

## EXPLANATORY STATEMENT

Issued by the authority of the Minister for Indigenous Australians

*Native Title Act 1993*

### **Native Title (Recognition as Representative Body – Cape York Land Council) Instrument 2021**

#### **Overview**

1. The *Native Title (Recognition as Representative Body – Cape York Land Council) Instrument 2021* (Instrument) recognises the Cape York Land Council (CYLC) as the representative Aboriginal/Torres Strait Islander body (representative body) for the Cape York area for a three year period from 1 January 2021 to 31 December 2023.
2. Among other things, the role of representative bodies is to facilitate and assist native title claimants and holders to gain formal recognition of their native title rights and assist them in the exercise of those rights.

#### **Background**

3. This Instrument is made under subsection 203AD(1) of the *Native Title Act 1993* (the Act). Under subsection 203AD(1), the Minister may, by legislative instrument, recognise, as the representative body for an area or areas, an eligible body that has applied under section 203AB to be the representative body for the area or areas if the Minister is satisfied that:
  - a. if the body is already a representative body, it satisfactorily performs its existing functions; and
  - b. the body would be able to perform satisfactorily the functions of a representative body.
4. Subsection 203AD(3A) of the Act provides that the period of recognition specified in the instrument of recognition must be at least one year but no more than six years.
5. In accordance with section 203A of the Act, CYLC was invited by the Minister to apply for recognition as the representative body for the area described in the Schedule to the Instrument.

6. In accordance with section 203AB of the Act, CYLC applied to the Minister for recognition as the representative body for the area in respect of which it was invited by the Minister to apply.
7. On the basis of the information provided, the Minister was satisfied CYLC would satisfactorily perform the functions of a representative body as required under section 203AD of the Act. In accordance with section 203AI, the Minister took into account whether CYLC will comply with section 203BA (which deals with how functions of representative bodies are to be performed).
8. In deciding the period of recognition to specify in this Instrument the Minister considered, in accordance with subsection 203(3B), whether CYLC is under external administration, whether a person is currently appointed under a condition imposed by the CEO of the National Indigenous Australians Agency to deal with funds and what period of recognition would promote the efficient performance of the functions mentioned in subsection 203B(1).
9. The Minister subsequently decided to recognise CYLC for the area described in Schedule 1 to the Instrument as a representative body for a period of three years commencing on 1 January 2021 and ending on 31 December 2023.
10. A detailed provision-by-provision description of the Instrument is at [Attachment A](#).
11. The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
12. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### **Regulation Impact Statement**

13. The Office of Best Practice Regulation has advised that recognition of CYLC as a representative body is unlikely to have more than a minor regulatory impact on business, community organisations or individuals and that a Regulatory Impact Statement is not required (OBPR reference ID: 26036).

### **Period of Recognition**

14. The period of recognition commences on 1 January 2021 and ceases to have effect at the end of 31 December 2023.

### **Consultation**

15. The Minister's decision to recognise CYLC as a representative body was preceded by a consultation process. Notices were placed in newspapers published in Cape York

and broadcast on local radio stations. A notice was also placed on the National Indigenous Australians Agency's website. The notices invited people with native title interests in the Cape York region and Aboriginal and Torres Strait Islander people living in the region to make a submission to inform the Minister's decision.

## **EXPLANATION OF INSTRUMENT**

### **Section 1 – Name**

1. The name of the Instrument is the *Native Title (Recognition as Representative Body – Cape York Land Council) Instrument 2021* (Instrument).

### **Section 2 – Commencement**

2. The Instrument commences on 1 January 2021.

### **Section 3 – Authority**

3. The Instrument is made under subsection 203AD(1) of the *Native Title Act 1993*.

### **Section 4 – Definitions**

4. Section 4 contains definitions of words used in the Instrument, including *Representative Body* and *Cape York Land Council*.

### **Section 5 – Recognised Representative Aboriginal/Torres Strait Islander Body**

5. Section 5 states that Cape York Land Council is recognised as the Representative Body for the area described in Schedule 1.

### **Section 6 – Period of recognition**

6. The recognition of the CYLC as a Representative Body takes effect on 1 January 2021 and ceases to have effect at the end of 31 December 2023.

### **Schedule 1 – Description of area (Cape York Region)**

#### *Item 1*

7. Item 1 in the Schedule contains a description of the Cape York Region.

#### *Item 2*

8. Item 2 contains the definition of *exclusive economic zone*.

#### *Map*

9. The map is a visual depiction of the Cape York Region.

## STATEMENT OF COMPABILITY WITH HUMAN RIGHTS

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

### **Native Title (Recognition as Representative Body - Cape York Land Council) Instrument 2021**

1. This *Native Title (Recognition as Representative Body – Cape York Land Council) Instrument 2021* (Instrument) 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 Instrument**

2. The Instrument provides for the recognition of the Cape York Land Council (CYLC) as the representative Aboriginal/Torres Strait Islander body (representative body) for the area described in Schedule 1 to the Instrument. Among other things, the role of representative bodies is to facilitate and assist registered native title bodies corporate, native title holders and native title claimants to gain formal recognition of their native title rights and to assist them in the exercise of those rights.
3. Subsection 203AD(3A) of the *Native Title Act 1993* (the Native Title Act) provides that the period of recognition specified in the Instrument must be at least one year but no more than six years. The period of recognition is for three years from 1 January 2021 to the end of 31 December 2023.

#### **Human rights implications**

4. This Instrument engages the following rights:
  - a. 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);
  - b. the right to self-determination in Article 1 of ICCPR and Article 1 of the ICESCR; and
  - c. the rights of equality and non-discrimination in Articles 2, 16 and 26 of the ICCPR and Article 2 of the International Convention on the Elimination of all forms of Racial Discrimination (CERD).

#### **The right to enjoy and benefit from culture**

5. The right to enjoy and benefit from culture is contained in Article 27 of the ICCPR and Article 15 of the ICESCR. 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.

6. The United Nations Human Rights Committee has stated that culture can manifest itself as a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples, which may include such traditional activities as fishing or hunting and the right to live on lands protected by law.<sup>1</sup>
7. The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) has stated that Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected.<sup>2</sup>
8. UNCESCR has also provided guidance on the communal and individual aspects of the right to culture, in particular that the reference to 'everyone' in Article 15 of the ICESCR may denote either individual or collective rights to culture.<sup>3</sup> UNCESCR has noted, in particular that Indigenous peoples have the right to act collectively to protect their cultural heritage, traditional knowledge and cultural expressions.<sup>4</sup>
9. Indigenous cultural knowledge and native title rights and interests in land are closely related. Justice Gummow observed in *Yanner v Eaton* (1990) 201 CLR 351 at paragraph 72 that native title 'is the relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law.' The Native Title Act enshrines in legislation a special procedure for the just and proper ascertainment of native title rights and interests by reference to traditional laws and customs.
10. The Native Title Act, as a whole, promotes the right to enjoy and benefit from culture by creating processes through which the native title of a community or society of Indigenous persons can be recognised, and provides for the protection of native title rights and interests. Native title rights and interests are by their nature communal, held collectively by all common law holders who are included in the determination of native title.
11. The Native Title Act provides for native title holders to act collectively to promote cultural rights. Under the Native Title Act, representative bodies have been given the statutory function of assisting native title claimants and native title holders to realise and administer their native title rights and interests. The core functions of representative bodies are:

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<sup>1</sup> United Nations Human Rights Committee, *CCPR General Comment No 23: Article 27 (Rights of Minorities)*, 50<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [7].

<sup>2</sup> UNCESCR, *General Comment No 21: Right of everyone to take part in cultural life (art. 15, para. 1(a) of the Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/21 (21 December 2009) [36].

<sup>3</sup> *Ibid* [9], [37].

<sup>4</sup> *Ibid* [37].

- a. facilitation and assistance in researching and preparing native title applications and in assisting registered native title bodies corporate, native title holders and other holders of native title in consultations, mediations, negotiations and proceedings;
  - b. certification of applications for determinations of native title and for registration of Indigenous land use agreements;
  - c. dispute resolution to assist in promoting agreement between its constituents;
  - d. notification to ensure that notices that are given to the representative body are brought to the attention of any person who the representative body is aware holds or may hold native title and to advise persons of the relevant time limits imposed under the Native Title Act;
  - e. agreement making as a party to indigenous land use agreements; and
  - f. internal review of its own decisions and actions, made or taken in the performance of its functions or the exercise of its powers which affect native title holders and persons who may hold native title.
12. Through the performance of their core functions, representative bodies play a crucial role as a principal source of advice and assistance in relation to the use of land resources within the area for which they are recognised. As such, representative bodies enable Indigenous groups to enjoy and benefit from their cultural attachment to the land.

### **The right to self-determination**

13. The right to self-determination, as set out in Article 1 of the ICCPR and Article 1 of the ICESCR, entails the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development. The right to self-determination is a collective right applying to groups of ‘peoples’. This is in contrast to the rights to culture which protect the rights of individuals within a group.
14. The principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) are also relevant to the Instrument. While UNDRIP is not included in the definition of ‘human rights’ under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context on how human rights standards under the international treaties apply to the particular situation of Indigenous peoples.
15. In particular, the following Articles from UNDRIP are relevant to the Instrument:
- a. Article 8(2)(a) provides that States shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of

depriving Indigenous peoples of their integrity as distinct peoples, or of their cultural values or ethnic identities;

- b. Article 8(2)(b) provides that States shall provide effective mechanisms for prevention of, and redress for any action which has the effect of dispossessing Indigenous peoples of their lands, territories or resources;
  - c. Article 26(3) provides that States shall give legal recognition and protection to these lands, territories and resources; and
  - d. Article 27 provides that States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.
16. The Native Title Act promotes the right to self-determination by recognising native title rights and interests, thereby restoring native title holders' ability to speak for, manage and utilise their traditional lands. The Native Title Act also upholds the collective nature of native title rights and interests and traditional decision making, consistently with the right to self-determination.
17. The Commonwealth Government has noted that native title should be seen as a source of Indigenous economic opportunity. By requiring the engagement of native title holders, native title rights ensure economic development occurs in ways that enhance the quality of life for Aboriginal and Torres Strait Islander peoples.<sup>5</sup> Representative bodies can assist in driving economic activity on Indigenous land and ensure that native title land can be an economic asset as well as a cultural and spiritual one.
18. The Instrument is a key component of the special procedures in the Native Title Act for recognising native title rights and interests. Providing recognition of CYLC as the representative body for the Cape York Region will advance the ability of Aboriginal and Torres Strait Islander peoples to achieve self-determination through the CYLC's assistance in collective and individual decision making to pursue economic, social and cultural development in relation to native title.

### **Rights of equality and non-discrimination**

19. The rights of equality and non-discrimination are contained in Articles 2, 3, 16 and 26 of the ICCPR, Article 2 of the ICESCR and Article 5 of the CERD. These rights recognise that all human beings have the right to be treated equally and not to be discriminated against. Of particular relevance, the CERD establishes a general prohibition on racial discrimination. The *Racial Discrimination Act 1975* implements this prohibition in Australian domestic law.

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<sup>5</sup> Australian Government, *Our North, Our Future: White Paper on Developing Northern Australia* (2015) [6].



20. Subsection 8(1) of the *Racial Discrimination Act 1975*, in accordance with Article 1(4) of the CERD, allows ‘special measures’ which are designed to ensure advancement of certain groups. ‘Special measures’ are an exception to the general prohibition on racial discrimination, and are designed to ‘secure to disadvantaged groups the full and equal enjoyment of human rights and fundamental freedoms’ (Article 2(2)). For a measure to be characterised as a ‘special measure’ it must:
- a. be for a particular group or individuals;
  - b. be taken for the sole purpose of securing the adequate advancement of that group or those individuals;
  - c. be ‘necessary’; and
  - d. not continue after its objectives have been achieved.
21. The Native Title Act establishes representative bodies to facilitate and assist registered native title bodies corporate, native title holders and native title claimants to gain formal recognition of their native title rights and to assist them in the exercise of those rights. As a result, the interests of Aboriginal and Torres Strait Islander persons are being specifically advanced under the Native Title Act.
22. The Instrument complements existing measures in the Native Title Act and can be characterised as a component of a broader ‘special measure’, being the Native Title Act in its entirety. The Instrument is appropriate, adapted and proportionate as it promotes the development of self-management and autonomy among Aboriginal and Torres Strait Islander people by recognising the CYLC as a representative body.

## **Conclusion**

23. The Instrument is compatible with human rights because it promotes the protection of human rights and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.