5 The independent review of the native title claims resolution process, conducted by Mr Graham Hiley QC and Dr Ken Levy, examined the role of the National Native Title Tribunal (NNTT) and the Federal Court of Australia (the Court). The consultants were tasked with advising the Government on measures for more efficient management of claims within the existing framework of the Native Title Act.

2.6 The Native Title Amendment Act includes measures to implement most of the recommendations of the Claims Resolution Review that were accepted by Government and required amendments to the Native Title Act.

2.7 One recommendation of the Claims Resolution Review accepted by Government proposed the development of a code of conduct for NNTT mediation. The Attorney-General's Department is currently consulting with relevant bodies on draft best practice guidelines for mediation in the NNTT. When the guidelines are completed and endorsed by the Attorney-General, they will be made available to all parties participating in NNTT mediation. This will implement the recommendation of the Claims Resolution Review as well as a recommendation by the Committee following its inquiry into the Native Title Amendment Act.

2.8 The Government will monitor the operation of the connection review function, in Division 4AA of the Native Title Amendment Act, and report to Parliament about it in two years time. This implements one of the recommendations made by the Committee in its report on the Native Title Amendment Act.

2.9 The Claims Resolution Review recommended a number of non-legislative measures to improve communication and coordination between the Court and the NNTT. In addition to progressing these, the Court and NNTT will be implementing measures recommended by the Committee, such as developing a protocol for dealing with reports about breaches of NNTT directions.

Implementing measures to improve the effectiveness of representative bodies

2.10 A number of legislative amendments were proposed to enhance NTRB effectiveness and ensure that NTRBs operate in a responsive and accountable manner. The Native Title Amendment Act included the bulk of the reforms to provisions relating to NTRBs, key aspects of which were outlined in our previous submission. Some other changes are included in this Bill.

2.11 As noted in our previous submission, FaCSIA is complementing these legislative measures with significant capacity building activity funded under its NTRB capacity building programme. This programme includes specialist training in governance, administrative law and contract management. There is also a project designed to improve the capacity of NTRBs to attract and retain quality staff. Regular forums and workshops are conducted for NTRB chief executive officers, chief financial officers, senior professional staff, and field officers.

Measures to encourage the effective functioning of prescribed bodies corporate

2.12 These measures were developed following an examination of current structures and processes of PBCs, coordinated by an inter-agency Steering Committee. The Steering Committee was tasked with identifying the basic function and resource needs of PBCs, ensuring those needs are aligned with existing funding sources, and assessing the appropriateness of the existing statutory governance model for PBCs. The Steering Committee made 15 recommendations in the PBC Report, all of which were accepted by Government. Two of these recommendations were implemented or partially implemented through amendments made by the Native Title Amendment Act. Another two recommendations will be partially implemented through measures in the Bill. Other changes will be made through the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations) and administratively.

Changes to the existing arrangements for the provision of financial assistance to non-government respondents in native title claims

2.13 This includes the making of new Guidelines by the Attorney-General which are applied in authorising assistance to non-claimants under the respondent funding scheme. The new Guidelines came into effect on 1 January 2007. The Guidelines have been redesigned to encourage agreement-making, rather than litigation, to resolve native title issues.

2.14 The Native Title Amendment Act expanded the scope of the financial assistance for non-government respondents in native title claims. The amendment to the Native Title Act enables assistance to be provided for the development of pro-forma agreements (or the review of existing agreements) relating to the application of the section 31 negotiation procedure and section 32 'expedited' procedure for mining related acts. The Guidelines will be amended to reflect the right to negotiate changes.

Introduction of a series of technical amendments to the Native Title Act, primarily aimed at improving existing processes for native title litigation and negotiation

2.15 This measure is intended to address procedural issues identified by stakeholders in their dealings with the Native Title Act. The majority of measures in the Bill will make these minor and technical amendments to the Native Title Act.

Measures to promote and encourage more transparency and communication between all parties involved in native title claims

2.16 This element acknowledges, in particular, the critical role that can be played by State and Territory governments in seeking to resolve native title issues and seeks to promote recognition by all parties of the value of transparency in obtaining timely and enduring outcomes. Initiatives under this element include the Native Title Ministers' Meetings, held in September 2005 and December 2006. This aspect of the reforms will be ongoing.

3 TECHNICAL AMENDMENTS

3.1 Schedule 1 of the Bill makes a series of minor and technical amendments to the Native Title Act. The technical amendments element of the reform package focused on identifying amendments of a minor or technical nature that would improve or clarify processes, or remove impediments from the system, without unduly impacting on rights established under the Native Title Act. It is designed to address predominantly procedural issues identified by stakeholders in their dealings with the Native Title Act.

Consultation

3.2 This aspect of the reforms has been guided by the results of consultation with stakeholders. Consultations regarding possible technical amendments have been primarily conducted through the release of two discussion papers.

3.3 On 22 November 2005, the Attorney-General released a discussion paper comprising sixteen possible amendment measures ('the first discussion paper') **(Attachment A)**. The paper was provided to a large number of stakeholders, listed at **Attachment B** and has also been available on line at the Attorney-General's Department's website since its release. All stakeholders were invited to comment on the proposals and to suggest other amendments of a minor and technical nature. Nineteen written submissions from a range of stakeholders were received in response to that invitation, including a large number of additional suggestions.

3.4 On 22 November 2006, the Attorney-General released a second discussion paper **(Attachment C)**. The paper was sent to a large number of stakeholders, listed at **Attachment D** and has also been available on line at the Attorney-General's Department's website since its release. The second discussion paper comprised:

- proposals from the first discussion paper which were been omitted or modified as a consequence of consultation
- a large number of additional suggestions from stakeholders, and
- three measures from the Claims Resolution Review which fell within the scope of the technical amendments reform element.

3.5 Seventeen written submissions were received from stakeholders in response to the second discussion paper. Not all of the proposals set out in the discussion papers or suggested by stakeholders were progressed. For example, a number would have significantly altered the balance of rights and interests in the Native Title Act. Others were not proceeded with because they would have had unintended practical implications.

3.6 Stakeholder feedback on the proposals in the discussion papers was a key factor in determining whether proposals in the discussion papers were progressed in the Bill. Comments made by stakeholders during the consultation process also informed the drafting of the provisions in the Bill.

Measures in the Bill

3.7 Schedule 1 of the Bill includes approximately 40 separate measures which were developed following the consultation process. The amendments affect most aspects of the native title process, including the future act and Indigenous Land Use Agreement provisions, the process for making and resolving native title claims and the obligations on the Native Title Registrar in relation to the registration of claims.

3.8 Schedule 1 of the Bill will also implement changes to the Native Title Act resulting from a recommendation made by the Committee following its inquiry into the Native Title Amendment Act. The Committee recommended that the Government consider inclusion of amendments to section 87A proposed by Telstra in the Bill. Items 90 and 91 of Schedule 1 of the Bill implement this recommendation.

3.9 A number of transitional and consequential amendments are also included.

3.10 A general summary of the measures included in Schedule 1 of the Bill, including a table referencing each measure to the relevant items is at **Attachment E**.

3.11 The measures in Schedule 1 of the Bill will come into force on a date fixed by proclamation. This will provide sufficient time to ensure all parties are aware of, and take into account, the relevant changes made by the Bill. Full implementation of the technical amendments will also require amendments to the Native Title (Notices) Determination 1998 and the creation of regulations for the bank guarantee regime. These will be progressed by the Attorney-General's Department as a matter of priority.

4 NATIVE TITLE REPRESENTATIVE BODIES

4.1 The Native Title Act provides for eligible bodies to be recognised by the Minister as NTRBs. NTRBs' functions include assisting native title claimants to lodge and progress native title applications, and to negotiate future act and indigenous land use agreements. NTRBs are funded by the Australian Government to perform their functions in relation to a designated area. There are currently fourteen NTRBs.

Measures in the Bill

4.2 Schedule 2 of the Bill includes measures to make further minor amendments to provisions governing NTRBs to:

- avoid regulatory duplication by ensuring that NTRBs are not subject to provisions of the *Commonwealth Authorities and Companies Act 1997* (CAC Act) which reflect obligations already imposed by their incorporation statutes and ensure that references are to current provisions of the CAC Act (item 4 of Schedule 2)

- make the process for reviewing decisions by NTRBs not to assist particular Aboriginal or Torres Strait Islander persons timelier, more cost-effective and easier to understand (item 5 of Schedule 2). This will be achieved by allowing the Secretary of FaCSIA to conduct relatively straightforward reviews (rather than requiring the Secretary to appoint an external reviewer), preventing reviews from being conducted if an applicant has not first made all reasonable efforts to have the NTRB review its decision, shortening the period within which reviews must be completed, and listing certain matters that the reviewer must take into account

- simplify and clarify provisions dealing with the transfer of documents and records from a former NTRB to its replacement (items 6 and 7 of Schedule 2). This will be achieved by allowing the Minister to issue directions regarding the transfer of certain materials if a replacement NTRB has advised the Minister that it has been requested to assist relevant native title claimants or holders (rather than requiring the Minister to ascertain whether a request for assistance has been made) and ensuring that directions can be issued to a former NTRB that is under external administration, and

- repeal inoperative provisions (items 1 – 3).

Consultation

4.3 Consultations undertaken in relation to NTRB reforms generally were detailed in Attachment A of our previous submission. The measures outlined above relating to review of NTRBs' decisions not to assist Aboriginal or Torres Strait Islander persons, and the transfer of documents and records from a former NTRB to its replacement were discussed at a meeting with NTRB Chief Executive Officers in November 2006. The full package of reforms was also discussed at meetings with NTRB Field Officers in February 2007 and NTRB Senior Professional Officers in March 2007. NTRBs have been invited to provide comments to FaCSIA on Schedules 2 and 3 of the Bill.

4.4 The application of the CAC Act to NTRBs was raised in submissions to the Committee during its inquiry into the Native Title Amendment Act.

5 PRESCRIBED BODIES CORPORATE

Measures arising out of the Report on the Structures and Processes of Prescribed Bodies Corporate

5.1 On 27 October 2006, the Attorney-General and the Minister for Families, Community Services and Indigenous Affairs released the PBC Report. A copy of the recommendations made in the PBC Report is at **Attachment F**. The Government has accepted all of the PBC Report's 15 recommendations. These recommendations were outlined in our previous submission.

5.2 Two of the PBC Report's recommendations were implemented, or partially implemented, by the Native Title Amendment Act, as outlined in our previous submission.

5.3 The following two recommendations will be partially implemented by measures in Schedule 3 of the Bill.

Recommendation 11

The Native Title Act should be amended to authorise PBCs to charge a third party for costs and disbursements reasonably incurred in performing [their] statutory functions under the Native Title Act or the PBC Regulations at the request of the third party. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.

5.4 The PBC Report indicated that NTRBs would normally be expected to provide assistance to PBCs in relation to future act matters. However, it also noted that due to competing demands on NTRBs, it will not always be possible for them to fulfil this role within the timeframes required by

future act proponents. The PBC Report therefore considered that there should be a clear legal basis through which PBCs may recover costs incurred in performing their functions at the request of future act proponents. It also considered that costs recovered should be limited to those involved in performing relevant functions, and that an appropriate authority should be able to investigate charging by PBCs to ensure costs were reasonably incurred.

5.5 Item 7 of Schedule 3 implements this recommendation. It will allow PBCs to charge future act proponents a fee for negotiating specified agreements. Fees charged must not be such as to amount to taxation (for a fee to avoid being a tax, it must be imposed in respect of a service delivered to the persons required to pay the fee). The Registrar of Aboriginal Corporations will be able to give an opinion about whether a fee proposed to be charged by a PBC exceeds what is permitted under the proposed amendments. Details of the scheme will be prescribed through regulations.

5.6 These amendments will commence on 1 July 2008 to allow the Registrar of Aboriginal Corporations time to prepare for her new role under the proposed amendments.

Recommendation 15

The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The Office of Indigenous Policy Coordination should develop a comprehensive proposal for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.

5.7 The PBC Report considered that it would be desirable to develop a mechanism for the performance of PBC functions by a 'default' PBC in strictly limited circumstances. A proposal was subsequently developed under which a particular government funded body or bodies could be prescribed to perform PBC functions under the following circumstances.

- Where the native title holders fail to nominate a PBC in conjunction with a native title determination. The PBC Report noted that the Native Title Act already provides that where this occurs, the Court must determine a body to perform PBC functions in accordance with the regulations. As there are no such regulations in place, the report noted that on several occasions the Federal Court has allowed a delay between a determination of native title and the establishment of a PBC which has resulted in considerable uncertainty for third parties in relation to dealings concerning the relevant land.

- Where a liquidator is appointed to a PBC. The PBC Report considered that a default PBC could be used where an administrator or special administrator was appointed to a PBC. However, it was ultimately considered that a PBC under administration could potentially become fully functional again, making use of a default PBC premature. As a liquidator would only be appointed if a PBC was being wound up, this was considered a more appropriate trigger.

- At the initiation of the common law holders.

5.8 The circumstances in which the native title holders could 'transfer out' of a default PBC and replace it with a new PBC of their choice will be specified by regulation.

5.9 This proposal will be partially implemented by Items 1 – 6 of Schedule 3, which amend and add to existing regulation making powers dealing with the replacement of PBCs generally. Amendments to the PBC Regulations will also be required.

5.10 The PBC Report's remaining recommendations will be implemented administratively, or through amendments to the PBC Regulations. It is anticipated amendments will be made to the PBC Regulations later this year.

Consultation

5.11 Details of consultation undertaken in relation to the PBC reforms were detailed in our previous submission and are repeated at **Attachment G**.

Other PBC measures

5.12 The Native Title Act envisages that regulations may provide for the replacement of PBCs at the initiation of the native title holders. However, existing regulation making powers may not allow for this to occur in all possible circumstances. Items 1 – 6 of Schedule 3 will remedy this deficiency. Amendments to the PBC Regulations will also be required.

6 LEGISLATIVE INSTRUMENTS

6.1 Schedule 4 of the Bill makes a number of amendments to the Native Title Act in relation to legislative instruments. These amendments are technical in nature and reflect the introduction of the *Legislative Instruments Act 2003*.

6.2 Currently, the Native Title Act provides that a number of determinations, instruments, approvals and revocations of determinations are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*. Section 46A was repealed by the Legislative Instruments Act. Section 6 of the Legislative Instruments Act declares that instruments that were disallowable instruments for the purposes of section 46A of the Acts Interpretation Act are legislative instruments. Schedule 4 of the Bill will make changes to the Native Title Act to reflect that these instruments are legislative.

6.3 All Commonwealth legislation that contains references to disallowable instruments is being updated as opportunities arise to ensure the legislation reflects the changes made by the Legislative Instruments Act.

7 LIST OF ATTACHMENTS TO THE SUBMISSION

A. Technical amendments to the *Native Title Act 1993* – first discussion paper

B. Technical amendments – parties to whom first discussion paper was provided

C. Technical amendments to the *Native Title Act 1993* – second discussion paper

D. Technical amendments – parties to whom second discussion paper was provided

E. Summary of technical amendments in the Bill

F. Recommendations of the Report on the Structures and Processes of Prescribed Bodies Corporate

G. Consultation process in relation to PBC Reforms

Technical amendments to the *Native Title Act 1993*

Discussion Paper

Introduction

On 7 September 2005 the Attorney-General announced a package of reforms to the native title system. One element of the package is a suite of minor and technical amendments to the *Native Title Act 1993* (the Act) to improve existing processes. The amendments are designed to enhance the operation of the Native Title Act and address issues which have emerged in practice. They are not designed to wind back native title rights.

Your comments are sought on the proposals set out in this paper. The Australian Government would also welcome your suggestions for other minor or technical amendments to the Act. In making suggestions for further amendments, you should include clear examples illustrating the nature of the problem and the way in which the proposed solution will address it.

The proposals in this paper do not reflect the final views of the Australian Government. An exposure draft of the technical amendments will be released early in 2006 for final comment before introduction into Federal Parliament.

If you would like to make a submission, please forward it no later than
31 January 2006 to:

The First Assistant Secretary
Legal Services and Native Title Division
Attorney-General's Department
National Circuit
BARTON ACT 2600

Submissions may also be e-mailed to native.title@ag.gov.au, or sent by facsimile to (02) 6250 5553.

Please note that any suggestions may be forwarded to other relevant Australian Government agencies and Departments for their consideration. Unless you request otherwise, information you provide may also be used in consultations and any explanatory documentation prepared in relation to the Bill.

List of Acronyms

ILUA	Indigenous Land Use Agreement
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993*
NTRB	Native Title Representative Body
PBC	Prescribed Body Corporate
RNTBC	Registered Native Title Body Corporate

Proposed amendments

A: Amendments to the Future Act Regime

Subsection 24AA(3): amend the overview of ILUA provisions

Section 24AA provides a general overview of future act provisions in the NTA, including an overview of future act validity under an ILUA (subsection 24AA(3)). Essentially, subsection 24AA(3) states that where parties to an ILUA consent to an act being done, that act will be valid.

However, even where the parties have consented, a future act is not valid until the ILUA has been registered (see sections 24EB and 24EBA). Whilst any conflict between the overview provision and operational provisions would likely be resolved in the latter's favour, it would be useful to amend the overview to align it with the substantive provisions. Accordingly, it has been proposed that subsection 24AA(3) be amended to make clear that a future act will be valid if the parties consent to the act being done *and* the agreement is registered.

Sections 24BB and 24CB: enabling body corporate and area agreements to be framework agreements

Currently an alternative procedure agreement can be about providing a framework for the making of other agreements about matters relating to native title rights and interests – these are known as 'framework agreements'(see paragraph 24DB(e)). However, there is no similar ability for a body corporate or area agreement to also be a framework agreement.

There is nothing in the nature of body corporate or area agreements prohibiting framework agreements. ILUAs are designed to be an adaptable and flexible mechanism, and given the limited availability of alternative procedure agreements, enabling all types of ILUAs to be framework agreements is desirable.

Accordingly, it has been proposed that sections 24BB and 24CB be amended to incorporate a provision similar to paragraph 24DB(e), enabling body corporate and area agreements to be framework agreements.

Sections 24BF, 24CF and 24DG: clarify use by the NNTT of information provided or obtained when providing assistance to parties in the negotiation of an ILUA

Sections 24BF, 24CF and 24DG provide that any party to negotiations for an ILUA may seek assistance from the NNTT in those negotiations. Concern has been expressed about what use the Registrar of the NNTT may make of information gained by or disclosed to the NNTT during the provision of that assistance, when he or she is later dealing with an application to register the ILUA.

These provisions can be contrasted with the provisions regarding mediation conferences (Part 6, Division 4A). The latter provisions prohibit the use of information obtained during mediation in court proceedings without the consent of parties, and also provide for the NNTT member who presides over or assists a

mediation not to take any further part in the proceeding without the consent of the parties (see subsection 136A(4)).

It is likely that concerns are not limited to use of information by the Registrar in the ILUA registration process, but may extend to the NNTT or the Registrar using information in other contexts, such as the mediation of a subsequent native title claim.

To ensure that information is not used inappropriately, and to provide comfort to parties who seek assistance from the NNTT in ILUA negotiations, it has been proposed that the NTA be amended to clarify that information provided by a person seeking assistance under sections 24BF, 24CF and 24DG is not to be used by the NNTT for any other purpose without the consent of the person.

References to the NNTT would include references to an alternative State or Territory body recognised under the NTA.

Section 24BI: provision for notification day for body corporate agreements

When a party or parties apply to the NNTT Registrar to have an ILUA registered, the Registrar must give notice of that application to a range of persons or bodies who are not parties to the agreement.

Notice given in relation to area agreements and alternative procedure agreements must specify a notification day. Prior to the notification day, persons claiming to hold native title in the area the subject of the agreement may object to that agreement being lodged. Limited other applications and activities can also occur within this period.

However, there is no similar 'notification day' provision for body corporate agreements. This is most likely because the only persons or bodies able to object to the registration of the agreement are the parties to the agreement. In limited circumstances, non party NTRBs can also prevent registration. Section 24BI provides that the Registrar of the NNTT must register the agreement unless there is an objection, or advice from the NTRB, within one month from notice of the agreement being given.

As notices are sent to a range of bodies and can conceivably be sent on different dates, and public notification is generally done by advertisement in relevant newspapers (which may not be published daily), there has been some confusion about when the Registrar gives notice, and hence when the one month starts to run. This confusion may be exacerbated by the fact that parties to the agreement – who are the only bodies able to object to the registration – are not required to be notified.

In order to clarify these provisions, it has been proposed that section 24BH (which provides for the giving of notice) be amended to require the NNTT to write to parties at the same time notice is given, advising them of the notification period. The notification period of one month would be specified to run from the date the notification is sent or, if notice is to be given on different dates, from the latest date notification is to be given.

In addition, it has been proposed that the NTA be amended to provide that where notice is given to a non-party NTRB, that notice must set out the notification date to

ensure that body can provide any relevant advice to the Registrar with the one month period.

Subsections 24CI(2) and 24DJ(2): clarify other use of information provided or obtained by the NNTT when providing assistance to parties in the negotiation of an objection to an ILUA

Section 24CI enables persons claiming to hold native title in the relevant area to, in certain circumstances, object to the proposed registration of an area agreement ILUA. Objections must be made in writing to the Registrar of the NNTT (subsection 24CI(1)), and the parties to the ILUA may request assistance from the NNTT to negotiate with the person who made the objection, with a view to having the objection withdrawn (subsection 24CI(2)). Where an objection is not withdrawn, the Registrar will determine whether or not the objection will be upheld (see subsection 24CK(2)).

A similar procedure applies to registration of an alternative procedure agreement ILUA (see sections 24DJ and 24DL). However, where an objection to an alternative procedure agreement is not withdrawn it is the decision of the NNTT (not the Registrar) as to whether or not the objection should be upheld.

The involvement of the NNTT and Registrar in the objection process could give rise to concerns about the use of information gained through the objection negotiations in any later decision by the Registrar (area agreement) or inquiry by the NNTT (alternative procedure agreement) about that objection.

It has been suggested that information obtained or provided during objection negotiations should not be able to be used during a later decision by the Registrar or inquiry by the NNTT without the consent of the parties. Similarly, an NNTT member who attempts to negotiate the withdrawal of an objection to an alternative procedure agreement should be prohibited from being involved in a subsequent inquiry into the objection unless the parties consent is obtained.

Accordingly, it has been proposed that the NTA be amended to make clear that information provided and/or obtained in the course of providing assistance in objection negotiations cannot be used by the NNTT or Registrar in a subsequent inquiry or decision about that objection, without the consent of the parties to the negotiations.

In addition, it has been proposed that the NTA be amended to provide that an NNTT member who provides assistance in negotiations to withdraw an objection to an alternative procedure agreement is prohibited from participating in any subsequent inquiry, without the consent of the parties.

Subsection 24MD(6B): amend to allow non-native title parties to request an independent hearing

Subsection 24MD(6B) of the NTA provides that, where certain types of acts are proposed over land or waters (namely, compulsory acquisitions by governments for the benefit of third parties, or the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility associated with mining) any native title claimant or PBC in relation to the relevant land or waters may object to the doing of that act to the extent that it affects their registered native title rights and interests. Paragraph 24MD(6B)(f) provides that where an objection is made, and the objector requests, the relevant Government party must ensure that the objection is heard by an independent person or body.

This provision has been interpreted to mean that the independent person or body can only hear the objection if the objector requests this. Where no such request is made, resolution of the objection, and therefore the proposed act, may be delayed.

Accordingly, to avoid the potential for extensive delays in resolving objections made pursuant to subsection 24MD(6B), it has been proposed that this subsection be amended to enable the relevant government party or the person who requested or applied for the doing of the act to request that the objection be heard by an independent person or body. The relevant government party or person who requested or applied for the doing of the particular act will only be able to request to have the objection heard by an independent person or body after two months from the date of the original objection by the native title claimant or PBC. This will allow time for the consultation required in paragraph (e) to progress, which may alleviate the need for the matter to be referred to an independent person or body.

B: Amendments to the Alternative State Regime provisions

Sections 43 and 43A: clarify resumption of right to negotiate when alternative state regimes cease

Pursuant to sections 43 and 43A of the NTA the Commonwealth Minister may make a determination that alternative State or Territory right to negotiate provisions apply instead of the NTA provisions.

Currently, neither section outlines what happens in the event that an alternative state regime is revoked or otherwise no longer exists. It would be useful to clarify this. Accordingly, it has been proposed that the NTA be amended to provide that following the revocation of a section 43 or section 43A determination, or the repeal by a State or Territory of the laws providing for an alternative state regime, the relevant NTA right to negotiate provision will resume application. The resumption of NTA processes would take effect immediately following the revocation or repeal coming into effect.

C: Amendments to the Prescribed Bodies Corporate provisions

Section 57: consent of agent PBCs to manage native title rights and interests

Where the native title holders want a PBC to hold the native title rights and interests on trust, they must nominate that PBC and provide to the Federal Court the written consent of that PBC. However, where the native title holders want a PBC to manage the native title rights and interests as their 'agent', there is no requirement that they provide the Federal Court with the written consent of the PBC.

This appears to be an unintended discrepancy. It has been proposed that section 57 be amended to provide that an 'agent' PBC must consent to being nominated to manage the native title.

D: Amendments to the Application and Registration Test provisions

Subsection 62(1): amend affidavit requirements about entries on the National Native Title Register

The NTA requires an application seeking to have native title recognised to be accompanied by an affidavit sworn by the applicant which, amongst other things, includes a statement that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register (see sub-paragraph 62(1)(a)(ii)).

This provision is designed to ensure that a new native title claim does not cover an area where native title has already been finally determined. Entries in the National Native Title Register are governed by subsection 193(1) of the NTA, which in addition to requiring details of determinations by the High Court, Federal Court and any State or Territory court, also required details of any 'other determinations of, or in relation to, native title in decisions of courts or tribunals'. This has the capacity to include a very wide range of native title related decisions which are not determinations of native title, and should not necessarily impede a native title claim being lodged over that area. For example, a State Supreme Court decision which may only have a lesser, *in personam* operation that a native title determination, would currently prevent an application being made over the area.

It has been proposed that the requirement in subsection 62(1) be modified to refer only to approved determinations of native title and not also those decisions entered under paragraph 193(1)(c). Such an amendment would not result in new claims being lodged where a determination of native title has already been made, as this is expressly prohibited by other parts of the NTA (subsection 61A(1) and 13(1)).

Paragraph 62(2)(c): searches carried out about non-native title rights and interests

Paragraph 62(2)(c) forms part of the requirements which an application to have native title recognised must meet. The provision requires that the details of all searches carried out to establish certain things be included in the application. As currently drafted it is not clear whether it refers to searches carried out by the applicants, or searches carried out by anybody.

The clear policy of the provision is that it is limited to searches carried out by the native title claim group. It has been proposed that paragraph 62(2)(c) be amended accordingly.

Subsections 62(2) and 62(3): amend information requirements for compensation application according to circumstances leading to application

A compensation claim may be made either by a RNTBC or a compensation claim group (section 61). A claim by a RNTBC will follow a determination that native title exists. However, a claim by a compensation claim group could be made in two circumstances – where no determination of native title has been sought, or where a determination has been sought and native title has not been recognised. It is possible that native title might not have been recognised because it was extinguished by acts which may be compensable under the NTA.

Where a compensation application is made by a compensation claim group, some information required in applications for a determination of native title must also be included in that compensation application (paragraph 62(3)(b)). That information includes a description and map of the relevant area, details and results of searches about non-native title rights and interests, and a description of the native title rights and interests and the basis on which it is asserted they exist.

Provision of this information ensures that where necessary the Federal Court can make a determination of native title at the time it determines compensation. (Subsection 13(2) provides that if at the time the Federal Court is making a native title compensation determination, there is not an approved determination of native title in relation to the whole or part of the area to which a native title compensation application relates, then the Federal Court must also make a current determination of native title at that time.)

However, where the compensation group has already sought a determination of native title, and that determination has resulted in native title not being recognised, provision of material under paragraph 62(3)(b) could be unnecessary. Accordingly, it has been proposed that paragraph 62(3)(b) be amended to require the provision of additional information only in circumstances where there is a material difference between the nature of the group, the rights and interests claimed, or the land and waters covered by the compensation claim and the native title claim. Such compensation claimants would still need to meet the authorisation and other requirements in subsection 62(3). An additional provision in section 62(3) would require the applicants to also provide material identifying the previous claim.

Further, the note to subsection 13(2) states that where a claim for compensation is made, and there has previously been no application for a determination of native title, the compensation claimants must include certain information in their claim pursuant to subsection 62(3). However, as noted above, a compensation claim may be made following an unsuccessful native title claim. It has been proposed that the note also be amended to reflect the amendments to paragraph 62(3)(b).

Sections 64 and 87: enabling an application to be split to facilitate resolution

Under the NTA an application can be split, to facilitate a consent determination over part of an area, for example where most parties consent to a determination and the parties who do not consent do not have an interest in the proposed determination area. However, this requires going through the registration test again which discourages applicants from taking up this option.

Accordingly, it has been proposed that the NTA be amended to enable applicants to apply to the Federal Court for a consent determination over part of a claim area and authorise the Federal Court to make such a determination. The application could only be made where the Federal Court is satisfied that all parties whose interest in the claim falls (either partly or solely) within the area proposed to be split off for the purposes of the partial determination would consent to a determination of native title.

It has also been proposed that this change be accompanied by consequential amendments requiring the Registrar of the Federal Court to review the party list after the split part of the claim has been resolved with a view to identifying parties who no longer have an interest in the claim. The Federal Court would be provided with the discretion to remove parties so identified by the Registrar from the remainder of the claim.

Sections 64 and 190A: amendments to applications and the registration test

Subsection 64(4) requires the Registrar of the Federal Court to provide a copy of all amended applications to the Native Title Registrar, who is required to consider the application and apply the registration test (section 190A). There are no exceptions to this process.

Registration of a claim is important as it confers procedural rights under the further acts regime, such as the right to negotiate. However, it has been the experience of many stakeholders that many claimants with registered claims do not, or are reluctant to, amend their claim to take into account changes in the law or to improve the quality of the claim, in case their claim loses its registered status. This is not conducive to timely mediation or litigation of claims.

The ability to amend the claim to remove particular areas without going through the registration test may also provide incentive for claimants and respondents to agree on some areas being excluded – and therefore some respondents being able to withdraw from the proceedings.

This could be resolved in part by providing that some amendments to applications no longer trigger the registration test. It has been proposed that section 190A be amended to provide that amendments to claims to reduce the area covered by the claim, to remove the name(s) of deceased claimants from the application, or to make purely procedural changes such as changing the address for service, will not trigger the registration test.

Under this proposal section 190 would also be amended, to provide that the details on the Register of Native Title Claims of applications which are amended but are not

required to go through the registration test again are updated, to ensure all parties are aware of any changes.

Subsection 190A(2) and section 24MD: extend the NNTT Registrar's obligation to consider claim within appropriate timeframes

Section 190A prescribes how the NNTT Registrar is to consider native title determination claims. Subsection 190A(2) provides that if notice is given under section 29 about a proposed future act which would affect land or waters within the claim area, the Registrar must endeavour to finish considering that claim within four months. That timeframe reflects paragraph 30(1)(a), which provides that a person who four months after notice is given under section 29 is a *registered* native title claimant over relevant land or waters will be a party to negotiations about the proposed future act.

Section 29 forms part of the right to negotiate provisions. Currently, the obligation in section 190A(2) does not extend to acts covered by State or Territory alternative right to negotiate regimes, or to other acts where procedural rights can arise.

Alternative state regimes

It has been proposed that section 190A(2) be amended to extend the Registrar's obligation to also cover where he or she is given notice of a future act under a relevant State or Territory alternative right to negotiate regime. The timeframe within which the Registrar would need to endeavour to finish considering the claim will reflect the time within which an objection to a future acts can be made under the State or Territory's alternative regime.

Section 24MD

It has been proposed that section 190A(2) be amended to also extend the Registrar's obligation to cover where notice is given by the Commonwealth, State or Territory under subsection 24MD(6B) about a proposed future act.

Section 24MD sets out how certain acts, which could be done in relation to land or waters whether there is native title or ordinary title over that land or waters, can be done. For example, section 24MD covers compulsory acquisition where both native title and non-native title interests are acquired and the native title holders are not caused any greater disadvantage than the non-native title holders.

Some types of acts covered by section 24MD – compulsory acquisitions which confer rights on persons other than the Commonwealth, State or Territory, and the creation or variation of a right to mine solely to enable construction of a mining related infrastructure facility – will give rise to procedural rights. Notice of such an act must be given by the Commonwealth, State or Territory to any registered native title claimant, native title body corporate, and relevant NTRB (paragraph 24MD(6B)(c)). A claimant or body corporate may then object to the act being done within two months of the notification.

It has been proposed that where notice is given by the Commonwealth, State or Territory about the proposed future act, the Registrar be obliged to use his or her best

endeavours to finish considering any native title claim within two months of that notice. The two month period reflects the time in which a claimant may currently object to the doing of an act which affects their *registered* native title rights and interests.

A consequential amendment to paragraph 24MD(6B)(c) would also be required to ensure that the Registrar is given notice of the proposed future act, as currently notice is only given to claimants, PBCs and any NTRB.

E: Miscellaneous Amendments

Section 78: clarify the scope of the Registrar's ability to provide assistance pursuant to this provision

Section 78 provides that the Registrar may give assistance to people in the preparation of applications, and may assist people (at any stage of a proceeding) in matters related to the proceeding. Section 78 is located in Part 3 of the NTA, which is about applications to both the Federal Court and the Registrar.

Whilst the Registrar can clearly provide assistance to people for some parts of the future act process – for example, in preparing an expedited procedure application – it is not clear whether assistance could be provided to a person applying to register an ILUA. It would improve the efficiency and effectiveness of the native title system if it were clarified that the Registrar can assist a person applying to register an ILUA. Accordingly, it has been proposed that section 78 be amended to enable the Registrar to give assistance to persons applying to register an ILUA.

Paragraph 139(d): provide for the NNTT to make a determination following an inquiry under paragraph 139(d)

Where a person claiming to hold native title in relation to land or waters covered by an alternative procedure agreement objects to the registration of that agreement, and that objection is not withdrawn, the NNTT must determine whether or not the objection should be upheld and registration prevented (see sections 24DJ and 24DL). The NNTT decides this matter through an inquiry, pursuant to paragraph 139(d).

Section 139 also provides for inquiries to be held in relation to right to negotiate applications and 'special matters'. Where the NNTT holds an inquiry into a right to negotiate application, section 162 prescribes that the NNTT must make a determination about the matters covered by the inquiry, and must state any findings of fact upon which the determination is based. When the NNTT holds an inquiry into a special matter, section 163 provides that the NNTT must make a report about the matters covered by the inquiry and report any findings of fact upon which it is based. Section 164 provides that determinations and reports referred to in section 162 and 163 respectively must be in writing and published by the Tribunal.

To ensure consistency, the requirements that apply to an inquiry to a right to negotiate application and a special matter should also apply to an inquiry under paragraph 139(d). Accordingly, it has been proposed that the NTA be amended to provide that where the NNTT holds an inquiry into a matter referred to in paragraph 139(d) they

must make a report about the matters covered by the inquiry. The report would include any findings of fact upon which it is based, be in writing and, be given to all parties.

ATTACHMENT B: TECHNICAL AMENDMENTS – parties to whom first discussion paper was provided

The first discussion paper was directly provided to the following parties:

- all State and Territory governments
- all NTRBs and NTSs and the National NTRB and NTS Forum
- Federal Court of Australia
- National Native Title Tribunal
- Australian Local Government Association
- Aboriginal and Torres Strait Islander Social Justice Commissioner (Human Rights and Equal Opportunities Commission)
- Australian Institute for Aboriginal and Torres Strait Islander Studies
- National Indigenous Council
- Australian Petroleum Production & Exploration Association
- Minerals Council of Australia
- Minerals Exploration Action Agenda Land Access Subcommittee
- National Farmers' Federation
- Pastoralists and Graziers Association of Western Australia
- Queensland Small Miners Association
- Western Australian Fisheries Industry Council
- various interested legal practitioners
- an interested member of the public

Technical amendments to the *Native Title Act 1993*

Second Discussion Paper

Introduction

It is proposed a Bill to amend the *Native Title Act 1993* (NTA) incorporating technical amendments be introduced to Parliament early in 2007. Other drafting commitments will not enable exposure draft legislation to be prepared in time to allow effective consultation and introduction in the Autumn 2007 Parliamentary sitting. This further discussion paper is released to ensure stakeholders have ample opportunity to comment on proposed technical amendments.

On 22 November 2005 the Attorney-General released a discussion paper setting out proposals to fine tune the operation of the NTA. All stakeholders were invited to comment on the proposals and to suggest other amendments of a minor and technical nature. In light of that consultation, this further discussion paper incorporates:

- proposals in the first discussion paper that will not be pursued
- proposals in the first discussion paper that have been modified, and
- additional proposals to make minor or technical amendments to the NTA.

This paper should be read in conjunction with the first discussion paper, given most of those proposals received broad support. While many suggestions have been incorporated in this discussion paper, a common reason for not advancing other suggested proposals from stakeholders was their capacity to unduly or substantively affect the balance of rights under the NTA.

The Australian Government welcomes you to make comments on the modified and additional proposals outlined in this second discussion paper.

If you would like to make a written submission, please forward it no later than 22 December 2006 to:

The First Assistant Secretary
Legal Services and Native Title Division
Attorney-General's Department
National Circuit
BARTON ACT 2600

Submissions may also be e-mailed to native.title@ag.gov.au, or sent by facsimile to (02) 6250 5553.

Any suggestions may be forwarded to other relevant Australian Government agencies and Departments for their consideration. Unless you request otherwise, information you provide may also be used in consultations and any explanatory documentation prepared in relation to the amending Bill.

Proposals which will be not be included in the technical amendments to the NTA

1. Two proposals from the first discussion paper will not be included as amendments to the NTA.

Proposed amendments to subsection 62(2) and 62(3) – information requirements for compensation applications

2. The discussion paper suggested amendments to reduce requirements for information to accompany compensation claims. In summary, it proposed the information should not be required if such information had previously been given to the Court in support of a native title claim, provided there was no "material difference" between characteristics of the two claims, such as the nature of the group, or the rights and interests claimed.

3. Some stakeholders expressed concerns about establishing the extent to which any differences between the claims would be "material", and questioned the need for such an amendment. Establishing "material" differences would necessarily involve subjective judgments, and the proposed amendment was likely to generate uncertainty in the processing of compensation applications. To the extent information provided in relation to the native title claim is capable of being used in support of a compensation claim, compensation claimants are currently able to adapt the material as appropriate. The onus should remain on claimants to ensure such information remains accurate for the purposes of the compensation claim. The original proposal will therefore not be pursued.

4. The discussion paper pointed out the note to subsection 13(2) does not reflect the current situation. In light of the above considerations, it should be amended to make clear the relevant information must be provided in relation to all compensation applications.

Proposed amendments to sections 64 and 87: splitting applications to facilitate resolution

5. The discussion paper suggested amendments to authorise the Court to make a consent determination over part of a claim area and to remove parties who do not have an interest in that part of the area from the proceedings. Although this proposal received support from some stakeholders, the objectives behind the proposal will now be considered in the context of implementation of recommendations 18 and 20 of the Native Title Claims Resolution Review. Those recommendations contemplate more substantive measures which would enable the removal of parties which do not have a relevant interest in the proceeding, and limiting the right of participation of non-government respondent parties to issues relevant to their interests. Accordingly, the original proposal will not be pursued in the context of the technical amendments to the NTA.

Modifications to proposals in the first discussion paper

Amendments to the Future Act Regime

Proposed amendments to sections 24BF, 24CF, 24DG, 24CI(2) and 24DJ(2): clarifying use of information obtained by the NNTT

6. The discussion paper suggested amendments to ensure information provided to the NNTT or Registrar for the purpose of securing assistance will not be used for other purposes (e.g., registration or mediation) without the consent of the parties. These proposals received broad support among stakeholders. One stakeholder suggested that, in the interests of consistency, the restrictions should apply to use of information obtained under other provisions enabling the NNTT to assist parties on request. It was also noted responsibility for consenting for further use of the information should rest with the party which provided that information.

7. Accordingly, the proposal has been modified to restrict the NNTT and Registrar from disclosing or using information which has been provided to the NNTT for the purpose of securing assistance under the following provisions: 24BF, 24CF, 24CI(2), 24DG, 24DJ(2), 31(3), 44B(4), 44F, 86F(2) and 203BK(3). Such information could only be used or disclosed by the NNTT or Registrar for other purposes where the person providing the information consents to this.

Proposed amendment to subsection 24MD(6B): allowing non-native title parties to request an independent hearing in relation to objections over certain acts

8. The discussion paper proposed amendments to subsection 24MD(6B) to enable government parties or future act proponents to request an independent hearing in relation to an objection to certain acts. Currently, only the native title party which made the objection can seek an independent hearing. This proposal received support from a number of stakeholders, although some concerns were raised about how the amendment would be drafted to ensure certainty of operation. One NTRB opposed the proposal on the grounds it would effectively reduce the available consultation period to two months, which could make it impossible to conduct effective consultations. It also raised concerns that other parties would have no incentive to act in good faith in consultations.

9. In light of these concerns, the proposal has been modified to include the following safeguards:

(a) the independent person or body will not be authorised to make a determination unless it is satisfied that the relevant party has consulted in good faith (compare subsection 36(2) of the NTA, which imports a similar requirement)

(b) the power for non-native title parties to refer a matter to an independent hearing will be confined to government parties, given under the NTA it is a matter for the Commonwealth, State or Territory government to arrange for the objection to be heard by an independent person or body (the relevant government may arrange to refer the matter on request by a third party)

(c) the government may only refer the matter to an independent hearing after five months have elapsed from the notification day for the act – this effectively provides for a *minimum* consultation period of three months

(d) if a Commonwealth, State, or Territory Minister decides that the independent determination shall not be complied with under paragraph 24MD(6B)(g), the Minister will be required to provide written reasons for this – such a requirement will provide greater transparency in relation to any such decisions.

Amendments to the Application and Registration Test provisions

Proposed amendment to sections 64 and 190A in relation to application of the registration test to amended claims

10. The discussion paper suggested that certain types of amendments to claimant applications (namely those to reduce the area covered, to remove the names of deceased applicants or to make purely procedural changes) should not trigger the registration test. This proposal received broad support, although a number of stakeholders suggested modifications. In particular, some stakeholders suggested there was confusing overlap between the amendment procedures in section 64 (which requires re-application of the registration test) and those in section 66B (which appears to enable the Court to order replacement of the applicant without going through the registration test). The application of the registration test to amended claims was also considered by the Native Title Claims Resolution Review, which recommended (Recommendation 12) that amendments be made to avoid the requirement for all amended applications to undergo the registration test if the application has already passed the registration test. The Australian Government agreed that recommendation 12 should be further considered in the context of the technical amendments process.

11. The Claims Resolution Review made the following specific suggestions under recommendation 12:

(i) An amended application should not be subject to the registration test, unless the Court orders otherwise, where a claimant application is amended to:

- reduce the area of land or waters covered by the application
- reduce the list of asserted native title rights and interests, or
- remove the name of a deceased applicant where other applicants remain.

(ii) Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:

- the amendment has been certified by the relevant representative body, or
- the amended application was accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other

persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see subsections 64(5) and 190C(4)).

(iii) Where an amendment is made which is not to be subject to the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.

12. This proposal is supported, subject to limited modifications as a consequence of removing the overlap between subsection 64(5) (which sets out a requirement to file an affidavit in a particular form for amendments to change the applicant, and generally requires re-imposition of the registration test) and section 66B (which deals with replacement of the applicant in specific circumstances, and is not expressed to require re-imposition of the registration test). It would be appropriate to ensure that all changes to the applicant may be dealt with under one provision. In summary, this will mean that in relation to proposal (ii) above, the question of reapplying the registration test will not require a certificate or affidavit regarding authorisation to be provided to the Native Title Registrar. Given the Court would need to be independently satisfied that the new applicants are properly authorised before an amendment may be made, this additional step is unnecessary and would not add anything to the process.

13. Accordingly, and in order to give effect to the objectives of recommendation 12 of the Claims Resolution Review, it is proposed the following amendments will be made to the NTA. First, section 66B will set out a broader range of circumstances in which the Court may agree to replace the applicant, enabling amendment to the Register without imposing the registration test. In addition to the current circumstances (replacement on the basis the current applicant is no longer authorised, or on the basis the current applicant has exceeded his or her authority), applications may be made to replace the applicant if one or more persons currently named as applicant are deceased, incapacitated, or have consented to their removal or replacement. The Court will need to be satisfied in every such case that the members of the native title claim group seeking to replace the applicant are authorised by the claim group to make the application and to deal with matters arising in relation to it. This means the procedural requirement for an affidavit under subsection 64(5) will not be required, and that provision may be removed. Where the Court agrees to amend a registered application to replace the applicant under section 66B, the registration test need not be applied (see subsection 66B(4)).

14. Second, and as outlined in the discussion paper, section 190A will be amended to provide that amendments to registered claims to reduce the area covered by the claim or to make purely procedural changes (e.g, changing the address for service) will no longer trigger the registration test. In addition to such amendments, and as recommended by the Claims Resolution Review, amendments to reduce the list of claimed native title rights and interests will no longer trigger the registration test.

15. Third, and as recommended by the Claims Resolution Review, section 190A will also be amended to make clear that if an amendment is made that does not require re-application of the registration test, the Registrar is still required to amend the Register of Claims to reflect this as soon as practicable.

Additional proposals following consultations

Amendments to the future act provisions

Subdivisions B and C of Division 3: enable amendment of ILUAs

16. Indigenous Land Use Agreements (ILUAs) are a mechanism through which native title holders and other parties may conclude binding arrangements in relation to acts affecting native title. Once an ILUA is registered, it operates to bind all native title holders in the relevant area, even if they are not parties to the agreement. Accordingly, the NTA provides that ILUAs must be subject to an extensive notification and objection process. The NTA does not make any provision for the amendment of ILUAs. In practice, this means any changes to the ILUA, including minor changes, need to go through the same process as applied in relation to the original agreement. A number of stakeholders have suggested it would be desirable to have provisions which allow for the amendment of ILUAs in appropriate circumstances. Such provisions would be very useful in ensuring that ILUAs are flexible and adaptable. However, given that ILUAs can bind all native title holders, it would be necessary to include some limitations on the amendment provisions.

17. There are two types of ILUAs which are currently used widely. Body corporate ILUAs only apply where there are prescribed bodies corporate (PBCs) for the whole of the area concerned, and all the PBCs must be parties to the agreement. Given that native title over the agreement area has been determined, it should be sufficient to allow for amendments to such agreements to be registered if all parties to the existing agreement (which must include the PBC itself, relevant Governments if extinguishment or validation issues arise, and may include NTRBs and third parties) consent. Accordingly, it is proposed the amendments to the NTA should provide that if the Registrar is satisfied that all of the parties (and any proposed new parties) agree to an amendment to the body corporate ILUA (and subject to conditions to ensure that the amended ILUA fits within general requirements for body corporate agreements – for example, an amendment cannot go beyond the areas for which native title has been determined) the Registrar should be required to register the amendment. The result of this is that the amended ILUA will not need to go through the normal notification procedures, and may therefore be registered more quickly.

18. As a safeguard, the existing one month cooling off period would be retained for amendments (see 24BI(2)), as well as the requirement to inform NTRBs (24BD(4)). There would also be provision for notification to State/Territory, Commonwealth, and local governments. These would assist in promoting transparency, without slowing the process down to any significant degree. In the event determined native title holders had concerns about an amendment to an ILUA, this would be addressed through the regime governing prescribed bodies corporate, by ensuring native title holders are consulted about and consent to any amendments.

19. Different considerations arise with regard to amendments to area ILUAs, given it is possible an amendment to an area ILUA will affect the native title rights and interests of persons who are not parties to the agreement (see paragraph 24EA(1)(b)). It would be appropriate to allow for amendments to be made with the agreement of all existing parties provided that the amendments would not affect native title in any way beyond that already contemplated under the original ILUA. Thus, provided the

amendment does not relate to any of the matters covered under paragraphs 24CB(a) to (e) of the NTA, and subject to the additional conditions set out above for amendment to body corporate ILUAs, the Registrar would be required to register the amendment.

20. The above proposals would also enable amendments to assign third party obligations under ILUAs, provided all parties to the original ILUA (as well as the proposed assignee) agreed to this.

Subsection 24BH(1)(b): remove requirement for public notice of body corporate ILUAs

21. The Native Title Registrar is currently obliged to notify the public of body corporate Indigenous Land Use Agreements before such agreements may be registered. Given such agreements may only be made in relation to land over which native title has already been determined to exist, and since members of the general public do not have any procedural or other rights in relation to registration of the agreement, the obligation to notify the general public in advance is unnecessary. From a practical perspective, the provision of each notice currently costs an average of $6,000, and the NNTT has never received a response to any public notices in respect of the 21 body corporate ILUAs registered to date.

Subsections 24CH(2) and 24DI(2): provide greater flexibility in public notification of area ILUAs and alternative procedure ILUAs

22. The current provisions for notification of area ILUAs and alternative procedure ILUAs require the notice to 'describe the area covered by the agreement'. The NNTT currently interprets this as requiring a detailed description including full coordinates, which leads to notices of inordinate length, complexity and expense. Accordingly, the NTA will be amended to provide the Registrar with the discretion to describe an area covered by an area ILUA or alternative procedure ILUA by way of a map instead of a detailed description.

23. The provisions also require notices to set out certain statements which are included in the ILUA (i.e., any statements of a kind mentioned in paragraphs 24EB(1)(b), (c) or (d) of the NTA). These statements are frequently complex and difficult to understand. It is proposed the NTA will be amended to provide the Registrar with the discretion to include a 'plain English' summary of such statements in public notices, rather than the actual detailed statements as set out in the ILUA.

24. The amendments will require that any public notice using a map of the area covered or a summary of the statements include information to enable further details to be obtained from the NNTT (compare paragraph 22H(2)(g)).

Subsection 24DJ(1): clarify relationship with section 77A

25. One State Government suggested subsection 24DJ should expressly require that persons objecting to the registration of an alternative procedure ILUA provide reasons for the objection. This obligation already exists under paragraph 77A(c), which requires that applications for objection 'state reasons why it would not be fair and reasonable to register the agreement'. In the interests of clarity, a note will be included in section 24DJ referring to the obligations in section 77A.

Section 24IC: Permit combination of two or more leases, licences, permits or authorities under a single renewal

26. Section 24IC provides that a future act will be a ‘permissible lease etc renewal’ if it is the renewal, regrant, remaking or extension of the term of a valid lease, licence, permit or authority and meets additional specific criteria. Section 24IC(2) makes it clear that the grant of two or more leases, licences, permits or authorities in substitution for a single lease etc is still a ‘renewal’ for the purposes of the provision. It has been suggested section 24IC should also provide for a permissible ‘renewal’ where two or more leases, licences, permits or authorities are substituted by a single lease etc. It is proposed the amendments to the NTA will include such a provision, which will make clear that all of the additional specific criteria conditional on renewal of leases etc will continue to apply.

Section 24KA: Specify automatic weather stations as facilities for services to the public

27. Section 24KA is intended to ensure that services to the general public can be provided unimpeded by native title. Subsection 24KA(2) comprises a list of such facilities, including roads, navigation markers, street lighting, pipelines and communications facilities, as well as other facilities ‘similar’ to these. It is not clear whether automatic weather stations operated by or on behalf of the Australian Bureau of Meteorology are covered by section 24KA. Given such facilities are provided by Government in order to benefit to the general public (including members of rural communities), it is proposed to specify them in the list of facilities in subsection 24KA(2). The additional safeguards in subdivision K would continue to apply in relation to such facilities. This means compensation would be payable to affected native title holders, and that native title holders and registered claimants would be subject to the same procedural rights as ordinary title holders. In addition, the non-extinguishment principle will apply to the act.

Section 24KA: Clarify application to ‘mixed purpose’ infrastructure

28. Section 24KA validates future acts relating to facilities such as water, electricity and gas which are operated ‘for the general public’. The construction or operation of such facilities will be validated if it is done by or on behalf of a Government authority. The provision does not clearly address circumstances where the purpose of the infrastructure may have a ‘private’ element. For example, the facilities may be used partly for the operations of a private company and partly for consumption by other business and domestic uses. It has been claimed some State authorities have declined to process future acts which were proposed on this basis, and that this creates impediments to the roll-out of infrastructure in remote communities. Mining companies are often the largest suppliers of electricity to the general public in remote areas. It has therefore been suggested that section 24KA should be amended to state that it may apply in circumstances where the relevant act has an element of private benefit.

29. The NTA will be amended to make clear that section 24KA extends to facilities that are operated primarily for the general public on behalf of a Government authority. Thus, the public element will remain the dominant criterion, and private companies

seeking the benefit of this provision must still be operating the facility in relation to the general public on behalf of Government.

Section 24LA: allow government bodies to continue to carry out certain acts for community benefit or public safety following a determination of native title

30. Section 24LA permits certain future acts which have a minimal effect on native title to be done without the need to comply with any procedural requirements. Section 24LA(2) relevantly allows excavation or clearing undertaken for the protection of public health or safety, or for environmental protection, to be carried out as a low impact future act. However, such acts may not be carried under the authority of this provision after a determination native title exists over the land. It has been suggested the authority to conduct such acts for public health or environmental protection should continue to apply after a native title determination has been made. This is considered preferable to requiring parties to conclude an Indigenous Land Use Agreement, which will take considerable time and may not be practicable in urgent circumstances.

31. The proposed amendments to the NTA will include an amendment to allow such acts to be carried out by or on behalf of Government authorities for reasons of public health or safety or environmental protection, but only in circumstances where the determined native title holders do not have exclusive rights over the relevant land. Where the native title holders have exclusive rights (akin to those of freehold owners or exclusive lessees) then the relevant government bodies should be required to consult the native title holders through the prescribed body corporate before undertaking such activities on the land. Where the relevant rights are not exclusive, authorities should remain able to conduct activities necessary for public health or safety and for protection of the environment.

Subsection 24MD(6B): amend note to clarify operation

32. A State Government has raised concerns about the interaction between paragraph 24MD(6B)(a) and subparagraph 26(1)(c)(iii)(A) of the Act. In summary, these concerns arise because the explanatory note in subsection 24MD(6B) is poorly expressed. The note currently states that certain acts are not covered by Subdivision P. The note should instead make clear that those relevant acts are only covered by subsection 24MD(6B) if they are acts to which Subdivision P does not apply. The cross-referencing of provisions in the note should also be amended, and a consequential amendment should be made to the note in subparagraph 26(1)(c)(iii). These amendments will assist in ensuring the notes (which have no force of their own) reflect the legislation more accurately.

Subsections 24KA(8) and (9), 24MD(7) and (8), 24NA (9) and (10): clarify future act processes pending establishment of a PBC

33. The above provisions contemplate differential processes for notification of future acts in circumstances where there has been no approved determination of native title in the area. In essence, the notification processes and other procedural rights may be satisfied in such circumstances through dealing with relevant NTRBs and registered claimants. As noted above, however, there are circumstances in which there has been an approved determination of native title but there is no registered native title body corporate to deal with the determined native title rights. It has been suggested that the

NTA should include clear procedures for giving valid future act notices after native title is recognised but before the PBC is established. Accordingly, it is proposed the above provisions will be amended to provide that the differential processes for notification etc should apply unless a registered native title body corporate has been established in relation to the area.

Section 29: enabling Government notices to cover more than one act

34. Section 29 requires Government parties to give notice of future acts to specific persons or groups as well as to the general public. Subsection 29(8) provides that the public may be notified of two or more acts in the one notice, but there is no equivalent provision with respect to notification of specific persons or groups. It has been suggested that the implied requirement for an individual notice in relation to each future act is inefficient, and that it would be preferable to expressly allow for a single notice to cover more than one act. The other specific requirements in relation to Government future act notices will remain applicable.

Section 32: Align right to negotiate with lodgement of objections to expedited procedure

35. In giving notice of a proposed future act, the Government party may state it considers the act attracts the 'expedited procedure', essentially on the grounds the act is not likely to have a substantial impact on the land concerned or sites of particular significance, or upon the conduct of community and social activities by native title holders and claimants. Native title parties are able to lodge an objection against the statement. If the objection is upheld, the Government party and the future act proponent must then negotiate with all parties with a view to obtaining the agreement of all native title holders and claimants in relation to the act. A proposed act (e.g., a mining tenement) may cover land or waters in more than one native title claim area. Even if only one claim group lodges an objection to the expedited procedure, all of the groups in the area need to participate in negotiations subsequent to a successful objection.

36. It has been suggested this creates significant and potentially unnecessary delays since it requires negotiations with groups who chose not to object to the expedited procedure. Accordingly, an amendment should be made to provide that if an objection to the expedited procedure is upheld, the Government need only negotiate with those native title parties which had lodged an objection to the procedure.

Section 43: Clarify scope of alternative regimes

37. Section 43 enables a State or Territory to establish right to negotiate procedures which operate to the exclusion of the NTA provisions where the Attorney-General is satisfied that the alternative provisions meet certain statutory criteria, which are set out in subsection 43(2). Concerns have been identified regarding the extent to which the current provision allows alternative regimes to include a similar range of mechanisms to those which are currently provided for by the right to negotiate system under the NTA. In particular, it is not clear the alternative regimes may include provision for:

(a) application of an ‘expedited procedure’ (compare sections 32 and 237 of the NTA), and

(b) ‘conjunctive agreements’ covering several stages of a proposed development (compare subsection 26D(2) of the NTA).

38. Although the alternative regimes provisions have not been widely used, it is appropriate to ensure that the existing regimes are on a secure legal footing, and to make clear that future regimes may include the full range of mechanisms available under the Commonwealth right to negotiate. Accordingly, the amendments to the NTA will include a provision to confirm the validity of the current schemes, and to put beyond doubt that State and Territory provisions which allow for an expedited procedure and conjunctive agreements may be determined under section 43.

Paragraphs 36C(5)(b), 41(3)(b), 42(5)(b) and section 52: A more flexible scheme for payments held under right to negotiate processes

39. The above provisions provide that an arbitral body or minister may, upon application, determine that a future act can be done subject to conditions, including that a certain amount of money be paid and held in trust in accordance with the regulations. Section 52 prescribes circumstances under which that money should be paid out of trust. Parties to such arbitrations have only sought conditions of this kind on a limited number of occasions to date, and no regulations have yet been made enabling holding of the relevant money in trust. Consultation on draft regulations was initiated in April 2004 with the approval of the Attorney-General. Those consultations highlighted a number of potential difficulties under the scheme.

40. It has been suggested that it would be preferable to amend the relevant provisions to provide for a bank guarantee regime instead of a trust regime. This would mean that the arbitral body or Minister, when making a future act determination, would be able to determine the act be done on condition that a certain amount of money be assured by way of bank guarantee, instead of through the payment of money on trust. The general conditions set out in section 52 relating to when the funds could be called upon or distributed would be retained. The key advantage of this approach is that proponents would not need to pay the full amount of money into trust, and would therefore be able to continue to use the amount guaranteed unless and until the guarantee is called upon. The bank guarantee would offer adequate security, without tying up funds for lengthy periods of time until compensation is finally determined. The amendments to the NTA will include appropriate provisions to give effect to this proposal. This should also include an amendment to section 43 to ensure that alternative state regimes may provide for a bank guarantee regime instead of a trust regime.

Amendments to provisions governing native title determination applications

Subparagraph 62(1)(a)(v): clarify to ensure that native title claimants identify basis of authorisation

41. Subparagraph 62(1)(a)(v) requires claimant applications to be supported by an affidavit stating ‘the basis upon which the applicant is authorised’ to bring the application and to deal with matters arising in relation to it. The authorisation

requirements are defined in section 251B, which contemplates (a) compliance with a process of decision making under traditional laws and customs or – in the absence of such a process – (b) a process agreed to and adopted by the persons in the relevant group.

42. One State Government stated the affidavits often provide little or no information setting out the basis of authorisation, and often only include the date upon which a meeting was held. This limits the utility of the process. Accordingly, it is proposed the provision be clarified to require the applicant to briefly describe the process of decision making through which the applicant was authorised, including whether the process followed 251B(a) or (b). Consequential amendments would need to be included for other provisions involving authorisation (e.g., those relating to amendment of the applicant).

Section 62A: clarify scope of applicant's authorisation

43. Section 62A provides that where a claimant application or compensation application has been authorised by the relevant claim group, 'the applicant may deal with all matters arising under [the NTA] in relation to the application'. It has been suggested that some parties mistakenly consider this confers authority on the applicant to enter into ILUAs, whereas such authorisation needs to comply with the specific requirements of section 251A. In the interests of clarity, a note will be included in section 62A referring to the separate authorisation process for ILUAs.

Division 1 of Part 3: clarification of authorisation requirements

44. The Native Title Claims Resolution Review found that resolution of native title claims was impeded by disputes among claimants about questions such as authority to act on behalf of the group, and disputes both within and between groups. It recommended (recommendation 13) that amendments be made to the authorisation provisions in the NTA to remove ambiguities. The Review suggested it would be appropriate to clarify whether:

- a lack of authorisation is fatal to a claim
- authorisation that might have been defective can be later ratified or otherwise cured, and
- the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in sections 251A and 251B.

45. The Government agreed to consider this in the context of the technical amendments. A number of other submissions also suggested that the authorisation requirements should be clarified.

46. The question as to whether identified deficiencies in the authorisation process will be fatal to the claim will, if raised, ultimately be determined by the Court, and it would not be appropriate to seek to impose a blanket statutory rule in relation to this requirement. However, to the extent that lack of authorisation may be regarded as

fatal, it would be appropriate to provide an appropriate mechanism through which it may be cured. In particular, this will assist in ensuring the Court will have jurisdiction to determine a claim in which there has been extensive hearings and evidence taken. Accordingly, it is proposed to include a provision which makes clear the Court may make an order to continue to hear a native title determination notwithstanding a defect in the original authorisation process, provided it is satisfied that such an order is necessary in the interests of justice. The Court would be given discretion to make such other orders as are appropriate, including orders dealing with use of evidence received in the proceedings, replacement of the applicants, and notification to other parties.

47. With respect to the final suggestion, it is not considered possible to specify whether the registered claimants, or the named applicants, must be unanimous in giving instructions or executing agreements. The source of authority for the named applicants will ultimately rest on their authorisation in accordance with the rules established in sections 251A and 251B. This is intended to ensure the process complies with either a traditional decision making process or one otherwise agreed to by the relevant group. It would be inconsistent with the nature of native title rights and interests to superimpose requirements of 'unanimity' or majority vote. To the extent that disputes arise in relation to the respective authority of different named applicants, this would need to be resolved in accordance with the provisions for replacing an applicant in section 66B. However, given the concerns identified in the Claims Resolution Review, it would be appropriate to clarify the nexus between section 66B and section 251B. Thus, section 66B should be amended to expressly recognise that section 251B prescribes the decision making process by which authorisation may be withdrawn.

Section 66: Providing greater flexibility in relation to notification

48. The Native Title Claims Resolution Review identified a number of difficulties in relation to the notification requirements in subsection 66(3) of the Act. It noted the existing framework (which contemplates a staged process of notification to various persons) could delay attempts to narrow issues associated with claims (for example, preliminary mediation in relation to overlaps, or clarification of the scope of the claim). It also noted that automatic notification to all parties following application of the registration test may not always be appropriate, particularly where the claim was made primarily for the purpose of securing the right to negotiate.

49. Accordingly, the review recommended, in recommendation 14, that the notification requirements in subsection 66(3) of the NTA be amended to provide the Court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular, it recommended that.

(i) Section 66 should be amended to allow the Court to order notification of potentially affected interest holders at any time which it considers appropriate.

(ii) The President of the NNTT should be empowered to direct the Registrar not to notify an application under subsection 66(3) of the NTA where:

- a claimant application is lodged in response to a notice under section 29 of the NTA and is registration tested within four months of the notification day (see paragraph 30(1)(a) and subsection 190A(2)), and

- it is apparent that the application is primarily for the purpose of securing the right to negotiate.

If subsequently the President is satisfied that the application should be notified, the President should be required to direct the Registrar to notify the application under subsection 66(3).

50. The NTA will be amended to give effect to this recommendation. With respect to part (i), this will require an amendment to section 66 to enable the Court to make an order that notification may be provided to potentially affected interest holders prior to the completion of the registration test where the Court considers this appropriate, or to order that notification to persons described in paragraphs 66(3)(iv) and (vii) may be deferred following the application of the registration test pending the taking of other steps (such as referral to limited mediation, or requiring particular tenure research to be carried out). This will broaden the Court's existing power to make orders on notification under subsection 66(7). It will also be necessary to make consequential amendments to section 86B to provide that where the Court has made such an order, it may refer the claim to the NNTT for mediation before all persons or bodies identified in subsection 66(3) have been notified. Finally, the amendments will need to make clear that notwithstanding any such order, all persons whose interests may be affected by a determination will have the opportunity to become aware of and the right to become parties to the application before the commencement of substantive proceedings in the Federal Court in relation to the claim.

51. With respect to part (ii), it will be necessary to introduce a provision giving the President of the NNTT the discretion to defer notification of a claim to persons or bodies entitled to be notified under subsection 66(3) where the claim is made in response to a future act notice, and the President is satisfied that such deferral will not adversely affect the interests of the relevant persons or bodies. A future act notice is a notice given under section 29 of the NTA or under the equivalent provision of a State or Territory law. A claim will be deemed to be in response to a future act notice where the claim is filed over all or part of the area covered by the relevant future act notice within four months of the notification day for the future act notice as defined in subsection 29(4). The discretion to defer notification would apply to registered and unregistered claims. The President would be required to direct notification if he subsequently considers that the other persons or bodies should be notified. The amendment should require that all such parties must be notified before the commencement of any substantive proceedings in the Federal Court in relation to the claim.

Subparagraph 66(3)(a)(iv) and subsection 66(5): clarify exceptions for notice of native title applications

52. Subparagraph 66(3)(a)(iv) requires the Registrar to give notice of native title applications to all persons who held a proprietary interest in the relevant area which was registered in a public register at the time the application was filed. It is often difficult or impossible for the Registrar to comply with this in practice, given that in

some jurisdictions the relevant information is not made available for some months, and may not include retrospective information as to proprietary interests as at the time of filing (as opposed to notification).

53. Subsection 66(5) currently provides that the Registrar is not required to give notice to a person under subparagraph 66(3)(a)(iv) if the Registrar considers it would be unreasonable to do so. The NTA will be amended to make clear the exception in subsection 66(5) will apply if the Registrar does not have access to sufficient tenure information in order to give direct notice to all relevant parties. To the extent that the Registrar has some information indicating possible property interests, this should be notified in accordance with paragraph 66(3)(a)(vii) of the NTA. A note will be included to make this clear.

Section 66A: Ensure all relevant parties are notified when a claim is amended to re-include areas previously claimed

54. Subsection 66A(1) obliges the Native Title Registrar to notify parties of amendments to claims which change the area of land or waters covered by 'the original application'. This refers to the application as it stood when the claim was initially lodged. There have been cases where the original claim area has been reduced by way of amendment (e.g., to resolve overlaps) and the claimant group has subsequently decided to revert to the area covered by the original claim. In such circumstances, there is no provision requiring notification of any parties who withdrew from the proceedings after their land was removed from the original claim, or to other persons who acquired an interest during the time between the two amendments to the claim. This appears to have been an unintended consequence of the drafting of this provision. It should be rectified to ensure that persons who agree to withdraw from proceedings following a reduction in the claim area can do so with confidence that they would be informed of any changes to restore the claim to the original size. Section 66A should be amended to ensure that when a change to an application results in the inclusion of land or waters additional to that covered by the claim immediately prior to the amendment, then persons with interests in the additional areas should be notified. A consequential amendment should be made to section 84 to provide that persons who receive such notice have the right to become parties to the amended claim.

Proceedings before the Federal Court

Division 1A of Part 4: Encourage access by parties to hearings through teleconference and other facilities

55. The Federal Court Act 1976 enables the use of video links, audio links and other methods of communication in proceedings, including native title proceedings. However, the Court has not always been prepared to agree to parties' attendance at interlocutory proceedings, such as directions hearings, through such means. When hearings are conducted in regional centres, attendance can be expensive and time consuming for parties, frequently at Commonwealth expense. It is proposed to include a provision encouraging the Court to allow for the use of such communication methods in appropriate circumstances. The provision could require that when considering an application by one of the parties for an order to hear submissions by video link, audio link or other appropriate means, and subject to the requirement of

section 47C of the Federal Court Act (which sets out relevant conditions), the Court must make the order unless it considers it would be contrary to the interests of justice to do so.

Subsection 84(6): clarify respondents' ability to withdraw from proceedings

56. Subsection 84(6) provides that respondent parties may withdraw from proceedings before the 'first hearing' simply by giving notice to the Court. After that time, it is necessary to seek leave from the Court. It has been noted there is some uncertainty about when the 'first hearing' occurs, and that continuing proceedings can take some years before going to trial. The NTA should be amended to make clear that respondent parties may withdraw as of right at any time before the commencement of substantive hearings of evidence.

National Native Title Tribunal

Subsection 136A(4) and section 136G: clarify status of mediation reports

57. Subsection 136A(4) generally prevents evidence being given, or statements made, concerning NNTT mediation conferences in proceedings before the Federal Court. This is intended to encourage parties to be candid during mediation without prejudice to their position in the event mediation fails. However, section 136G requires the NNTT to provide a written report to the Court setting out the results of the mediation. In practice, the NNTT reports provided to the Court do not include confidential information. It would be preferable to make this position clear in the legislation, by specifying that section 136G is subject to subsection 136A(4). An amendment to this effect should be included in the technical amendments with a view to ensuring clarity. The issue will need to be reviewed in light of any substantive amendments to the NTA as a result of the Native Title Claims Resolution Review, to ensure that – in the context of the overall reform package – the proposal does not impede effective reporting by the NNTT to the Court.

Register of Native Title Claims

Section 190 and 190A: Give priority to registration of amendments to claims

58. Concerns have been expressed about the time taken to amend the Register of Native Title Claims after a claim has been amended. As outlined above [paragraph 24], the NTA will be amended to provide that amendments to registered claims which do not need to go through the registration test (e.g., to reduce the size of the claim area) must be reflected on the Register of Claims as soon as practicable [compare existing subsection 190(3), and note this will require an amendment also to section 66B(4)]. However, this will not address circumstances in which the amendment to the claim requires re-application of the registration test. It is also proposed that section 190A be amended to provide that in such circumstances the Registrar is to re-apply the registration test as soon as practicable.

Subsection 190(4) clarify obligation to remove 'finalised' claims from Register

59. Paragraph 190(4)(d) requires the Registrar to remove claims from the Claims Register once the relevant application has been withdrawn, dismissed or otherwise

finalised. The note to this provision states an application may be finalised by a determination of native title. The operation of the provision is unclear in circumstances where a determination of native title has been made but no prescribed body corporate has been nominated in relation to the native title holders.

60. The NNTT currently proceeds on the basis that the claim is not finalised until the prescribed body corporate has been determined or registered, which ensures that the native title holders may still be notified on any proposed future acts pending registration. However, this approach gives rise to confusion where the determination establishes that native title has been extinguished over parts of the claim area, in so far as the Register will not reflect this (and could suggest that the claimants continue to have procedural rights over those parts). The Note should be amended to make clear that in such circumstances the Register should amend the entry (pursuant to paragraph 190(4)(e)), to reflect the fact that the application has been the subject of a native title determination but no PBC has yet been determined.

Subsection 190A(2): encouraging prompt consideration of claims subject to non-claimant applications

61. The NTA allows persons who do not claim native title to seek a determination of whether native title rights exist in relation to particular areas through a 'non-claimant' application. If there is no 'relevant native title claim' lodged over the land following notification of a non-claimant application, then future acts may be validly done over the land (see sections 24FA and 24FB in particular). A 'relevant native title claim' includes a claim made during the notification period, provided it is subsequently accepted for registration. Thus, the ability for Governments to do future acts over the land will depend on how quickly a decision is taken in relation to registration of the claim.

62. The NTA seeks to ensure that priority is given to consideration of claimant obligations in certain circumstances where the ability to do future acts will depend on whether the claim is accepted for registration. If, for example, a future act notice has been issued under section 29 in relation to the area covered by a claim, subsection 190A(2) requires the Registrar to use 'best endeavours' to finish considering the claim within four months. It has been suggested a similar obligation should apply in relation to claims made in response to a 'non-claimant' application. Accordingly, the NTA will be amended to extend the obligation under subsection 190A(2) so that the Registrar must use his or her use best endeavours to finish considering a claims for registration within four months where a claim has been made over an area which is subject to a non-claimant application. Together with reforms proposed in the earlier discussion paper, this will ensure that greater priority is given to registration decisions in circumstances where timing will be relevant to possible future development of the land.

Paragraph 190C(4)(a): Clarify authority of NTRBs to certify applications

63. Paragraph 190C(4)(a) enables the Registrar to be satisfied as to the identity of the claimed native title holders if the 'application has been certified under Part 11 *by each representative Aboriginal/Torres Strait Islander body that could certify the application* in performing its functions under that Part'. There have been two ambiguities identified in relation to this provision. First, it is not clear whether an

NTRB responsible for only part of the claim area can certify an application if there is no NTRB existing in relation to the remainder of the claim area. The current wording of the provision implies that if one or more NTRBs are not able to certify the application in relation to the entire area, then the Registrar will need to form an independent view in relation to the entire area. Second, it is not clear whether a certificate may be validly relied upon by the Registrar in the event that the NTRB's recognition is withdrawn before the application is registered.

64. The technical amendments will include amendments to subsection 190C(4) to address these issues. In relation to the first issue, the amendment will make clear that to the extent that an NTRB is only able to certify an application in relation to parts of the claim area, then the Registrar need only form an independent view in relation to the remainder of the claim area. In relation to the second issue, the amendment will make clear that the Registrar may rely on any certificate provided the relevant NTRB was authorised to certify the application at the time the certificate was issued.

Section 190D: provide a mechanism for internal review of registration decisions

65. Subsection 190D(2) provides that where the Native Title Registrar [or delegate] refuses a claim for registration the applicant may apply to the Federal Court for review of the decision. Given the expense and time involved in applications to the Federal Court, it has been suggested that it would be useful to provide a mechanism for internal review of such decisions before applying to the Federal Court. The technical amendments to the NTA will include a mechanism to enable the applicant to request review of a decision to refuse registration of a claim upon payment of a prescribed fee. Such applications would be subject to a time limit of 42 days following date of notification of the decision.

National Native Title Register

Paragraph 193(1)(c): clarify the types of determinations which must be included on the National Native Title Register

66. Section 193 sets out the determinations which must be included on the native title register. In addition to approved determinations of native title, paragraph 193(1)(c) requires the Register include 'other determinations of, or in relation to, native title in decisions of courts or tribunals'. The scope of this provision is unclear, and there is no requirement for courts or tribunals generally to inform the Registrar of potentially relevant determinations. The NTA will be amended to provide such determinations need only be included where the NNTT is aware of them, and where it is considered appropriate to do so.

Subsection 199(2): remove prescription of relevant land titles offices

67. Section 199 is intended to ensure State and Territory land titles officers are informed of any native title determination in their jurisdiction. Subsection 199(2) contemplates regulations prescribing the bodies responsible for keeping a register of real estate interests in each jurisdiction. No such regulations have been made, and the NNTT currently advises the relevant land titles office in each State or Territory as a matter of practice. It is considered that subsection 199(2) is unnecessary and impractical, given that the details of relevant land titles offices will continue to change

over time (thereby necessitating new regulations). It would be preferable to delete subsection 199(2), and retain the broad obligation for the Registrar to inform the 'relevant land titles office' in each jurisdiction.

Register of Indigenous Land Use Agreements

Section 199C: clarify powers to remove expired or terminated ILUAs from the Register

68. Subparagraph 199C(1)(c)(i) obliges the Registrar to remove details of an ILUA from the Register if 'the agreement expires', but does not provide any means through which the Registrar may establish that an agreement has in fact expired. Accordingly, the subparagraph should be amended to make clear the Registrar is only obliged to remove such ILUAs if he or she becomes aware that the agreement has expired, and a note should be included to reflect that the Registrar may seek advice from the parties as to whether an ILUA has expired.

69. In addition to this, it would be appropriate for the subparagraph to address situations where the Registrar becomes aware that an ILUA has been terminated in accordance with the terms of the agreement. (Subparagraph 199C(1)(c)(ii) currently only applies where all of the parties advise the Registrar in writing that they wish to terminate the agreement).

Minor and consequential amendments

70. Minor amendments should be made to the NTA as a consequence of earlier legislative changes. The proposed changes will involve:

(a) amendment of references to provisions of the *Commonwealth Authorities and Corporations Act 1997*, which have been repealed and replaced under the *Corporate Law Economic Reform Program Act 1999* (see sections 203EA and 203EB of the NTA),

(b) amendment of the note to subsection 223(3) which refers to a 'permissible' future act, given that the 1998 NTA amendments replaced this concept with a 'valid' future act, and

(c) amendment of the definition of right to negotiate application in section 253 to replace the incorrect reference to paragraph 139(1)(b) with a reference to subsection 139(b).

ATTACHMENT D: TECHNICAL AMENDMENTS - parties to whom second discussion paper was provided

The second discussion paper was directly provided to the following parties:

- all State and Territory governments
- all NTRBs and NTSs
- Aboriginal and Torres Strait Islander Social Justice Commissioner (Human Rights and Equal Opportunities Commission)
- Alcan South Pacific Pty Ltd
- Alcoa World Alumina Australia
- Australian Institute for Aboriginal and Torres Strait Islander Studies
- Australian Local Government Association
- Australian Petroleum Production & Exploration Association
- Badu Island Council
- Bar-Barrum Aboriginal Corporation
- Barengi Gadjin Land Council Aboriginal Corporation
- Blake Dawson Waldron, solicitors
- BHP Billiton
- Chamber of Minerals and Energy Western Australia
- Combined Small-Scale Miners' Associations of Australia
- Consolidated Rutile Ltd
- Dauanalgaw (Torres Strait Islanders) Corporation
- Dunghutti Elders Council (Aboriginal Corporation)
- Eastern Yugambeh Corporation
- Ergon Energy Corporation Ltd
- Erubam Le Traditional Land And Sea Owners (Torres Strait Islanders) Corporation
- Federal Court of Australia

- Gebaralgal (Torres Strait Islanders) Corporation
- Gumulgal (Torres Strait Islanders) Corporation
- Hopevale Congress Aboriginal Corporation
- Iluka Resources
- Indigenous Land Corporation
- Jidi Jidi Aboriginal Corporation
- Kaiwalagal Aboriginal Corporation
- Karajarri Traditional Lands Association
- Mr B Keon-Cohen QC
- Kulkalgal (Torres Strait Islanders) Corporation
- Kunin (Native Title) Aboriginal Corporation
- Law Council of Australia
- Lhere Artepe Aboriginal Corporation
- Local Government Association of Queensland Inc
- Magani Lagaugal (Torres Strait Islanders) Corporation
- Malu Ki'ai (Torres Strait Islanders) Corporation
- Masigalgal (Torres Strait Islanders) Corporation
- Mer Gedkem Le (Torres Strait Islanders) Corporation
- Minerals Council of Australia
- Minerals Exploration Action Agenda Land Access Subcommittee
- Miriuwung and Gajerrong #1 (Native Title Prescribed Body Corporate) Aboriginal Corporation
- Mualgal (Torres Strait Islanders) Corporation
- Mura Badulgal (Torres Strait Islanders) Corporation
- National Farmers' Federation
- National Indigenous Council
- National Native Title Tribunal

- New South Wales Minerals Council
- Newcrest Mining Ltd
- Ngaanyatjarra Council
- Ngan Aak Kunch Aboriginal Corporation
- Ngarluma Aboriginal Corporation
- Norman Waterhouse, solicitors
- Pastoralists and Graziers Association of Western Australia
- Pila Nguru Aboriginal Corporation
- Porumalgal (Torres Strait Islanders) Corporation
- Queensland Resources Council
- Rio Tinto Ltd
- Saibai Mura Buway (Torres Strait Islanders) Corporation
- Telstra Corporation Ltd
- The Association of Mining and Exploration Companies (Inc)
- Tjamu Tjamu Aboriginal Corporation
- Walmbaar Aboriginal Corporation
- Western Australian Fisheries Industry Council
- Western Desert Lands Aboriginal Corporation
- Western Yalanji Aboriginal Corporation
- Xstrata Copper
- Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation)

ATTACHMENT E: Summary of minor and technical amendments in Schedule 1 of the Native Title Amendment (Technical Amendments) Bill 2007

AMENDMENT	ITEM NO.	CONSEQUENTIAL ITEM NO.
FUTURE ACTS AND INDIGENOUS LAND USE AGREEMENTS (ILUAS)		
Improve processes for registering ILUAs Provisions in the Bill would:		
• enable the Registrar to describe an area covered by an ILUA by way of a map instead of a detailed description	9, 18, 27	
• enable the Registrar to include a 'plain English' summary of certain statements which are required to be included in ILUA notifications	10, 19, 28	
• require the NNTT to produce a report if it has held an inquiry into an objection to registering an alternative procedure ILUA, and	92, 93, 94, 95	96
• remove the requirement that the Registrar notify the public of body corporate agreements before such agreements may be registered.	7	8, 111
Make provisions relating to body corporate, alternative procedure and area agreements more consistent Provisions in the Bill would:		
• enable all types of ILUAs to provide a framework for the making of other agreements about matters relating to native title rights and interests (currently restricted to alternative procedure agreements), and	3, 14	
• require the Registrar to specify a notification day when notifying relevant people of body corporate agreements, reflecting existing provisions for area and alternative procedure agreements.	11	12, 13

Include automatic weather stations as facilities for services to the public for the purposes of Subdivision K of Division 3 of Part 2 • This amendment would clarify that automatic weather stations are facilities for services to the general public. • The safeguards in subdivision K would apply in relation to such facilities.	34	
Enable the combination of two or more existing leases, licences, permits or authorities to be a ‘permissible renewal’ for the purposes of Subdivision I of Division 3 of Part 2 • Section 24IC provides that a future act will be a ‘permissible lease etc renewal’ if it is the renewal, regrant, remaking or extension of the term of a valid lease, licence, permit or authority and meets additional specific criteria. • The Bill would provide for a permissible ‘renewal’ where two or more leases, licences, permits or authorities are substituted by a single lease etc.	33	
Enable future act notices to particular persons or entities to cover more than one act • This is consistent with future act notices given to the public, which can cover more than one future act.	56	
Enable the Native Title Registrar to provide assistance to parties seeking to register an ILUA • This amendment would enable the Registrar to give assistance to persons applying to register an ILUA as it is not currently clear whether the Registrar’s existing assistance power under section 78 covers this situation.	6, 17, 26	
Change notification provisions to ensure that native title holders who are yet to set up a PBC are notified of future acts where the PBC would otherwise have been notified • This amendment will deal with the practical situation where a determination of native title has been made but a PBC has not yet been set up.	35, 36, 37, 38, 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54	

Establish a more flexible scheme for payments held under right to negotiate processes • Currently, an arbitral body or the Minister may determine that a future act can be done subject to the condition that an amount of money be held in trust, enabling money to be set aside on account of any future liability for compensation. • Provisions in the Bill would replace this trust regime with a bank guarantee regime.	58, 59, 60, 61, 69	55
PRESCRIBED BODIES CORPORATE		
Require consent to be obtained from 'agent' PBCs before the Court can determine the PBC to be the registered native title body corporate • Currently native title holders must supply written consent from a 'trust' PBC to manage native title before the Court can determine the PBC to be the registered native title body corporate for the native title holders, but are not required to provide consent from an 'agent' PBC.	70	
MAKING AND RESOLVING CLAIMS		
Make changes to section 87A in accordance with Recommendation 9 of the Committee's report into the Native Title Amendment Bill 2006 (now the Native Title Amendment Act 2007) • The Native Title Amendment Act inserted new section 87A which enables the Court to make a determination of native title over part of a claim where some, but not all, parties to the claim agree to the determination. The provision requires the consent of each person who is a party to the claim who holds a *registered proprietary interest* in relation to the area that is to be determined. • The Bill would amend section 87A to require the consent of each person who is a party to the claim who holds an *interest in relation to land or waters* in the area to be determined. • The Bill would also remove the requirement for the Court to be satisfied that an order cannot be made under section 87A before making a consent determination under section 87.	91 90	

Amend notification provisions to ensure appropriate parties are notified of new or amended claims • Amendments would ensure that the Registrar must give notice of native title applications to all persons who held a registered proprietary interest at the time notice of the application is given, rather than when the application was filed. • A separate amendment would ensure that notification is given in the circumstance where the applicant has reduced the claim area, but later seeks to re-include the area that was excluded.	80 81	 86
Amend the requirements for making claimant applications and compensation applications The Bill would amend the requirements for making a *claimant* application to provide that: • accompanying affidavits must swear the applicant believes that none of the area covered by the application is also covered by an approved determination of native title (rather than covered by an entry in the National Native Title Register), and • applications must set out details of the process of decision-making through which the applicant was authorised. The Bill would amend the requirements for making a *compensation* application to provide that applications must set out details of the process of decision-making through which the applicant was authorised.	71 72, 73 76	
Streamline the process for replacing the native title applicants in claims • The Bill would amend section 66B to set out a broader range of circumstances in which the Court may agree to replace the applicant in a native title claim. • The registration test will no longer need to be reapplied where one or more persons named as applicant are deceased, incapacitated, or no longer wish to be the applicant.	82 79	

Give the Court greater ability to deal with questions about the authorisation of claims which arise during proceedings • Provisions in the Bill would clarify what steps could be taken if, during the course of native title proceedings, issues about the authorisation of the applicant by the claim group arise. For example, there may be doubts raised about whether the initial authorisation process authorising the making of the application was conducted properly. • Currently, if the Court determines the application is not properly authorised, there is a question about whether the Court may continue to hear and determine the application.	88	
Encourage access by parties to hearings (such as directions hearings) through teleconferences and other facilities • The Bill would require the Court to exercise the discretion it currently has under the *Federal Court of Australia Act 1976* to allow a person to appear or make submissions by way of video link, audio link or other appropriate means provided it is not contrary to the interests of justice to do so.	85	
Clarify the timeframe in which a respondent may simply withdraw from a proceeding • The Bill would clarify the meaning of 'first hearing' for the purpose of determining whether a party may withdraw from proceedings without seeking leave from the Court.	87	
REGISTRATION PROVISIONS		
Provide for *de novo* review of registration decisions by the Registrar (or delegate), in addition to the existing provision for review by the Federal Court under section 190D(2) • Provisions in the Bill would enable native title claimants to seek a *de novo* review by the Registrar where the Registrar has advised that the application has failed the registration test.	107	22, 23, 31, 32, 78, 84, 97, 98, 99

<table>
<tr><td>Require the timely application of the registration test, particularly where the exercise of procedural rights would flow from registration of a claim
• The Registrar would be required to use his or her best endeavours to finish considering the claim for registration within the designated timeframe after a notice about a proposed future act is given under subsection 24MD(6B)(c) or a provision within an Alternative State Regime equivalent to section 29.
• Consequential amendments would also be made to the transitional provisions in the Native Title Amendment Act which relate to the requirement for the Registrar to reconsider all unregistered claims.</td><td>101

118, 119</td><td>42, 74, 75</td></tr>
<tr><td>Exempt amended claims from going through the registration test where the amendments would not affect the interests of other parties, such as where the rights and interests being claimed are reduced
• Amendments to registered claims to reduce the area covered by the claim, remove a claimed right or interest, or change the name of the NTRB in the application will no longer trigger the registration test.</td><td>102</td><td>103, 104</td></tr>
<tr><td colspan="3">OTHER</td></tr>
<tr><td>Restrict the use of information obtained by the NNTT in exercising its assistance function
• Provisions in the Bill would ensure that, in most cases, information gained by or disclosed to the NNTT during the provision of assistance is not used by the NNTT in later dealings involving that party (for example, in mediating a native title claim) without the consent of that party.
• Information provided or obtained pursuant to section 86F (which enables so called ‘non-native title agreements’ to be negotiated) will be able to be used in relation to mediations.</td><td>5, 16, 20, 25, 30, 57, 66, 68, 113

89</td><td>4, 15, 21, 24, 67</td></tr>
<tr><td>Clarify that certification of a claim or ILUA by a NTRB is still valid if that NTRB is subsequently derecognised or ceases to exist
• Provisions in the Bill would make clear that the Registrar may rely on a NTRB’s certification of a claim or ILUA where that NTRB is later de-recognised (provided the relevant NTRB was authorised to certify the application at the time the certificate was issued).</td><td>17, 106</td><td></td></tr>
</table>

Alternative State Regimes Section 43 enables a State or Territory to establish right to negotiate procedures which operate to the exclusion of provisions in the Act where the alternative provisions meet certain statutory criteria. The Bill would: • make clear that a determination for an alternative state regime must be revoked where that regime ceases to have ongoing effect, thereby ensuring resumption of the right to negotiate provisions of the Native Title Act, and • clarify the scope of alternative state regimes under section 43 and ensure that South Australia's existing alternative regimes are on a secure legal footing.	62, 63, 64, 65	
Clarify when information is added to, amended or removed from the registers setting out details of native title claims, determinations and ILUAs Provisions in the Bill would: • give the Registrar discretion to include information about other determinations of, or in relation to, native title decisions of courts or tribunals on the National Native Title Register • ensure that the Register of Native Title Claims would be amended to reflect the situation when a determination of native title has been made but no PBC has been nominated, and • require the Registrar to remove ILUAs from the Register of ILUAs if a party to the agreement advises the Registrar the agreement has expired and the Registrar believes, on reasonable grounds, that the agreement has expired.	109 100 112	108
Remove anomalies in order to clarify operation of certain provisions • Insert definition of 'subsection 24DJ(1) objection application.' • Remove requirement for prescription of bodies responsible for keeping a register of real estate interests in each jurisdiction, since no regulations have been made.	114, 117 110	
Adjust or remove misleading or ambiguous notes and overview provisions, and provide for other notes to be included to assist navigation of the Act	1, 2, 29, 41, 77, 83, 105	
Amend previous drafting errors	115, 116	

ATTACHMENT F: RECOMMENDATIONS OF THE PBC REPORT

Recommendation 1

The Australian Government should make clear to all stakeholders the extent to which NTRBs may currently assist PBCs following their establishment and incorporation.

Recommendation 2

The Australian Government should arrange the preparation and maintenance of information packages for PBCs for each jurisdiction, outlining relevant State and Territory legislation, potential sources of assistance through Government grants and programs, as well as available information on support from the private sector.

Recommendation 3

The Attorney-General and the Attorney-General's Department should press State and Territory Governments to agree to:

- place PBC establishment and needs on the agenda for consideration of all parties as a matter of practice when negotiating consent determinations or future act agreements, and
- actively promote a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system.

This should be done through multilateral forums, such as the Native Title Ministers' Meeting, as well as through bilateral meetings and consultations at ministerial and officer level.

Recommendation 4

The Office of the Registrar of Aboriginal Corporations should coordinate the provision of relevant information on PBCs to native title claimants in the lead-up to the making of any native title determinations. This should include information and training on roles and responsibilities and related governance issues, and sound decision making-processes and record keeping. Such information could be provided with the assistance of the National Native Title Tribunal and the relevant Native Title Representative Body.

Recommendation 5

The PBC regime should be amended to make clear that the statutory requirements for PBCs to consult with and obtain the consent of native title holders on 'native title decisions' are limited to decisions to surrender native title rights and interests in relation to land or waters.

Recommendation 6
The PBC regulations should be amended to clarify the circumstances in which 'standing authorisations' may be issued to a PBC, and, in particular, to provide that only one certificate needs to be issued with each authorisation.

Recommendation 7

The PBC regime should be amended to enable an existing PBC to be determined as a PBC for subsequent determinations of native title in circumstances where the native title holders covered by all determinations agree to this.

Recommendation 8

The PBC regulations should be amended to remove the requirement that all members of a PBC be native title holders and associated safeguards should be included to ensure the protection of native title rights and interests.

Recommendation 9

The Office of the Registrar of Aboriginal Corporations should develop and distribute appropriate educative material regarding obligations and requirements under the CATSI legislation to all PBCs and NTRBs. This should include:

(a) a Guide to Good Governance specifically tailored to PBCs
(b) model rules for PBCs, and
(c) additional information as appropriate.

Recommendation 10

The process for allocating funds to NTRBs should be modified to ensure that appropriate priority is given to the performance of NTRB functions associated with assistance to PBCs. NTRBs should be required to detail the nature and level of support which they expect to provide to PBCs, and to report on the implementation of such measures.

Recommendation 11

The Native Title Act should be amended to authorise PBCs to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the NTA or the PBC Regulations at the request of the third party. The amendments should also provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.

Recommendation 12

The General Terms and Conditions Relating to Native Title Program Funding Agreements should be amended to enable NTRBs to assist PBCs with their day to day operations in circumstances where this has been approved by the Office of Indigenous Policy Coordination.

Recommendation 13

The Australian Government should, in consultation with State and Territory Governments, actively promote measures for providing support to PBCs via Shared Responsibility Agreements and/or Regional Partnerships Agreements.

Recommendation 14

The Australian Government should consult State and Territory Governments on possible measures to enable State or Territory land rights corporations to act as PBCs where the native title holders agree to this.

Recommendation 15

The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The Office of Indigenous Policy Coordination should develop a comprehensive proposal for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.

ATTACHMENT G: PRESCRIBED BODIES CORPORATE – consultation

The Attorney-General's Department coordinated Australian Government consultations with stakeholders as part of the examination of PBCs. The consultations were guided by a Steering Committee, comprised of officers from the Attorney-General's Department, FACSIA and the Office of the Registrar of Aboriginal Corporations. Officers from the Attorney-General's Department and FACSIA met with a number of PBCs and NTRBs during October and November 2005, listed at **Appendix A**. The Attorney-General's Department also held a teleconference on 15 February 2006 with the Mer Gedkum Le Corporation (a PBC).

Issues papers were provided, with requests for comment, to all NTRBs and NTSs and contactable PBCs, State and Territory governments, relevant Australian Government agencies and Departments, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the National Native Title Tribunal, the Australian Institute of Aboriginal and Torres Strait Islander Studies and peak industry bodies. The recipients are listed at **Appendix B**. In December 2005 correspondence was also sent to relevant Australian Government departments and agencies seeking information on resources or services which may be available to PBCs. A list of these departments and agencies is at **Appendix C.**

A total of 26 written submissions were received in response to the issues papers from NTRBs, one PBC, State and Territory governments, peak industry bodies and Australian Government agencies. A list of those stakeholders who made written submissions is at **Appendix D**.

Appendix A: measures to encourage effective functioning of PBCs

Government officers held discussions with representatives of the parties listed below about measures to encourage the effective functioning of PBCs. Technical amendments were also considered in many of these discussions.

PBCs

- Lhere Artepe Aboriginal Corporation (26 October 2005)
- Gumulgal (Torres Strait Islanders) Corporation (14 November 2005)
- Magani Lagaugal (Torres Strait Islanders) Corporation (14 November 2005)
- Mura Badulgal (Torres Strait Islanders) Corporation (14 November 2005)
- Mualgal (Torres Strait Islanders) Corporation (14 November 2005)
- Mer Gedkum Le Corporation (15 February 2006 by teleconference)

NTRBs

- Central Land Council (26 October 2005)
- Ngaanyatjarra Council (9 November 2005)
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (9 November 2005)
- South West Aboriginal Land & Sea Council (10 November 2005)
- Kimberley Land Council (11 November 2005)
- Torres Strait Regional Authority (14 November 2005)
- Cape York Land Council (15 November 2005)
- Carpentaria Land Council Aboriginal Corporation (15 November 2005)
- North Queensland Land Council Native Title Representative Body Aboriginal Corporation (15 November 2005)
- Aboriginal Legal Rights Movement Inc (1 December 2005)

State and Territory governments

- Western Australian government (10 November 2005)
- New South Wales Government (6 December 2005)
- Australian Capital Territory Government (7 December 2005)
- Northern Territory Government (23 January 2006)

Other parties

- Chamber of Minerals and Energy, Western Australia (10 November 2005)
- Indigenous Land Corporation (11 January 2006)

Appendix B: measures to encourage effective functioning of PBCs – parties to which issues papers were provided

Issues papers concerning measures to encourage effective functioning of PBCs, with request for comment, were provided to the following parties:

Prescribed Bodies Corporate

- Bar-Barrum Aboriginal Corporation
- Dauanalgaw (Torres Strait Islanders) Corporation
- Dunghutti Elders Council (Aboriginal Corporation) (NSW NTS)
- Erubam Le Traditional Land and Sea Owners (Torres Strait Islanders) Corporation
- Gebaralgal (Torres Strait Islanders) Corporation
- Gumulgal (Torres Strait Islanders) Corporation
- Hopevale Congress Aboriginal Corporation
- Jidi Jidi Aboriginal Corporation
- Kaiwalagal Aboriginal Corporation
- Karajarri Traditional Lands Association (Aboriginal Corporation) (KLC)
- Kulkalgal (Torres Strait Islanders) Corporation
- Kunin (Native Title) Aboriginal Corporation
- Lhere Artepe Aboriginal Corporation
- Magani Lagaugal (Torres Strait Islanders) Corporation
- Malu Ki'ai (Torres Strait Islanders) Corporation
- Masigalgal (Torres Strait Islanders) Corporation
- Mer Gedkem Le (Torres Strait Islanders) Corporation
- Mualgal (Torres Strait Islanders) Corporation
- Mura Badulgal (Torres Strait Islanders) Corporation
- Ngan Aak Kunch Aboriginal Corporation
- Pila Nguru Aboriginal Corporation
- Porumalgal (Torres Strait Islanders) Corporation
- Saibai Mura Buway (Torres Strait Islanders) Corporation
- Tjamu Tjamu Aboriginal Corporation
- Tjurabalan Native Title Land Aboriginal Corporation
- Walmbaar Aboriginal Corporation
- Western Desert Lands Aboriginal Corporation (Jam ukurnu-Yapalikunu)
- Western Yalanji Aboriginal Corporation

- Yarnangu Ngaanyatjarraku Parna (Aboriginal Corporation)
- Yindjibarndi Aboriginal Corporation (for the Yindjibarndi People)

Other parties

- All NTRBs and NTSs
- All state and territory governments
- National Native Title Tribunal
- Social Justice Commissioner (Human Rights and Equal Opportunities Commission)
- Australian Local Government Association
- Australian Institute for Aboriginal and Torres Strait Islander Studies
- Cape York Institute for Policy and Leadership
- National Indigenous Council (note: this paper was sent on 6 December 2005)
- Australian Seafood Industry Council
- Chamber of Minerals and Energy, Western Australia
- Combined Small Scale Miners Association of Australia
- Minerals Council of Australia
- National Farmers' Federation (Native Title Taskforce)
- Pastoralists and Graziers Association of Western Australia

Appendix C: PBCs – measures to encourage effective functioning of PBCs – organisations to whom the Attorney-General's Department wrote to seeking information on resources or services which may be available to PBCs

- Federal Court of Australia
- Indigenous Land Corporation
- Indigenous Business Australia
- Department of Industry, Tourism and Resources
- Department of Environment and Heritage
- Department of Family and Community Services
- Department of Employment and Workplace Relations
- Department of the Prime Minister and Cabinet
- Department of Finance and Administration
- Department of Agriculture, Fisheries and Forestry
- Department of Transport and Regional Services
- Department of Education, Science and Training
- Department of Communications, Information Technology and the Arts (DoCITA)

Appendix D: PBCs – measures to encourage effective functioning of PBCs – organisations who provided written submissions in response to issues papers

Native Title Representative Bodies

- Central Land Council
- Goldfields Land and Sea Council
- Kimberley Land Council
- Native Title Services Victoria
- Northern Land Council
- Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation

Prescribed Bodies Corporate

- Mer Gedkum Le (Torres Strait Islanders) Corporation

State and Territory Governments

- Victoria
- Queensland
- South Australia
- Western Australia
- Northern Territory

Industry Bodies

- National Farmers' Federation
- Pastoralists and Graziers Association of Western Australia
- Rio Tinto

Australian Government agencies

- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Department of Agriculture, Fisheries and Forestry
- Department of Communications, Information Technology and the Arts
- Department of Employment and Workplace Relations
- Department of Environment and Heritage
- Department of Finance and Administration
- Department of Industry, Tourism and Resources
- Department of the Prime Minister and Cabinet
- Department of Transport and Regional Services

- Indigenous Land Corporation
- National Native Title Tribunal