



Law Council
OF AUSTRALIA

Office of the President

18 April 2023

Ms Katherine Jones PSM
Secretary
Attorney-General's Department
C/- Native Title Unit
Robert Garran Offices
3–5 National Circuit
CANBERRA ACT 2600

By email: native.title@ag.gov.au

Dear Ms Jones

Sunsetting Native Title Instruments

Thank you for the opportunity to contribute to the Commonwealth Attorney-General's Department (**AGD**) review of legislative instruments made under the *Native Title Act 1993* (Cth) (**NTA**), which are due to sunset on 1 October 2023.

The specific instruments under review are:

- *Native Title (Federal Court) Regulations 1998*;
- *Native Title (Indigenous Land Use Agreements) Regulations 1999*;
- *Native Title (Tribunal) Regulations 1993*; and
- *Native Title (Notices) Determination 2011 (No 1)*.

The Law Council of Australia is grateful to its Indigenous Legal Issues Committee (**ILIC**), the Law Society of New South Wales (**LSNSW**), and the Queensland Law Society (**QLS**) for assistance in the preparation of this submission. This submission represents the Law Council's preliminary views in response to the Consultation Paper published by AGD.

Introduction

The Law Council welcomes the ongoing review and reform of the native title regime established pursuant to the NTA. As stated in the Law Council's submission, dated 20 May 2022, to the initial consultation relating to the sunset of the above instruments, the Law Council continues to be guided by the core principles underpinning native title reform, including the need for authority, legitimacy and recognition of the communal character of native title law.¹

¹ Law Council of Australia, Submission to the Attorney-General's Department, *Sunsetting of Native Title Instruments* (20 May 2022) <<https://www.lawcouncil.asn.au/publicassets/f61d1507-faed-ec11-9452-005056be13b5/2022%2005%2020%20-%20S%20-%20Sunsetting%20Native%20Title%20Instruments.pdf>>.

As a general point, the Law Council wishes to emphasise that many native title applicants may be unfamiliar with the content of the native title instruments as well as native title legislation and decisions more broadly, given their complex and technical nature. The Law Council also notes some applicants may also speak English as a second or third language or otherwise experience English literacy or communication barriers, or have experienced prior disempowerment within Australia's administrative or legal systems leading to confusion or undermining trust.²

Accordingly, many native title applicants rely on their legal practitioner to provide them with advice to progress their claim from the outset and throughout the determination process. That advice is critical to establishing, and the ongoing operations of, Prescribed Body Corporates and Registered Native Title Bodies Corporate. The Law Council highlights the importance of the legal practitioners acting on behalf of native title applicants being familiar with and understanding the application process for their clients. Legal practitioners must be able to relay the complex nature of these instruments in plain English to those they represent.

To support native title applicants, the Law Council suggests it would be helpful, for ease of understanding, for AGD to create flow charts that legal practitioners may take a native title applicant through to set out every step in the process of a native title claim. The legislation should clearly be referenced to supplement each step, clearly explaining the process.

Finally, the Law Council encourages consistent engagement with registered native title representative bodies (**RNTRBs**) that hold native title on trust on behalf of native title holders in conducting the current consultation and any future consultations relating to native title.

Previous Law Council Submission

On 20 May 2022 the Law Council made a submission to the initial consultation conducted by the AGD in relation to its review of the sunset native title instruments.

Relevantly, in that submission, the Law Council made the following comments and suggestions:

Providing Digital Notice

- The Law Council raised that there is an issue as to whether providing notice via newspapers or the post under the *Native Title (Notices) Determination 2011 (No. 1)* is outdated and may no longer be the most effective means of communicating with those affected under the native title regime. Accordingly, there may be benefit to allowing digital means of communication for notification within any future instrument, including to ensure consistent minimum standards of practice. Consultation is vital in considering the best means of communication for notices, noting that there are challenges for digital communication in regional and remote areas including both slow, infrequent or non-existent mail delivery and unreliable or non-existent internet and phone reception.³

² Law Council of Australia, 'The Justice Report' (August 2018) <<https://www.lawcouncil.asn.au/justice-project/final-report>>, 31.

³ Law Council of Australia, 'Aboriginal and Torres Strait Islander Peoples', Justice Project (Final Report, August 2018) 42.

Fee Waivers and Exemptions

- The Law Council noted that fee waivers for Federal Court forms and applications under section 75 of the NTA do not extend to RNTBCs and claimants who are not assisted by a native title representative body. Expedited procedure objections can be a significant cost impost on RNTBCs. The LSNSW also sought to emphasise that, in NSW, Local Aboriginal Land Councils (**LALCs**) are active participants in claims and are required by section 42 of the *Aboriginal Land Rights Act 1983* (NSW) to make non-claimant applications. Given this, the LSNSW submitted that LALCs fall within the class of bodies that ought to have a fee exemption or at the very least not have to pay a full corporate rate.

The Law Council maintains the suggestions made in its 2022 submission in relation to the relevant proposals raised in the Consultation Paper. The Law Council has prepared an Annexure setting out responses to questions raised in the Consultation Paper, drawing on the perspectives of its ILIC, and the specific responses provided by the QLS (see **Annexure 1**). It is grateful for the more detailed QLS views, noting that its ILIC has not been able to consider all of these in full in the time available.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Luke Murphy', with a large, stylized flourish at the end.

Luke Murphy
President

Enc.