

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 27

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

Native Title Act 1993

Native Title (Prescribed Bodies Corporate) Amendment Regulation 2012 (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.

The Regulation makes an amendment that had been intended to be made by the *Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011* (the Amendment Regulations). This amendment was not made by the Amendment Regulations due to a drafting error that occurred during the editing process of the Amendment Regulations. The Regulation amends the definition of **native title decision** in subregulation 3(1) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (the Principal Regulations) 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.

The Act does not impose any conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after registration on the Federal Register of Legislative Instruments.

Consultation

In March 2010, the Department of Families, Housing, Community Services and Indigenous Affairs released a consultation draft of the Amendment Regulations. Submissions closed on 30 April 2010. The Amendment Regulations took into account the 17 submissions received. The Regulation makes an amendment that should have been given effect by the Amendment Regulations and had been consulted on previously. No further consultation was undertaken.

Statement of Compatibility

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

The Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

PBCs hold and manage native title rights and interests on behalf of common law holders. PBCs must follow certain consultation and consent processes under the Principal Regulations before making ‘native title decisions’.

The purpose of the Regulation is to amend the definition of ‘native title decision’ to clarify that it covers decisions to do, or agree to, acts that would affect the native title rights or interests of common law holders.

Human rights implications

The definition of ‘native title decisions’ and therefore the types of decisions that are subject to certain consultation and consent processes under the Principal Regulations are likely to engage the right to self-determination contained in article 1 of the International Covenant on Civil and Political Rights (ICCPR), article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and article 3 of the Declaration on the Rights of Indigenous Peoples. The amended definition is also likely to engage the rights of equality and non-discrimination contained in articles 2, 16 and 26 of ICCPR as well as the right to enjoy and benefit from culture contained in article 27 of the ICCPR and article 16 of the ICESCR.

By clarifying the definition of ‘native title decision’ and therefore the types of decisions by PBCs that are subject to certain consultation and consent processes, the Regulation is clearly consistent with these rights.

Conclusion

The Regulation is compatible with human rights.