EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister to the Attorney-General and Parliamentary Secretary to the Attorney-General

Native Title Act 1993

Native Title Legislation Amendment (2021 Measures No. 1) Regulations 2021

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Native Title Act 1993* (the Act) provides for the recognition and protection of native title, and establishes ways in which future dealings affecting native title may proceed. The Act also provides certainty as to the effect of native title on other interests in land. Subsection 215(1) of 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.

The *Native Title (Federal Court) Regulations 1998*, the *Native Title (Indigenous Land Use Agreements) Regulations 1999* and the *Native Title (Tribunal) Regulations 1993* prescribe the relevant procedures and forms in relation to various processes under the Act.

The *Native Title Legislation Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations) amend relevant regulations under the Act to support amendments made by the *Native Title Legislation Amendment Act 2021* (the Amendment Act). The Regulations improve the efficiency and effectiveness of native title claims resolution and agreement-making.

The Regulations:

- amend the *Native Title (Federal Court) Regulations 1998* (the Federal Court Regulations) to
    - require limitations on the authority of an applicant under new section 251BA of the Act to be noted on the court form for a native title determination application or native title compensation application
    - provide for consequential amendments as a result of new section 47C in the Act, which allows historical extinguishment of native title to be disregarded over national, state and territory parks where the native title party and the relevant government party agree, and
    - allow for email addresses to be included as an address for service, if the person filing the form so elects.
- amend the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (the ILUA Regulations) to
    - require information about agreements ancillary to Indigenous Land Use Agreements (ILUAs) to be provided as part of an application for registration, and
    - require the details of any conditions imposed on the making of an ILUA under new section 251BA to be included in the application to register any such an agreement

- amend the *Native Title (Tribunal) Regulations 1993* (the Tribunal Regulations) to
    - allow for email addresses to be included as an address for service, if the person filing the form so elects, and
    - update the Tribunal Regulations consistent with how applicants and the National Native Title Tribunal conduct business in relation to right to negotiate applications.

Details of the Regulations are set out in Attachment A. A Statement of Compatibility with human rights for the Regulations is at Attachment B.

COMMENCEMENT

The Regulations commence immediately after the commencement of the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021.*

CONSULTATION

Consistent with the requirements of the *Legislation Act 2003*, the Regulations have been informed by consultation as part of the development of the Amendment Act. This includes public consultation on an options paper (open from 29 November 2017 to 28 February 2018) and an exposure draft bill (open from 29 October 2018 to 10 December 2018). Stakeholders are broadly supportive of the measures in the Amendment Act which have been given practical effect by the Regulations.

The Federal Court of Australia and the National Native Title Tribunal have both been engaged as part of the consultation process for the Amendment Act and the Regulations and are supportive of the Regulations.

REGULATION IMPACT STATEMENT

A short form Regulation Impact Statement (RIS) was completed for the Amendment Act (OBPR reference number 21828). An additional RIS for the Regulations was not required, as the Office of Best Practice Regulation considered that the Regulations will have a no more than minor impact on individuals, businesses and community organisations.

NOTES ON SECTIONS

Section 1 – Name

Section 1 provides that the title of the instrument is the *Native Title Legislation Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations).

Section 2 – Commencement

The instrument commenced in accordance with column 2 of the table, being immediately after the commencement of the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021* (the RNTBC Regulations). This was to avoid multiple amendments to the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (the ILUA Regulations) because both this instrument and the RNTBC Regulations amend the ILUA Regulations.

The RNTBC Regulations commenced at the same time as those measures in the Amendment Act that commenced by Proclamation. The Proclamation for the Amendment Act fixed 25 March 2021 as the commencement date for these measures.

Section 3 – Authority

Section 3 provides that this instrument is made under the *Native Title Act 1993* (the Act).

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Native Title (Federal Court) Regulations 1998

Item 1 – After regulation 6

This item means that the updated Forms 1, 3 and 4, as inserted by Schedule 1 of the Regulations must be used in relation to any application made after the commencement of the Regulations.

Item 2 – Schedule (Form 1)

This item repeals and replaces Form 1 within the *Native Title (Federal Court) Regulations 1998* (the Federal Court Regulations).

Amendments to give effect to new section 251BA of the Act

The new Form 1 contains provisions to record conditions on authority of the applicant in relation to native title determination applications as per new section 251BA which is inserted by the Amendment Act.

Amendments in Form 1 to give effect to new section 251BA are:

- Updating Note 2 of Form 1 to reflect the new requirements about the applicant's affidavit which accompanies a determination application.

- Requiring that a determination application must include details of any conditions under section 251BA of the Act on the authority of the applicant to make the application and to deal with matters arising in relation to it (*Schedule LA*).

- Amending *Schedule R* to also require that if the determination application has not been certified by each representative Aboriginal/Torres Strait Islander body, the application must include a statement which addresses the issue of whether there are conditions under the new section 251BA.

The purpose of these amendments is to require that any restrictions or limitations on the applicant's authority be included in information available on the Court record and accessible by the parties. Form 1 is one of the forms for the kinds of application under the Act which an applicant may be authorised to make. These amendments allow other parties to the proceedings to deal with the applicant transparently and effectively within any restrictions placed on it by the claim group.

Amendments to give effect to new section 47C of the Act

The amended Form 1 also provides for consequential amendments, relevant to native title determination applications to the Federal Court, as a result of new section 47C which will be inserted by the Amendment Act.

New section 47C allows historical extinguishment of native title to be disregarded over areas set aside for the preservation of the natural environment (for example, national, state and territory parks), where the native title party and the relevant government party agree.

Amendments to Form 1 to give effect to new section 47C are:

- Adding paragraph (1)(d) in *Schedule L* to require that for the area covered by a determination application, the claimant must include details of any area in relation to which the operation of section 47C of the Act has been agreed to in writing in accordance with paragraph 47C(1)(b) of the Act.

- Adding section 2 in *Schedule L* to require that if the operation of section 47C of the Act has been agreed to in writing in accordance with paragraph 47C(1)(b) of the Act in relation to the whole or any part of the area covered by a determination application, the determination application must include a copy of the agreement and, if there is an agreement under subsection 47C(5) of the Act, that agreement.

Amendments to allow for email addresses to be included as an address for service, if the person filing the form so elects

There are a range of notification requirements under the Act. These are governed by the Native Title (Notices) Determination 2011 (Cth) (the Notices Determination).

The Notices Determination sets out methods for giving notice under the Act. It distinguishes between notice which must be given generally (such as notice of new claims or the holding of an inquiry) and notice given specifically (such as notice that a future act will be done on a certain area).

In relation to notification processes for notices which are given specifically, in practice the party giving notice will use the address which appears for the registered native title claimant on the Register of Native Title Claims.

Under the new Form 1 inserted by the Regulations, section B is amended to ensure that notices to specified persons (i.e. notices relating to specific future acts) under the Act can be provided

electronically where the person to be notified agrees. The amendment allows for parties to a proceeding to include an email address as an address for service on their court forms, and to indicate whether that email address is their preferred method for receiving notifications under the Act. This is consistent with the Notices Determination which at subsection 8(2) provides that notice may be given by a different means if the person to be notified agrees.

This amendment is intended to recognise the fact that online communication is becoming commonplace and is the preferred method of communication for a significant proportion of Australian society.

This amendment is supported by paragraph 215(1)(b) of the Act.

Item 3 – Schedule (Forms 3 and 4)

The item repeals and replaces Forms 3 and 4 of the Federal Court Regulations.

Under the revised Form 3, *Schedule GA* in subsection (A)(3) is inserted to require that applications for the revocation or variation of an approved determination of native title must include a copy of the agreement if the determination covers an area in relation to which the operation of section 47C of the Act has been agreed.

The revised Form 4 contains consequential amendments to give effect to new section 251BA.

These consequential amendments are:

- Amending Note 2 to require that compensation applications must be accompanied by an affidavit sworn by the applicant stating that:
    - if the application is authorised by a compensation claim group and there are no conditions under section 251BA of the Act on the authority that relate to the making of the application—that there are no such conditions;
    - if the application is authorised by a compensation claim group and there are any conditions under section 251BA of the Act on the authority that relate to the making of the application—that the conditions have been satisfied and how the conditions have been satisfied;
- Inserting *Schedule LA* in subsection (A)(3) of Form 4 to require that compensation applications contain details of any conditions under section 251BA of the Act on the authority of the applicant to make the application and to deal with matters arising in relation to it.

The purpose of these amendments is to require that any restrictions or limitations on the applicant's authority be included in information available on the Court record and accessible by the parties.

The revised Form 4 also amends Note 2 to give effect to Schedule 4 in the Amendment Act by requiring that certain information must be included in the applicant's affidavit which accompanies a compensation application, if the application is made by a registered native title body corporate (RNTBC). This information includes a statement that either the applicant holds (or is an agent prescribed body corporate in relation to) the native title rights and interests for the area, or that the area is within the external boundary of the area of land or waters covered by an approved determination of native title under which the applicant holds (or is an agent prescribed body corporate in relation to) native title rights and interests.

The revised Form 4 also amends section B to allow for notices under the Act to be provided electronically where the person to be notified agrees. This amendment is supported by paragraph 215(1)(b) of the Act.

Native Title (Indigenous Land Use Agreements) Regulations 1999

Item 4 – At the end of subregulation 6(3)

The National Native Title Tribunal (NNTT) maintains a Register of Indigenous Land Use Agreements (ILUA Register), which contains information about ILUAs that have been accepted for registration. Currently, the Act requires parties to all three types of ILUAs to provide copies of their agreement to the NNTT. The Act also specifies that the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (the ILUA Regulations) may set out other documents which should accompany a registration application.

This item inserts 6(3)(e) into the ILUA Regulations to require that the information accompanying a registration application for a body corporate ILUA must include an indication of whether there are any ancillary agreements to the body corporate ILUA.

The purpose of this amendment is to allow the ILUA Register to note the existence of agreements which are ancillary to a body corporate ILUA. In many cases, an ILUA is only a small part of a broader agreement between a project proponent and a native title group, and most of the commercial terms are contained in other agreements which are not registered on the ILUA Register.

Item 5 – At the end of subregulations 7(3) and 8(3)

New paragraphs 7(3)(e) and 8(3)(e) require that an application for registration of an area agreement (under paragraph 7(3)(e)) or an application for registration of an alternative procedure agreement (under paragraph 8(3)(e)) must be accompanied by details of any conditions under section 251BA of the Act on the authority to make the agreement. This is a further consequential amendment to give effect to new section 251BA.

New paragraphs 7(3)(f) and 8(3)(f) require that an application for registration of an area agreement (under paragraph 7(3)(f)) or an application for registration of an alternative procedure agreement (under paragraph 8(3)(f)) must be accompanied by a note of whether there is any other written agreement made between some or all of the parties to the agreement in connection with the doing of an act to which the agreement relates. Similarly to item 4 in respect of body corporate ILUAs, this amendment will allow the ILUA Register to note the existence of agreements which are ancillary to area and alternative procedure ILUAs.

Item 6 – In the appropriate position in Part 3

This item clarifies that the amendments of the ILUA Regulations made by the Regulations apply in relation to any application made after the Regulations take effect.

Native Title (Tribunal) Regulations 1993

Item 7 –Subregulation 3(1) (at the end of the definition of *lodge and address for service*)

This item adds a note which clarifies that an 'address' includes a physical address, a postal address or an email address.

Item 8 – Paragraph 8(d)

The *Native Title (Tribunal) Regulations 1993* (the Tribunal Regulations) prescribe fees, and conditions for their waiver, in relation to right to negotiate applications to the NNTT regarding expedited procedure objection and future act determination applications.

Regulation 8(d) prescribes the conditions under which the Native Title Registrar may waive the prescribed fee having regard to 'the income, day-to-day living expenses, liabilities and assets' of the applicant.

Historically, the Registrar has considered that RNTBCs may apply for fee waivers under this regulation. The reference to 'day-to-day living expenses' does not conform to this historical practice and the statutory context which suggests that this regulation was intended to apply to both natural persons that may logically have 'day-to-day living expenses' and RNTBCs that do not. This item omits 'day-to-day living' from paragraph 8(d) to resolve this ambiguity.

Item 9 – Regulation 10 (heading)

Regulation 10 relates to subsection 141(3) of the Act which outlines who are the parties to an inquiry to a special matter. Regulation 10 refers to an applicant's intention to become a party to 'an application'. It should refer more correctly to an applicant's intention to become a party to 'an inquiry'.

This item amends Regulation 10 to refer to 'an inquiry', rather than 'an application', to be consistent and give force to subsection 141(3) of the Act.

This amendment is supported by paragraph 215(1)(b) of the Act.

Item 10 – After regulation 12

This item inserts new regulation 12A which requires a party to an inquiry in relation to a right to negotiate application to provide the Registrar with a physical, postal or email address within 7 days of the party being given notice of the application.

By requiring parties to give the Registrar notice in writing of an email address if they have one, this item ensures the NNTT can conduct future act inquiries efficiently by using electronic communication, allowing for the prompt delivery of notices.

Regulation 3 of the Tribunal Regulations sets out how certain aspects of the regulations should be interpreted. This regulation provides that 'lodge an address for service, in relation to a person, means give to the Registrar notice in writing of an address to which documents for the person may be sent.'

Providing the Registrar with a physical, postal or email address under new regulation 12A amounts to 'lodging an address of service' as defined in regulation 3.

An address provided under regulation 12A can be updated under regulation 12, and can be used to serve documents under regulation 13 and new regulation 13A.

Item 11 to 15 – Regulation 13

These items amend regulation 13 to provide specifically for the service of a summons and to remove ambiguity with reference to the service of documents other than summons as provided for elsewhere in the Tribunal Regulations, including in new regulation 13A.

Item 11 amends the heading of regulation 13 to refer to 'service of summons', rather than 'service of documents'.

Items 12 to 15 amend subregulations 13(4) to 13(7) to explicitly clarify that an address for service under regulation 13 includes a physical address for the purpose of serving a summons on a person.

Item 16 – Regulation 13A

This item inserts new regulation 13A to allow for a notice or document, other than a summons, to be served on the NNTT or on a party by sending it by post or email. This amendment is supported by paragraph 215(1)(b) of the Native Title Act.

Item 17 – Regulation 18

This item clarifies that the amendments of regulations 8 and 10 and Schedule 1 made by the Regulations apply in relation to any application made, or notice given to the NNTT, after the Regulations take effect.

Item 18 – Schedule 1 (Forms 4 to 6)

This item repeals Forms 4, 5 and 6 within the Tribunal Regulations and substitutes new Forms 4, 5 and 6.

Amendments to allow for email addresses to be included as an address for service, if the person filing the form so elects

The Tribunal Regulations prescribe the relevant forms for applications to the NNTT relating to native title parties' right to negotiate and a summons to give evidence before the NNTT.

Most NNTT business relating to the right to negotiate applications is conducted via email. However, the Tribunal Regulations do not currently refer to email or electronic communication as a method of address for service. They also do not currently allow the person filing the form to note a preferred address for service.

The Tribunal Regulations do not currently require other parties to a matter to nominate an address for service. For example, in an expedited procedure objection application, the government party will determine that the expedited procedure applies, and the native title party will file an objection. In these circumstances the NNTT has the address for service for the applicant/native title party, and the government party; however, it is required to seek out information from the grantee party about its address for service.

Under item 18, Forms 4 and 5 are amended to provide for the person filing the form to include an email address in addition to a physical address for service, and to provide for the person filing the form to note a preferred method of address for service.

Amendments to Forms 4 and 5 rely on the necessary or convenient power in paragraph 215(1)(b) of the Native Title Act.

Amendments to correct and resolve ambiguities within the Tribunal Regulations

The Tribunal Regulations prescribe the relevant form for an applicant to object to the inclusion of a proposed act in an expedited procedure application. A RNTBC can act as an applicant in such instances.

If a proposed future act will affect more than one native title determination area, there may be more than one RNTBC that wishes to apply to the NNTT. The current prescribed form implies that there may be only one RNTBC that can act as the relevant applicant when objecting to the inclusion of a proposed future act in an expedited procedure.

Item 18 amends Item 6 of Form 4 to clarify that more than one RNTBC may be able to apply to the NNTT to object to the inclusion of a proposed future act in an expedited procedure application.

Item 9, Form 5 of Schedule 1 of the Tribunal Regulations requires applicants to provide a description of the future act to which the application relates. Form 4 currently does not replicate this requirement, even though this Form also relates to a future act being done.

Item 18 amends subsection 8 of Form 4 to require applicants to provide a description of the act to which the Form 4 application relates.

Section 29(4) of the Act specifies that a notification to parties affected by a proposed future act should specify a day as the 'notification day'. The current Item 6 in Form 4 and Item 7 in Form 5 of the Tribunal Regulations require an applicant to provide information on 'the government that issued the notice and the date of the notice'. This inconsistency is an historical one, as the concept of 'notification day' was introduced to the Act by amendment, and may give rise to confusion.

Item 18 amends Forms 4 and 5 of Schedule 1 to require applicants to provide the notification day as specified under s 29(4) of the Act instead of the date the government party issued the notice.

Form 6 relates to subsection 141(3) of the Act which outlines who are the parties to an inquiry to a special matter. The current Form 6 refers to an applicant's intention to become a party to 'an application'.

Item 18 amends Form 6 of Schedule 1 to refer to 'an inquiry', rather than 'an application', to be consistent with and give force to subsection 141(3) of the Native Title Act. This amendment is supported by paragraph 215(1)(b) of the Act.

ATTACHMENT B

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Native Title Legislation Amendment (2021 Measures No. 1) Regulations 2021

1. The Regulations are 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 Regulations

2. The *Native Title (Federal Court) Regulations 1998* (the Federal Court Regulations), the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (the ILUA Regulations) and the *Native Title (Tribunal) Regulations 1993* (the Tribunal Regulations) prescribe the relevant procedures and forms in relation to various processes under the *Native Title Act 1993* (the Act).

3. The *Native Title Legislation Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations) amend these regulations to support and give practical effect to amendments made by the *Native Title Legislation Amendment Act 2021* (the Amendment Act).

4. The Regulations:

- amend the Federal Court Regulations to:
  - require limitations on the authority of an applicant under new section 251BA of the Act to be noted on the court form for a native title determination application or native title compensation application
  - provide for consequential amendments as a result of new section 47C in Act, which will allow historical extinguishment of native title to be disregarded over national, state and territory parks where the native title party and the relevant government party agree, and
  - allow for email addresses to be included as an address for service, if the person filing the form so elects.

- amend the ILUA Regulations to
  - require information about agreements ancillary to Indigenous Land Use Agreements (ILUAs) to be provided as part of an application for registration, and
  - require the details of any conditions imposed on the making of an ILUA under new section 251BA to be included in the application to register any such agreement.

- amend the Tribunal Regulations to
  - allow for email addresses to be included as an address for service, if the person filing the form so elects, and
  - update the Tribunal Regulations consistent with how applicants and the National Native Title Tribunal conduct business in relation to right to negotiate applications.

Human rights implications

5. The Regulations promote the following rights:
    - the right to enjoy and benefit from culture in Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
    - the right to self-determination in Article 1 of the ICCPR
    - the right to an effective remedy in Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
    - the right to equality before courts and tribunals in Article 14 of the ICCPR, and
    - the right to a fair and public hearing by a competent, independent and impartial tribunal in Article 14(1) of the ICCPR.

The rights to self-determination and to enjoy and benefit from culture

6. The right to enjoy and benefit from culture is contained in Article 27 of the ICCPR and Article 15 of the ICESCR.[1] Article 27 of the ICCPR protects the rights of individuals belonging to minorities within a country to enjoy their own culture. Article 15 of the ICESCR protects the right of all persons to take part in cultural life.

7. The United Nations Committee on Economic, Social and Cultural Rights (UNESCR) specifically refers to Indigenous peoples' cultural values and rights associated with their ancestral lands and states that their relationship with nature should be regarded with respect and protected.[2]

8. The right to self-determination is a collective right, in that it pertains to groups of people, as opposed to individuals within a group. The right to self-determination, as set out in Article 1 of the ICCPR and Article 1 of the ICESCR, enshrines the right of peoples to have control over their destiny and to be treated respectfully.[3]

9. Although the right to self-determination is a collective right, it is important that individuals are heard with regard to contributing to the direction of the group. This may include adequately consulting and giving appropriate consideration to minority views to ensure that genuine agreement is reached.[4]

10. The right to enjoy and benefit from culture, and the right to self-determination, are promoted by amendments in the Regulations to give effect to new sections 251BA and 47C in the Amendment Act, as well as amendments to allow the Register of Indigenous Land Use Agreements (ILUA Register) to note the existence of agreements which are ancillary to an ILUA.

<u>Amendments to give effect to new section 251BA of the Act</u>

11. New section 251BA allows a claim group to impose conditions on the authority of the applicant. The purpose of this amendment is to reflect that, while the applicant currently

[1] *International Covenant on Civil and Political Rights* (n 1) art 27; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) article 15.
[2] UNESCR, General Comment No. 21 (2009) at paragraph 36.
[3] *International Covenant on Civil and Political Rights* (n 1) art 1; *International Covenant on Economic, Social and Cultural Rights* (n 5) article 1.
[4] Parliamentary Joint Committee on Human Rights comment on *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Scrutiny Report 1 of 2020) at paragraph 1.87.

has the power under section 62A of the Act to deal with all matters arising in relation to a native title application, in practice many claim groups expect that the applicant will bring key decisions back to the group for consideration or specific authorisation.

12. The Regulations revise Forms 1 and 4 of the Federal Court Regulations, and paragraphs 7(3)(e) and 8(3)(e) of the ILUA Regulations to give effect to this change.

13. The purpose of the amendments in the Regulations is to require that any restrictions or limitations on the applicant's authority be included in information available on the Court or Tribunal record and accessible by the parties.

14. Examples of conditions that the claim group could be able to place on the authority of the applicant under new section 251BA include requiring the applicant to seek specific authorisation from the claim group before agreeing to a consent determination, or before discontinuing or amending an application.

15. These amendments promote the right to enjoy and benefit from culture by providing the claim group with flexibility around how it wants the applicant to operate and to ensure the applicant acts in accordance with its wishes.[5]

Amendments to give effect to new section 47C of the Act

16. New section 47C will allow historical extinguishment of native title to be disregarded over areas set aside for the preservation of the natural environment where the native title party and the relevant government party agree. The Regulations revise Forms 1 and 3 of the Federal Court Regulations to give effect to new section 47C.

17. The insertion of section 47C in the Amendment Act recognises the cultural significance that national parks and reserves hold for many native title holders and is strongly supported by Indigenous stakeholders. The section promotes the right to enjoy and benefit from culture by extending the circumstances in which the past extinguishment of native title may be disregarded and subsequently recognised. The Regulations support and give practical effect to section 47C.

Amendments to allow the ILUA Register to note the existence of agreements which are ancillary to an ILUA

18. The Regulations amend the ILUA Regulations to allow the ILUA Register to note the existence of agreements which are ancillary to an ILUA. In many cases, an ILUA is only a small part of a broader agreement between a project proponent and a native title group. Where these details appear in ancillary agreements, they may not be visible to the broader claim group or other third parties.

19. This amendment is designed to increase transparency regarding agreements which are ancillary to an ILUA, through ensuring that the broader claim group or other third parties are aware of their existence. The public record will only note the existence of such agreements rather than contain details of the agreement itself, and will not include any information which is commercial-in-confidence.

20. The Regulations therefore support amendments in the Amendment Act which promote the right to self-determination through ensuring that individuals have the information regarding

[5] ALRC Report, Recommendation 10-5.

agreements which impact them which is necessary to be able to effectively contribute to the direction of the group.

The right to an effective remedy

21. The right to an effective remedy is contained in Article 2(3) of the ICCPR.[6] Article 6 of the CERD also provides a right to an effective remedy for acts of discrimination contrary to that Convention.[7]

22. The right to an effective remedy provides a right to appropriate reparation where rights have been breached. This may include compensation, restitution and changes to laws and practices to protect against repetition of breaches of rights. The Act as a whole supports the right to an effective remedy by recognising native title rights and interests under Australian law, including by allowing the extinguishment of native title to be disregarded in certain circumstances.

23. This right is promoted by amendments in the Regulations:
    - to give effect to new section 47C in the Amendment Act
    - to give effect to new Schedule 4 in the Amendment Act
    - to correct and resolve ambiguities within the Tribunal Regulations.

Amendments to give effect to new section 47C in the Amendment Act

24. As discussed above, section 47C of the Amendment Act allows historical extinguishment of native title to be disregarded over certain areas. The Regulations revise Forms 1 and 3 of the Federal Court Regulations to give effect to section 47C.

25. This promotes the right to an effective remedy by increasing the circumstances in which native title rights and interests can be recognised. The Regulations support and give practical effect to section 47C.

Amendments to give effect to Schedule 4 in the Amendment Act

26. Schedule 4 of the Amendment Act amends the Act to allow a registered native title body corporate (RNTBC) (the corporation established by traditional owners following a determination of native title) to bring a compensation application over areas within the external boundary of its determination area where native title has been fully extinguished. Currently, RNTBCs can only bring compensation applications over areas where native title has been partially extinguished or impaired.

27. The Regulations amend Form 4 in the Federal Court Regulations to give effect to Schedule 4.

28. The Regulations support the amendments made by Schedule 4 which promote the right to an effective remedy by making it easier for certain types of compensation claims to be brought. In particular, these amendments avoid the complexities of authorising an applicant in circumstances where there is already a recognised body that has the authority of relevant common law holders to represent their interests.

[6] *International Covenant on Civil and Political Rights*, opened for signature 16 Decmeber 1966, 999 UNTS 171 (entered into force 23 March 1976) article 2(3).
[7] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) article 6.

Amendments to correct and resolve ambiguities within the Tribunal Regulations

29. The Regulations also include amendments to correct and resolve ambiguities within the Tribunal Regulations. These include:
    - clarifying that more than one RNTBC may be able to apply to the National Native Title Tribunal (NNTT) to object to the inclusion of a proposed future act in an expedited procedure application
    - requiring applicants to provide a description of the future act to which a Form 4 application relates, and
    - requiring applicants to provide the notification day as specified under s 29(4) of the Act.

30. These amendments promote the right to an effective remedy through ensuring that there is no confusion for applicants to the NNTT around concepts such as the notification day, and subsequently all parties are provided with the correct information about a notification day. The amendments also ensure that all parties to an objection to an expedited procedure application have the information regarding the relevant future act which is necessary to effectively respond to an application. Further, the Regulations ensure that RNTBCs are able to apply to the NNTT to object to the inclusion of a proposed future act in an expedited procedure application which will affect their native title determination area, and are therefore able to access an effective remedy for acts affecting their native title rights.

The rights to equality before courts and tribunals, and to a fair and public hearing

31. Article 14(1) of the ICCPR enshrines the right of a person to have a fair and public hearing by a competent, independent and impartial tribunal established by law.[8] This article also sets out the general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies.[9]

32. This right is promoted by a number of amendments in the Regulations which aim to allow for email addresses to be included as an address for service, if a person so elects.

33. Much of the NNTT's business is conducted via email. However, the Tribunal Regulations do not currently refer to email or electronic communication as a method of address for service. They also do not currently allow the person filing the form to note a preferred address for service.

34. The Tribunal and Federal Court Regulations also do not currently require other parties to a matter to nominate an address for service. For example, in an expedited procedure objection application, the government party will determine that the expedited procedure applies, and the native title party will file an objection. In these circumstances, the NNTT has the address for service for the applicant/native title party, and the government party; however, it is required to seek out information from the grantee party about its address for service. This could lead to delays for the processing of applications.

35. By allowing for notices to be served via email, these amendments ensure the Federal Court and NNTT can conduct proceedings efficiently by using electronic communication. These amendments are also intended to recognise the fact that online communication is becoming

[8] *International Covenant on Civil and Political Rights* (n 1) article 14(1).
[9] UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32.

commonplace and is the preferred method of communication for a significant proportion of Australian society.

36. The Regulations therefore promote the rights to equality before courts and tribunals, and to a fair and public hearing, through ensuring that all parties receive relevant notices and are not excluded from proceedings, and the concerns of all parties can be considered during the relevant proceedings.

CONCLUSION

37. The Regulations are compatible with human rights as they promote the protection of human rights.