Law Council
OF AUSTRALIA

Office of the President

20 May 2022

Ms Sara Samios
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Native Title Unit
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3-5 National Circuit
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Dear Assistant Secretary

Sunsetting Native Title Instruments

Thank you for the opportunity to contribute preliminary views to the Commonwealth Attorney-General's Department (**AGD**) in relation to the review of four legislative instruments of the *Native Title Act 1993* (Cth) (**NTA**) due to sunset on 1 October 2023: the 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 (**Law Council**) is grateful to its Indigenous Legal Issues Committee and the Law Society of New South Wales for assistance in the preparation of the below submission.

Introduction

The Law Council welcomes the ongoing review and reform of the native title regime established pursuant to the NTA and acknowledges that the procedural activity associated with the regime gives rise to practical and operational issues and norms.

In responding to the current review of legislative 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. It is generally supportive of reform measures that are designed to promote certainty and efficiency in native title decision-making, but as a general proposition emphasises that reform measures must not undermine the core principles or the international standards engaged by native title considerations, including, but not limited to, the right of self-determination and the right to free, prior and informed consent.[1]

[1] See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007) (**UNDRIP**). Australia formally announced its support for the UNDRIP on 3 April 2009. While the UNDRIP is not a treaty, several provisions have been recognised as reflecting customary international law or echo many of the rights articulated in legally binding treaties, but with a specific focus on Indigenous peoples. Insofar as the UNDRIP relies on and elaborates well-established human rights

The Law Council has not undertaken a comprehensive analysis of the instruments currently under review but is pleased to provide the following preliminary comments on discrete issues.

Notices

The Native Title (Notices) Determination 2011 (No 1) provides that notice of several types of future acts, and notice of determination and compensation applications and amended applications, must be published in newspapers, relevant special interest publications, or given by post unless otherwise agreed by the person notified.

There is an issue as to whether these modes of notification may be outdated or may no longer be the most effective means of communicating with those affected by acts or applications under the native title regime.

The Full Court of the Federal Court of Australia in *Mace v State of Queensland* [2019] FCAFC 233 at [116] made some comment on outdated means of communication with specific reference to the fact that a lack of responses to notices in the case it was considering 'may be because the publication of notices in newspapers is no longer the most effective way to reach members of the Indigenous community'. It further noted 'other information sources such as social media and television' that may take precedence over newspapers in current times and 'that vast amounts of public and community communications now occur through social media rather than through newspapers'.[2]

There is no reference in the current instrument to digital means of communication, and there may be benefit in formalising such a form of notification within any future instrument, including to ensure consistent minimum standards of practice.

The Law Council is supportive of innovative attempts to ensure that complex legislative regimes are accessible to those outside the legal profession, including that regulations, rules, directions and notices are known, available and comprehensible to all groups who will be affected by them. First Nations peoples and Traditional Owners in particular are principal parties under the native title regime, and in certain instances may live remotely, have limited access to facilities necessary both to become aware of notices and to respond to notices, speak English as a second or third language or otherwise have issues with English literacy and comprehension, or have experienced prior disempowerment within Australia's administrative or legal systems leading to confusion or undermining trust.

Digital methods of communication can also be particularly effective for populations of people frequently away from their primary residence travelling for work or health reasons, or who change addresses often due to being renters or other social factors. At the same time, the Law Council heard of challenges in remote areas from both slow, infrequent or non-existent mail delivery and unreliable or non-existent internet and phone reception during consultations for its Justice Project,[3] as well as anecdotal information from specific legal practitioners of disruptions to satellite connections.

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in international treaty and customary law, it is legally binding on Australia. See, eg, International Law Association, *Rights of Indigenous Peoples*, 75th Conference, ILA Resolution No 5/2012 (30 August 2012); Federico Lenzerini, 'Implementation of the UNDRIP Around the World: Achievements and Future Perspectives' (2019) 23 *International Journal of Human Rights* 51. See also Adam McBeth, Justine Nolan and Simon Rice, *The International Law of Human Rights* (Oxford University Press, 2011) 456.

[2] *Mace v State of Queensland* [2019] FCAFC 233, [92], [93]. See also [65].

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

The Law Council recommends close consultation before proposing prescriptive changes to notices, taking into account the above practical challenges and the views of local communities on modes and forms of communication that would be most effective, including postal versus print publication versus digital modes, as well as whether there is need for notices to be given in local languages and in simple or less legalistic forms. It would urge the AGD in reviewing the current instrument to work in close partnership with First Nations organisations as to solutions, in particular those organisations with a regular presence in remote and very remote areas that may have current working knowledge of communications barriers or needs.

This should include discussion of the adequacy of resourcing levels for native title representative bodies. While representative bodies should undertake a level of proactive engagement with interested parties and native title holders as part of carrying out their functions, they must have the resources to do so properly. In the abovementioned case, for example, the court noted that 'Parliament intends that a representative body be treated as a likely repository of at least some information about potential native title holders in its region', but also heard 'that representative bodies face funding challenges' resulting in certain matters and activities being prioritised above others, including where anthropological research and fieldwork and maintenance of details on the representative body database are concerned, all of which impact on the accessibility of notifications, particularly in non-claimant applications.[4]

Efforts to facilitate effective notification are particularly important in the present context given the principle of free, prior and informed consent that interacts with the native title regime.

Fee Waivers and Exemptions

The Law Council notes that fee waivers for Federal Court forms and applications under section 75 of the NTA, which deals with expedited procedure objections and future act determination applications, currently do not extend to Prescribed Bodies Corporate (**PBCs**) and claimants who are not assisted by a native title representative body. For expedited procedure objections, particularly in jurisdictions such as Western Australia which has a blanket policy of considering that the expedited procedure applies to almost all exploration licences, this can be a significant cost impost on PBCs.

Further, there is currently no exemption for Local Aboriginal Land Councils (**LALCs**) to pay the prescribed fees. The Law Society of New South Wales has emphasised to the Law Council that 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. They are established under remedial and beneficial legislation, are generally charitable bodies with limited resources, and are the only entities that are required to make a non-claimant application before they are entitled to use their land. Given this, the Law Society submits that they 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.

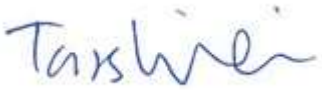
Conclusion

The Law Council would be pleased to provide additional assistance at a future point in the review, including through consulting further with its constituent bodies, committees and sections, should that be helpful. Please contact Ms Alex Kershaw, Senior Policy Lawyer, on

[4] *Mace v State of Queensland* [2019] FCAFC 233, [89]-[98].

02 6246 3708 or at alex.kershaw@lawcouncil.asn.au, in the first instance, should you require further information or clarification.

Yours sincerely



Mr Tass Liveris
President