**SUPPLEMENTARY EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Indigenous Australians

*Corporations (Aboriginal and Torres Strait Islander) Act 2006*

*Native Title Act 1993*

***Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021***

**Purpose of the Supplementary Explanatory Statement**

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

**Nature and scope of the amendments**

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

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

**Nature and scope of the information contained in the certificates**

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

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

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

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

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

*A person that is a common law holders*

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

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

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

*A person with a substantial interest in the decision*

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

*Registrar of Aboriginal and Torres Strait Islander Corporations*

The Review recommended that the Registrar’s compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders. The Registrar is appointed by the relevant Minister under section 653-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and has the duties, functions and powers provided for under the CATSI Act or another law of the Commonwealth. The functions of the Registrar under new section 55A of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* are to assess whether or not, in the Registrar’s opinion, a certificate prepared by a PBC for the purposes of regulation 9 of the PBC Regulations complies with that regulation. The Registrar also has the function of notifying the person who requested the assessment the date of the certificate, the decision to which the certificate relates and the Registrar’s opinion as to whether or not the certificate complies with regulation 9 of the PBC Regulations.

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

**Safeguards**

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

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

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

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

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

If a PBC is not an APP entity it will not be subject to section 15 of the *Privacy Act 1988*, which requires that an APP entity must not do an act, or engage in a practice, that breaches an APP. PBCs that are not APP entities could choose to opt into the obligations under the *Privacy Act 1988* under section 6EA. In doing this, a PBC would be making a public commitment to good privacy practice that may result in further confidence and trust being derived from operating under the *Privacy Act 1988*.

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

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