

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 257

Issued by the Authority of the Minister for Families, Community Services and
Indigenous Affairs

Native Title Act 1993

Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 (No. 1)

Subsection 215(1) of the *Native Title Act 1993* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Under sections 56 and 57 of the Act, when the Federal Court of Australia makes a determination that native title exists, it must also determine a prescribed body corporate (PBC) to hold or manage the native title rights and interests on behalf of the common law holders of the native title.

Section 59 of the Act provides that the regulations may prescribe the kinds of bodies corporate that may be determined under section 56 or 57. Section 60AC of the Act provides that the regulations may provide for a registered native title body corporate (RNTBC) to charge a person, other than a person mentioned in subsection 60AB(4), a fee for costs the RNTBC incurs when performing other functions specified in the regulations. Section 60AC of the Act also provides that the regulations may make provisions dealing with the process by which the request to the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) is made and considered; the withholding of payment of the fee in relation to which a request is made; and any other matters in relation to the request, the consideration of the request, the giving of an opinion by the Registrar, and the consequences of the giving of that opinion.

The Regulations will give effect to some recommendations arising from the 'Structures and Processes of Prescribed Bodies Corporate' report (the PBC Report), produced by an Inter-Departmental Steering Committee formed as part of a package of reforms to the native title system, announced by the then Attorney-General in September 2005.

The purpose of the Regulations is to:

- give effect to submissions received on a consultation draft of the Regulations;
- improve the flexibility of the PBC governance regime by:
 - enabling an existing PBC to be determined as a PBC for subsequent determinations of native title;
 - removing the requirement that all members of a PBC are also the native title holders;
 - clarifying that standing authorisations in relation to particular activities of a PBC need only be issued once;

- subject to certain exceptions, allowing PBCs to substitute their own consultation requirements in relation to native title decisions rather than follow the requirements in the regulations; and
- provide for the transfer of PBC functions in circumstances where there has been failure to nominate a PBC, where a liquidator is appointed, or where a PBC wishes this to occur; and
- enable PBCs to charge a fee for costs incurred in providing certain services and set out a procedure for review by the Registrar of a decision by a PBC to charge such a fee.

Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commenced on the day after they were registered on the Federal Register of Legislative Instruments.

In March 2010, the Department of Families, Housing, Community Services and Indigenous Affairs released a consultation draft of the Regulations.

The following groups were consulted:

- State and Territory Governments; and
- targeted stakeholders in the native title system including:
 - all native title representative bodies established and funded under section 203C of the Act;
 - bodies funded by the Department under subsection 203FE(1) of the Act to perform similar native title functions;
 - native title-related institutions (eg. the Australian Institute of Aboriginal and Torres Strait Islanders Studies, the National Native Title Tribunal);
 - the Federal Court; and
 - key industry bodies (eg. the Australian Local Government Association and the Minerals Council of Australia).

Submissions closed on 30 April 2010. These Regulations take into account the 17 submissions received. In addition to some minor technical and other corrections, changes made to the Regulations as a result of the consultations include:

- a non-derogable requirement to consult and obtain the consent of common law native title holders (common law holders) in relation to certain native title decisions, being decisions to:
 - enter into an Indigenous Land Use Agreement (ILUA) under Subdivision B, C or D of Division 3 of Part 2 of the Act, or a Right To Negotiate (RTN) agreement under Subdivision P of Division 3 of Part 2 of the Act (paragraph 8(1)(b));
 - allow non-common law holders to become members of the PBC (paragraph 8(1)(c)); and

- consent to one or more consultation processes in the PBC's constitution (paragraph 8(1)(d));
- requiring the Registrar to give written reasons for an opinion (subregulation 22(1) and subregulation 25(1)); and
- allowing the Registrar to seek information from the applicant and the body corporate when reconsidering an opinion or decision not to give an opinion (subregulation 24(2)) and consequential changes to timeframes for the giving of an opinion (subregulation 25(1)).

This explanatory statement has been revised in response to changes to the Regulations and to respond to other issues raised in the consultations.

Details of the Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 (No. 1)

Regulation 1 – Name of Regulations

This regulation provides that the name of the Regulations is the *Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that the Regulations commenced on the day after they were registered on the Federal Register of Legislative Instruments.

Regulation 3 – Amendment of Native Title (Prescribed Bodies Corporate) Regulations 1999

This regulation provides that Schedule 1 amends the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (the Principal Regulations).

Schedule 1 – Amendments

Schedule 1 – Item [1] Before regulation 1

This item inserts, before regulation 1 of the Principal Regulations, a new heading “**Part 1 Preliminary**”.

Schedule 1 – Item [2] Subregulation 3(1), after definition of Act

This item inserts a definition of *native title decision* which means a decision to surrender native title rights and interests in relation to land or waters or to do, or agree to, any other act that would affect the native title rights or interests of the common law holders. It replaces the definition formerly contained in subregulation 8(1) by omitting the word “do” from after the words “agree to” in paragraph (b) of the definition. This correction recognises the fact that acts of governments may affect native title rights and interests, as well as acts done by the common law holders. In relation to future acts, the definition is intended to cover only future acts which amount to surrender of native title or to the agreement to an act that may affect native title, not all future act procedural decisions. Moving it into the Interpretation clause of the Regulations has the effect of ensuring that the definition now applies throughout the Regulations. Further details of this amendment are set out under item 11, below (which contains the relevant amendments to regulation 8).

Schedule 1 – Item [3] Subregulation 3(1), definition of *prescribed body corporate*

This item replaces the existing definition to include that a prescribed body corporate also means the Indigenous Land Corporation (ILC) established by subsection 191A(1) of the *Aboriginal and Torres Strait Islander Act 2005* (the ATSI Act) as well as being prescribed by regulation 4.

While retaining the original definition as set out in the Principal Regulations (ie. a body corporate prescribed by regulation 4), it adds the ILC to the definition of a PBC. This will assist in giving effect to recommendation 15 of the PBC Report, which was:

“The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The [Department] should develop a comprehensive proposal for establishing ‘default’ bodies corporate to perform PBC functions where there is no functioning PBC nominated by the native title holders.”

The ILC is established under section 191A of the ATSI Act. The ILC is a suitable body to be prescribed as the default PBC because it is a national statutory body with a regional presence and it has land management functions set out under section 191E of the ATSI Act. Section 191C of the ATSI Act empowers it to, among other things, perform such functions as are conferred on it by any other law of the Commonwealth. The provisions of paragraph 57(2)(c) and 59(2) of the Act are sufficient to enable regulations to be made for this purpose and this is noted at pages 75-76 of the Explanatory Memorandum for the *Native Title (Technical Amendments) Act 2007* (the Amendment Act), which inserted these provisions.

It is expected that the ILC would generally only be used as an option of last resort and for a limited period of time. It would perform statutory PBC functions while allowing the common law holders time to establish a replacement PBC. See further under item 13, regulation 11, below.

Schedule 1 – Item [4] After regulation 3

This item inserts, after regulation 3 of the Principal Regulations, a new heading “**Part 2 Prescribed bodies corporate**”.

Schedule 1 – Item [5] Paragraphs 4(2)(a) to (c)

This item implements recommendation 8 from the PBC Report, which was:

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

The effect of subregulation 4(2) of the Principal Regulations was that only the common law holders could be members of a corporation to be prescribed as a PBC. The PBC Report found that allowing common law holders to include non-traditional owners and also non-Indigenous people as members of a PBC may assist in making the existing governance structure more representative of the broader community in which they live and also increase the corporate skills base. The ability to include non-traditional owners and non-Indigenous people will, for example, allow partners of native title holders who have been living in the community to participate in RNTBCs as a member, provided that native title holders choose to allow this. The use of this provision is expected to be an exception rather than the rule. The making of native title decisions and control of membership of RNTBCs would still require the consultation and consent of native title holders. This change will allow common law holders to consider using existing corporations as their PBCs and further avoid unnecessary creation of additional corporate structures.

Item 5 substitutes existing paragraphs 4(2)(a) to (c) with new paragraphs 4(2)(a) to (d) to give effect to recommendation 8 of the PBC Report, while also ensuring that the Indigeneity requirement in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) under which PBCs are incorporated, is complied with. The CATSI Act requires that a specified proportion of members of an Indigenous corporation, depending on the size of the membership specified for the corporation, must be Indigenous people.

Schedule 1 – Item [6] After regulation 4

This item inserts new regulation 4A to give effect to recommendation 7 of the PBC Report, which was:

“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.”

Subsection 59(1) of the Act provides that regulations may prescribe the kinds of bodies corporate that may be determined under paragraph 56(2)(b) (a trustee PBC) or 57(2)(b) (an agent PBC). When it makes a determination under the Act that native title exists, or as soon as practicable thereafter, the Federal Court must ask the common law holders whether they intend their native title to be held on trust and, if so, to nominate a PBC to be the trustee of the native title (section 55 and paragraph 56(2)(a) of the Act). If the common law holders nominate a PBC under these provisions, the Federal Court must determine that the PBC is to hold the native title in trust for the common law holders (paragraph 56(2)(b) of the Act). A trustee PBC holds the native title in accordance with the regulations (subsections 56(3) and (4) of the Act and regulation 6).

If the common law holders do not nominate a PBC to be the trustee of the native title, the Federal Court must determine that the native title will be held by the common law holders (paragraph 56(2)(c) of the Act). In that case, the Federal Court must ask the common law holders to nominate a PBC, which is to perform the functions in subsection 57(3) of the Act (paragraph 57(2)(a) and regulation 7) on their behalf. In this instance it will act as an agent of the common law holders (agent PBC).

In practice, the Principal Regulations have prevented an existing PBC being determined under section 56 or section 57 of the Act in respect of a subsequent determination of native title, even where the common law holders agreed to this. This is because subregulation 4(2)(a) required all members of a PBC to be persons who, at the time of the making of a determination under section 56 or section 57 of the Act, were included or proposed to be included in the determination of native title as native title holders. This could only occur where each member of the existing PBC was also the same native title holder in relation to the subsequent determination of native title.

Accordingly, a new section 59A was inserted into the Act by the Amendment Act that states that the regulations can provide for an existing PBC to be determined by the Federal Court (under section 56 of the Act) as a PBC for subsequent determinations of native title in circumstances where all the native title holders covered by all of the determinations agree to this.

For the purposes of subsection 59A(3) of the Act, the provisions of new regulation 4A require the PBC to consult with the common law holders for whom the PBC was initially determined and to obtain their consent to the nomination of the PBC by subsequent common law holders. The existing PBC is required to consult with and obtain the consent of the first group of common law holders in the same way as it was required to fulfil these obligations before making a native title decision under new regulation 8 (see item 11, below).

However, the effect of subsections 59A(1) and (2) of the Act is that an existing trustee PBC can only be determined as a trustee PBC, and an existing agent PBC can only be determined as an agent PBC, for subsequent determinations: see new paragraph 4A(a) of the Regulations. The effect of this is that the PBC cannot change its nature with respect to a subsequent group of common law holders (so if the PBC is a trustee PBC, it cannot act as agent for a subsequent group; and, if it is an agent PBC, it cannot act as trustee for a subsequent group). The transition from a trustee PBC to an agent PBC will be provided for under new regulation 13 and the transition from an agent PBC to a trustee PBC will be provided for under new regulation 15.

Schedule 1 – Item [7] Regulation 5

This item makes a technical amendment to regulation 5 of the Principal Regulations.

Schedule 1 – Item [8] Subregulation 6(2)

This item substitutes the existing note in the Principal Regulations and would ensure that an agent PBC was subject to all regulations between regulation 8 and 10, including new regulation 8A.

Schedule 1 – Item [9] Paragraph 7(1)(a)

This item substitutes paragraph 7(1)(a) of the Principal Regulations that confirms that the PBC is the agent PBC for those rights and interests.

Schedule 1 – Item [10] Subregulation 7(2), note

This item substitutes the existing note in the Principal Regulations and would ensure that an agent PBC was subject to all regulations between regulation 8 and 10, including new regulation 8A.

Schedule 1 – Item [11] Regulation 8

Regulation 8 of the Principal Regulations is substituted with a new regulation 8 by this item. In addition, this item also inserts a new regulation 8A. These provisions deal with consultation and consent in relation to a native title decision.

Regulation 8 – Consultation with, and consent of, common law holders

Regulation 8 of the Principal Regulations provides that a PBC, regardless of whether it is an agent or trustee PBC, is required to consult with, and obtain the consent of, the common law holders before making a so-called ‘native title decision’. This included a requirement to follow any traditional decision making processes specified under the traditional laws and customs of the common law holders (subregulations 8(4) and 8(5)).

New regulation 8 removes the definition of ‘native title decision’ from regulation 8 (it is now in subregulation 3(2) – see discussion under item 2, above).

New regulation 8 maintains consultation and consent as the normal or default process for making a native title decision. Indeed, new paragraphs 8(1)(b), (c) and (d) expressly require a PBC to consult with, and obtain the consent of, the common law holders when entering into an ILUA under Subdivision B, C or D, a RTN agreement under Subdivision P of Division 3 of Part 2 of the Act, when making a decision to allow non-common law holders to become members of the PBC or to consent to one or more consultation processes in the PBC’s constitution. However, in relation to other native title decisions, new paragraph 8(1)(a) allows PBCs to follow agreed alternate processes (see new regulation 8A).

New paragraphs 8(1)(b), (c) and (d) act as a safeguard to ensure that the consent of the common law holders is obtained for significant native title decisions. It reflects concerns of stakeholders to ensure that a balance is maintained between effective decision making by the PBC, and control of native title rights by the common law holders.

Regulation 8A – Alternative consultation processes

New regulation 8A enables the common law holders to make provision in the corporation’s rules to exclude the operation of regulation 8 and to consent to inclusion in the constitution of one or more alternate consultation processes. This allows the common law holders to decide on one or more consultation processes that are appropriate for the exercise of particular rights in their particular circumstances.

Schedule 1 – Item [12] Regulation 9

Regulation 9 to the Principal Regulations is substituted with a new regulation 9 by this item.

Paragraph 9(2)(b) of the Principal Regulations set out a regime of ‘standing authorisations’ to be issued by the relevant common law holders in relation to decisions affecting native title. In essence, the holders are taken to have consented to a proposed native title decision if a document (complying with certain requirements) certified that (i) the proposed decision is of a kind in respect of which the common law holders have been consulted and (ii) the common law holders have decided that decisions of that kind can be made by the PBC without the requirement for further consultation and consent.

The PBC Report noted that in practice this procedure appears to not have been adopted. While this may have been due to reluctance on the part of native title holders to delegate authority, the PBC Report considered that the existing provisions were too complicated to implement as with the often remote location of PBCs and native title holders, it was difficult and time consuming to obtain the required signatures.

Recommendation 6 of the PBC Report stated:

“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.”

The effect of new paragraph 9(1)(a) is to ensure that only one certificate needs to be signed in connection with each standing authorisation issued by the PBC.

New paragraphs 9(1)(b) would prevent standing authorisations from being used to evidence consultation and consent for decisions made under regulation 8(1)(b), (c) and (d) (to enter into an ILUA under Subdivision B, C or D, a RTN agreement under Subdivision P of Division 3 of Part 2 of the Act, when making a decision to allow non-common law holders to become members of the PBC or to consent to one or more consultation processes in the PBC’s constitution).

Aside from new subregulation 9(1), the remaining provisions have not been substantially altered by the amendments.

Schedule 1 – Item [13] Regulation 11

This item omits regulation 11 of the Principal Regulations and substitutes a new Part 3 (**Part 3 Changes to holding of native title rights and interests**) that includes new regulations 11 to 18 and a new Part 4 (**Part 4 Fees for services charged by registered native title bodies corporate**) that includes new regulations 19 to 24.

Part 3 – Changes to holding of native title rights and interests

New Part 3 deals with the replacement and going into liquidation of PBCs, and also the determination of a “default” PBC in cases where the common law holders are unable to nominate a PBC.

Regulation 11 – Determination of the ILC as default agent PBC

New regulation 11 implements recommendation 15 of the PBC Report, which was:

“The Australian Government should note the need to develop a mechanism for the determination of a default PBC in appropriate circumstances. The [Department] should develop a comprehensive proposal for establishing ‘default’ bodies corporate to perform PBC functions where there is no functioning PBC nominated by the native title holders.”

Paragraph 57(2)(c) of the Act enables regulations to be made for the Federal Court to determine a PBC where a PBC has not been nominated by the common law holders. Subsection 59(2) of the Act provides that regulations may be made to prescribe the body corporate or kinds of body corporate that may be determined by the Federal Court under paragraph 57(2)(c). New regulation 11 gives effect to these provisions.

Subregulation 11(1) allows the Federal Court to appoint the ILC to be an agent PBC under paragraph 56(4)(e), 57(2)(c) or 60(b) of the Act in circumstances where the common law holders have failed to nominate a PBC and where a liquidator has been appointed to wind up a PBC (see regulations 14 and 17). It also allows the ILC to be determined as an agent PBC where the ILC consents to a nomination by the common law holders (see regulations 13 and 16).

The ILC was established to assist Aboriginal persons and Torres Strait Islanders to acquire and manage Indigenous-held land so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders. The ILC was considered the most appropriate entity to be determined as default PBC because of its functions, as well as its ability to operate nationally and its accountability as an independent statutory authority under the *Commonwealth Authorities and Companies Act 1997*. It is also included in the definition of PBC at item 3, subregulation 3(1).

Subregulation 11(2) requires the Registrar of the Federal Court to give reasonable written notice to the ILC prior to making a determination under paragraph 57(2)(c) of the Act. This will allow the ILC to prepare itself for any new role and, if necessary, to seek any orders relevant to the transfer to it of the PBCs function.

Subregulation 11(3) provides that the ILC will operate as a PBC for at least five years. A set period provides the ILC with some certainty about the length of time it is likely to operate as a replacement agent PBC and recognises the time it can take to establish a new corporation. It is, however, open to the common law holders to use the processes established by regulations 15 or 16 to seek the return of these functions any time within the five-year period once the common law holders decide that they are in a position to nominate their own PBC.

Subregulation 11(4) requires the Court to determine an extension of up to one year for the ILC in its role as “default” PBC if the common law holders have not nominated a replacement PBC before the expiration of the initial five-year period or in the subsequent extended period.

Regulations providing for the Replacement of PBCs

Item 13 also inserts new **regulations 12 to 18**, which deal with situations where PBCs are replaced. In particular, they deal with the replacement of PBCs in the event of the native title holders deciding to do so or in the event of the PBC going into liquidation.

It would be open to the Federal Court to develop guidance material to assist common law holders to understand the process of applying to the Federal Court for a determination to replace one PBC with another PBC.

Regulation 12 – Replacement of trustee PBC

Paragraphs 56(4)(b) and (c) of the Act allow regulations to be made to provide for the replacement of the relevant trustee PBC by a new trustee PBC.

Subregulation 12(1) provides that the common law holders may apply to the Federal Court to make a determination replacing an existing trustee PBC with a new trustee PBC, subject to complying with the notification requirement in new regulation 18.

Paragraph 12(2)(a) requires the Federal Court to make a determination to this effect as soon as practicable after receiving the application. Paragraph 12(2)(b) allows the Federal Court to make orders about any matter necessary or appropriate to give effect to the common law holders’ wishes, as well as transitional matters, such as dealing with transfers of assets and liabilities, including rights and obligations where a PBC is a party to an ILUA (see subsection 56(7) of the Act).

Regulation 13 – Replacement of trustee PBC by agent PBC

Subparagraph 56(4)(d)(i) and paragraphs 56(4)(e) and (f) of the Act provide analogous provisions to paragraphs 56(4)(b) and (c) (discussed in relation to new regulation 12; see above) where the common law holders decide to allow a trustee PBC to be replaced by an agent PBC (including a default body).

Subregulation 13(1) provides that the common law holders may apply to the Federal Court for a determination to terminate the prescribed trustee PBC, subject to complying with the notification requirements in new regulation 18. The common law holders may nominate an agent PBC to replace the prescribed trustee PBC.

Subregulation 13(2) allows the Federal Court to make orders about any matter necessary or appropriate to give effect to the common law holders’ wishes, as well as transitional matters, such as dealing with transfers of assets and liabilities, for example, rights and obligations where a PBC is a party to an ILUA (see subsection 56(7) of the Act).

Subregulation 13(3) confirms that on termination of the trust, the native title reverts to the common law holders.

Regulation 14 – Replacement of a trustee PBC in liquidation

Subparagraph 56(4)(d)(ii) and paragraph 56(4)(f) of the Act allow regulations to make provision for the termination of a trustee PBC where a liquidator has been appointed for that PBC.

Subregulation 14(1) requires the liquidator to apply to the Federal Court for the determination of a replacement PBC within 14 days of appointment. If the ILC is nominated as the replacement, the liquidator is also required to notify the ILC in writing within the same 14-day timeframe. This will allow the ILC to prepare itself for any new role and, if necessary, to seek any orders in connection with it assuming the PBC function as default agent PBC.

Subregulation 14(2) requires the Federal Court to determine the application as soon as practicable after receiving the application. This subregulation also provides that the Federal Court may make orders about the termination of the trust or transitional matters.

Subregulation 14(3) confirms that on termination of the trust, the native title reverts to the common law holders.

Regulation 15 – Replacement of agent PBC by trustee PBC

Paragraph 56(7)(a) of the Act enables regulations to be made to enable an agent PBC to be replaced with a trustee PBC where the common law holders wish for this to occur.

Subregulation 15(1) provides that the common law holders may apply to the Federal Court for such an arrangement, subject to them complying with the notification requirements in regulation 18.

Subregulation 15(2) enables the Court to make a determination to this effect, and may make orders in relation to the termination of the trust, the performance of the PBC's functions and any transitional matters.

Regulation 16 – Replacement of agent PBC by another agent PBC

Subparagraph 60(a)(i) of the Act enables regulations to be made for the common law native title holders to apply to the Federal Court for the replacement of their current agent PBC with another agent PBC.

Regulation 16(1) enables the common law holders to apply to the Federal Court for a determination to replace their current agent PBC with another agent PBC, subject to complying with the notification requirements in regulation 18.

Subregulation 16(2) requires the Court to make a determination to this effect as soon as practicable after receiving the application and enables the Court to make orders to give effect to the common law holder's wishes and any transitional matters.

Regulation 17 – Replacement of an agent PBC in liquidation

Subparagraph 60(a)(ii) of the Act allows regulations to be made for the termination of an agent PBC where a liquidator has been appointed for that PBC.

Subregulation 17(1) requires the liquidator to apply to the Federal Court for the determination of a replacement agent PBC within 14 days of appointment. If the ILC is nominated as the replacement, the liquidator is also required to notify the ILC in writing within the same 14-day timeframe. This will allow the ILC to prepare itself for any new role and, if necessary, to seek any orders in connection with it assuming the PBC function as default agent PBC.

Subregulation 17(2) requires the Federal Court to determine the application as soon as practicable after receiving the application. This subregulation also provides that the Federal Court may make orders about the termination of the trust or transitional matters.

Regulation 18 – Notification requirements

Subregulation 18(1) specifies that regulation 18 applies to applications to the Federal Court made under subregulations 12(1), 13(1), 15(1) and 16(1).

Subregulation 18(2) requires the applicant for the replacement PBC to provide the existing PBC with at least 14 days written notice of the intention to make an application to the Federal Court for that PBC to be replaced and any alternative arrangements that the applicant has decided to put in place, including an alternative structure for the replacement PBC (see subregulation 13(3)). Subregulation 18(4) requires the applicant to advise the Federal Court of the proposed alternative arrangements and provide the written consent of the relevant nominated replacement PBC.

Part 4 – Fees for services charged by RNTBCs

New Part 4 implements Recommendation 11 of the PBC Report, which was:

“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.”

The PBC Report proposed that RNTBCs be allowed to charge for reasonable costs incurred or to be incurred in performing particular activities associated with the performance of particular functions and the exercise of particular powers under the future act regime. Part 4 applies to ‘registered native title bodies corporate’ rather than ‘prescribed bodies corporate’. This is because, whilst PBCs may hold native title before becoming RNTBCs, under the Act and regulations, it is in fact RNTBCs that perform statutory functions and exercise statutory powers; see further under regulation 19 (definition of ‘body corporate’), below.

The intention of new Part 4 is to enable RNTBCs to charge for activities they perform (eg. consulting with common law holders) as well as for services they procure that are performed by others (eg. obtaining legal advice).

Item 7 of Schedule 3 of the Amendment Act inserted new Division 7 (sections 60AB and AC) into Part 2 of the Act; the regulations contained in Part 4 are made under this new Division.

Subsection 60AB(1) of the Act specifies the activities in respect of which RNTBCs may charge fees, with the remainder to be dealt with under regulations (subsection 60AB(2)). Section 60AC makes provision for review by the Registrar, who is appointed under the CATSI Act, of any fees so charged by RNTBCs.

Regulation 19 – Definitions

Regulation 19 provides definitions of certain terms used in Part 4. An “applicant” is defined as being the person making a request for an opinion of the Registrar under subsection 60AC(1) of the Act. A “body corporate” is defined as being a registered native title body corporate. The “Registrar” is the Registrar of Aboriginal and Torres Strait Islander Corporations, the same meaning given by subsection 60AC(1) of the Act.

Regulation 20 – Fees for Services

Subsection 60AB(1) of the Act specifies that a RNTBC may charge a person (other than a person specified in subsection 60AB(4)), a fee for services, which includes any cost incurred or to be incurred in:

- negotiating RTN agreements (under Subdivision P of Division 3 of Part 2 of the Act);
- negotiating agreements under provisions of a State/Territory law which are the subject of a determination under paragraph 43(1)(b) of the Act; and
- negotiating ILUAs (Subdivisions B, C or D or Division 3 of Part 2 of the Act).

Subsection 60AB(3) of the Act provides that the fees imposed must not amount to a tax. Whether or not a fee will amount to a tax will depend on the cost of providing the service and ensuring that any fee reflects the value of the service provided, and is not so high as to amount to something that goes beyond reasonable recovery of expenses incurred in, and reasonably incidental to, providing the service.

Subsection 60AB(4) of the Act does not allow fees to be levied on:

- the common law holders for whom the RNTBC holds native title in trust or as an agent;
- any other RNTBC, or any native title representative bodies established under the Act or funded under the Act to perform native title functions; or
- registered native title claimants or others claiming native title in relevant native title claim or ILUA areas under the Act.

Subsection 60AB(5) of the Act ensures that RNTBCs cannot recover costs for participating in arbitral or court proceedings related to the negotiations referred to above.

Regulation 20 provides that costs may be recovered in relation to the following activities:

- activities related to providing comments on proposed future acts under paragraphs 24GB(9)(d), 24GD(6)(b), 24GE(1)(f)(ii), 24HA(7)(b), 24ID(3)(b), 24JB(6)(b), 24JB(7)(b) such as contacting affected common law holders;
- activities related to the exercise of procedural rights that are conferred by or referred to in the future act regimes under subsections 24KA(7), 24MD(6A) and 24NA(8) of the Act;
- activities related to consultations with proponents under section 24JAA or paragraph 24MD(6B)(e) of the Act such as meeting and travel costs and obtaining legal advice;
- activities related to the exercise of procedural rights in relation to acts or provisions mentioned in a determination made under sections 26A (approved exploration acts), 26B (approved gold or tin mining acts) or 43A (which deals with State or Territory provisions that may provide for an exception to the RTN provisions that are set out in Part 2, Division 3, Subdivision P) of the Act; and
- activities related to making submissions under paragraph 26C(5)(b) of the Act such as contacting affected common law holders.

It is intended that this regulation will allow reasonable cost recovery for all statutory activities other than those activities precluded from cost recovery by the Act; the test for a valid fee is that it does not breach the provisions of subsections 60AB(3) to 60AB(5) of the Act.

Regulations 21 and 22 – Application for opinion of Registrar about fees charged for services and opinion of the Registrar

Subsections 60AC(1) to (4) of the Act provide the Registrar with powers to resolve disputes between RNTBCs and third parties about the fees proposed to be charged by a RNTBC. Recognising that RNTBCs need to incorporate under the CATSI Act and that the Registrar has the necessary knowledge of and experience with Aboriginal and Torres Strait Islander corporations, this function was conferred on this statutory office.

Subsections 60AC(2) and (3) of the Act provide that the Registrar may give an opinion in writing to the effect that the charge is one that the RNTBC may charge. If it is the Registrar's opinion that it is not one that the RNTBC may charge, then the RNTBC must withdraw that charge. For the avoidance of doubt, the opinion may include an alternate fee that the Registrar considers is one that the RNTBC may charge.

Subsection 60AC(4) of the Act provides that the opinion of the Registrar is not a legislative instrument and therefore does not need to be registered on the Federal Register of Legislative Instruments under the *Legislative Instruments Act 2003*.

Subsection 60AC(5) of the Act allows regulations to be made dealing with:

- the process by which a request to the Registrar is made and considered (paragraph (b));

- the withholding of payment of the fee in relation to which a request is made (paragraph (c)); and
- any other matters in relation to the request, the consideration of the request, the giving of an opinion by the Registrar and the consequences of the giving of that opinion (paragraph (d)).

Regulation 21 sets out the process by which a request for an opinion is made to the Registrar by an applicant and is considered by the Registrar for the purposes of paragraph 60AC(5)(b) of the Act.

Subregulation 21(2) provides that any request made under this regulation must be made in writing to the Registrar and must be made within 21 days after the charging of the fee. The request must include:

- the applicant's name and address;
- if the applicant is a corporate body, the signatures of the director or secretary or, absent these, an authorised person of that body;
- if the applicant is an individual, the signature and printed name of that person;
- the name, address and Indigenous Corporation Number of the RNTBC which charged the fee;
- a description of the services provided (or purportedly provided) by the RNTBC for which the fee is charged;
- submissions or statement about why the fee is not one that the RNTBC may, under subsection 60AB(1) of the Act or regulation 20, charge the applicant;
- any documentation provided by the RNTBC that mentions the functions for which the fee has been charged; and
- any documentation provided by the RNTBC to the applicant explaining the charge and its calculation.

Subregulation 21(3) requires the applicant to provide the RNTBC that charged the disputed fee with a copy of the request within seven days of lodging it.

Subregulation 21(4) allows such a request to be withdrawn in writing at any time before the Registrar provides the requested opinion.

Subregulation 21(5) enables the Registrar to seek further information in writing from the applicant or the RNTBC, including specifying a time limit (as decided by the Registrar) within which the applicant must supply that information. If the applicant does not comply with this request within the time limit (including any extension of the time limit granted by the Registrar), the Registrar is entitled to treat the application as having been withdrawn. If the Registrar does so, subregulation 21(7) would require the Registrar to give the applicant written notice within 14 days of making the decision to treat the application as having been withdrawn.

Under subregulation 21(6), if the Registrar seeks further information under subregulation 21(5), the Registrar is obliged to inform the applicant of the consequences of not complying with the initial or extended time limit specified.

Under subregulation 21(8), if the Registrar makes a request for information from the RNTBC that charged the fee under paragraph 21(5)(b), or the period for providing that information is extended under paragraph 21(5)(c), the Registrar must tell the applicant in writing of the period within which the RNTBC has been requested to provide that information.

Regulation 22 makes provision for the consideration of a request for an opinion and the giving of an opinion by the Registrar for the purposes of paragraph 60AC(5)(d) of the Act. The Registrar's opinion may include an alternate fee that the Registrar considers is one that the RNTBC may charge.

Subregulation 22(1) specifies that if the Registrar provides an opinion on whether the fee is one that the RNTBC may charge, the opinion and the reasons for the opinion must be provided in writing within 28 days after the request for an opinion has been received by the Registrar or any extended period and that the opinion must be provided to the applicant, the RNTBC that charged the fee and also to the Secretary of the Department with responsibility for administering the Act. Requiring the Registrar to give reasons for the Registrar's opinion promotes good decision making and public confidence in administration. Reasons also play an important role in informing an affected party's decision to seek reconsideration or review. Notwithstanding this, an aggrieved person may still have a right independent of the regulations to request reasons under section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

The effect of subparagraphs 22(1)(a)(ii) and (iii) is that if the Registrar asks for further information from the applicant or the RNTBC under regulation 21, the time limit for giving of the opinion in regulation 22 is within 28 days after the end of the period mentioned in the request or any extended period. If the Registrar asks for further information from both the applicant and the RNTBC, the opinion must be given within 28 days of the period mentioned in one of the requests or any extended period, whichever is latest.

If the Registrar decides not to give an opinion, the Registrar is not required to give reasons for that opinion or to notify the applicant. This reflects the discretion given to the Registrar in subsection 60AC(2) of the Act. Notwithstanding this, an aggrieved person may still have a right independent of the regulations to request reasons under section 13 of the ADJR Act.

Regulation 23 – Reconsideration of Registrar's opinion or decision not to give an opinion

Regulation 23 provides for a reconsideration by the Registrar of an opinion given under subsection 60AC(2) (regarding whether the fee charged is one that a PBC may charge), or a decision not to give an opinion under that subsection. The enabling provision is paragraph 60AC(5)(c) of the Act. Subregulation 23(2) requires a request for reconsideration to be made in writing to the Registrar within 28 days:

- of notification in writing of the Registrar's opinion;
- after the period mentioned in subregulation 22(1) has ended; or
- of any longer period allowed by the Registrar.

Under subregulation 23(3) a notice must set out the reasons for making that request.

Subregulation 23(4) allows the Registrar to reconsider an opinion or a decision not to give an opinion on his or her own initiative.

Regulation 24 – Request for further information or documents

Regulation 24 applies if an applicant or RNTBC asks the Registrar to reconsider a matter under subregulation 23(1) or the Registrar decides to reconsider a matter mentioned in paragraph 23(1)(a) or (b) on his or her own initiative.

Subregulation 24(2) allows the Registrar to ask the applicant or the RNTBC for information or documents relating to the fee in dispute.

Such a request must be made in writing and within 28 days after:

- the Registrar received notice of a request for reconsideration under subregulation 23(2); or
- on the day the Registrar decided to reconsider the matter (if the Registrar decided to reconsider a matter on his or her own initiative under subregulation 23(4)).

The request must specify the period when the requested information or document is required to be provided to the Registrar and state that if it is not complied with in the period or any expended period that the request would be treated as being withdrawn (see paragraphs 24(3)(c) and (d) and also subregulations 24(4) and (5)).

Subregulation 24(6) requires the Registrar to give notice to the applicant and RNTBC within 14 days after the Registrar makes the decision to treat the request for reconsideration as being withdrawn.

Subregulation 24(7) requires the Registrar to tell the applicant and the RNTBC, in writing, of the period that has been specified for information or documents to be provided to the Registrar where the Registrar has made a request under subregulation 24(2) or has extended the period mentioned in a request made under subregulation 24(4).

Regulation 25 – Registrar’s opinion following reconsideration

Regulation 25 provides for a comprehensive regime of reconsideration. If the Registrar, after reconsidering an opinion or a decision not to give an opinion under paragraph 23(1)(a) or (b), forms an opinion, the Registrar must tell the applicant and the RNTBC of that opinion and his or her reasons for it, in writing. The Registrar’s opinion may include an alternate fee that the Registrar considers is one that the RNTBC may charge. The Registrar must tell the applicant and the RNTBC of his or her opinion, and reasons for it, within 28 days after:

- receiving a notice of request for reconsideration under subregulation 23(2) or, if the Registrar decided to reconsider the matter on his or her own initiative under subregulation 23(4), the day the Registrar decided to reconsider the matter (if the Registrar did not make a request for further information or documents under subregulation 24(2));

- the period mentioned in a request for further information or documents made under subregulation 24(2) (if the Registrar requested further information or documents from the applicant or the RNTBC under subregulation 24(2));
- the extended period allowed for providing further information or documents under subregulation 24(4) (if the Registrar requested further information or documents from the applicant or the RNTBC and the period for providing the information or documents was extended under subregulation 24(4));
- the period mentioned in the request for further information or documents made under subregulation 24(2) that ends the latest (if the Registrar requested further information or documents from the applicant and the RNTBC under subregulation 24(2));
- the extended period allowed for providing further information or documents under subregulation 24(4) that ends the latest (if the Registrar requested further information or documents from the applicant and the RNTBC and the period for providing the information or documents in one or more of the requests was extended under subregulation 24(4)).

Requiring the Registrar to give reasons for the Registrar's opinion promotes good decision making and public confidence in administration. Reasons also play an important role in informing an affected party's decision to seek reconsideration or review. Notwithstanding this, an aggrieved person may still have a right independent of the regulations to request reasons under section 13 of the ADJR Act.

The Registrar must give a copy of an opinion mentioned in subregulation 25(1) to the Secretary of the Department within the same time limit as he or she is required to tell the applicant and the RNTBC (see subregulation 25(2)).

If the Registrar decides not to give an opinion on reconsideration, the Registrar is not required to give reasons for that opinion or to notify the applicant. This reflects the discretion given to the Registrar in subsection 60AC(2) of the Act. Notwithstanding this, an aggrieved person may still have a right independent of the regulations to request reasons under section 13 of the ADJR Act.

Subregulation 25(3) clarifies that the Registrar is taken to have confirmed the opinion given (if the Registrar given an opinion at first instance) or to have decided not to give an opinion (in all other cases) if the Registrar does not give an opinion within the period required. This provides certainty for the applicant or RNTBC that asked the Registrar to reconsider the opinion or decision at first instance.

Subregulation 25(4) allows a person to make an application to the Administrative Appeals Tribunal (AAT) for a review of an opinion given by the Registrar following reconsideration under subregulation 25(1), an opinion given at first instance that is confirmed under paragraph 25(3)(a) or a decision of the Registrar not to give an opinion under paragraph 25(3)(b). This ensures that an applicant or RNTBC first seeks reconsideration under regulation 23 before seeking AAT review.

Regulation 26 – Time for payment of fee

Regulation 26 provides for the withholding of payment of the fee and any interest calculated on that fee in relation to which a request is made following the Registrar's decision or after a reconsideration of that decision for the purposes of paragraph 60AC(5)(c) of the Act.

The effect of this regulation is that the requirement for the payment of fees is suspended (with no interest payable) while the request for an opinion or reconsideration is current and until such time as the matter is resolved.

Under subregulation 26(1), fees are not due and payable until the time for making a request for reconsideration has passed (if no request for reconsideration is made), or the time for making an application to the AAT has ended (if a request for reconsideration was made). The Regulations provide that if a fee is to be paid it must be paid by the end of 28 days after the period referred to in subregulation 26(1), or any period that the RNTBC specified in writing to the applicant.