

# **NATIVE TITLE (INDIGENOUS LAND USE AGREEMENTS) REGULATIONS 2024**

## **EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General

Under section 215 of the *Native Title Act 1993* (Cth)

### **PURPOSE AND OPERATION OF THE INSTRUMENT**

The *Native Title Act 1993* (Cth) (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 and waters.

Paragraph 215(1)(a) of the Act provides the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed. Sections 7 and 8 of the *Native Title (Indigenous Land Use Agreements) Regulations 2024* (the Regulations) are made in reliance on this power.

Paragraph 215(1)(b) of the Act provides that the Governor-General may make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

These Regulations replace the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (the 1999 Regulations). There are no statutory preconditions which must be satisfied for this instrument to be lawfully made.

Under subsection 33(3) of the *Acts Interpretation Act 1901* (Cth), 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.

Indigenous land use agreements (ILUAs) are a key mechanism under the ‘future acts regime’ (Part 2, Division 3 of the Act) which support the operation of the native title system. ‘Future acts’ are defined in section 233 of the Act. Registration of an ILUA attracts the operation of Part 2, Division 3, Subdivision E of the Act, which provides for the validation of future acts and other matters.

There are 3 different types of ILUA that are described by sections 24BA, 24CA and 24DA of the Act:

- body corporate agreements
- area agreements
- alternative procedure agreements.

These Regulations prescribe the documents and information required to accompany an application for registration of each of the 3 different types of ILUAs.

The documents and information accompanying an application to register an ILUA ensure that there is sufficient information for the Native Title Registrar (the Registrar) to decide whether the ILUA should be included on the Register of Indigenous Land Use Agreements (the Register). The documents and information are also used by the Registrar to prepare material for the public notification process that occurs before an ILUA is registered.

These Regulations also prescribe the form for objection to the registration of an alternative procedure agreement.

In repealing and replacing the 1999 Regulations, these Regulations:

- collate the prescribed documents and information which must accompany an application to register the 3 different types of ILUA into one section
- provide the option of including either a full copy of a native title determination or an extract of the native title determination in applications to register an ILUA
- update the definition of ‘complete description’ to align application requirements with those required by native title determination applications under section 61 of the Act.

These Regulations adopt current drafting practices, language and expressions to promote accessibility and ease of use.

## **CONSULTATION**

In accordance with the requirements of the *Legislation Act 2003* (Cth), these Regulations have been informed by consultation. In 2017, then Attorney-General, Senator the Hon George Brandis KC, made the *Legislation (Native Title Instruments) Sunset-altering Declaration 2017* under section 51A of the *Legislation Act 2003* (Cth), to align the sunseting date of 4 instruments made under the Act, including the 1999 Regulations, in order to facilitate a holistic review. In early 2022, the Attorney-General’s Department (the department) commenced consultation on remaking these 4 instruments (together ‘the sunseting instruments’). The department sought preliminary views from native title stakeholders on whether the sunseting instruments remain fit-for-purpose and possible reforms to better support the efficient operation of the native title system.

In October 2022, a native title Expert Technical Advisory Group (ETAG) was convened to provide technical and expert advice to the department on the review and remaking of the sunseting instruments. The ETAG comprises representatives from across the native title system, including from the Federal Court of Australia (the Federal Court), National Native Title Tribunal (the Tribunal)

Minerals Council of Australia, National Farmers' Federation, National Indigenous Australians Agency (the NIAA), National Native Title Council and its members, and state and territory governments.

In 2023, the department prepared a consultation paper titled *Review of sunseting instruments under the Native Title Act 1993 (Cth) - Reform options* and from 3 March to 3 April 2023 invited public submissions on it.

#### **Ability to provide an extract of a determination of native title**

During consultations, the Attorney-General's Department (department) received feedback which suggested that parties have difficulty providing a full copy of a determination (which can often be lengthy), for example, due to the size limits for email attachments. Paragraph 7(2)(g) in these Regulations provides applicants with the option to provide either a copy of a native title determination or an extract of the native title determination from the Tribunal's Register. This change reduces the administrative burden on parties seeking to register an ILUA.

#### **Removal of requirement for ILUA area geographic coordinates on map**

Consultations identified there is no requirement for native title applications under section 61 of the Act to include a map with geographic coordinates – see, for example, paragraph 62(2)(b) of the Act. Feedback noted that an absence of geographic coordinates in those native title applications has not created any issues with identifying the relevant boundaries of an application area.

Section 6 of these Regulations provides an updated definition of 'complete description' which is used by paragraphs 7(2)(i) and (j). This change does not prohibit the provision of a map which includes geographic coordinates, rather it removes a redundant requirement which is not required by native title applications made under section 61 of the Act.

These Regulations were drafted in consultation with the Tribunal, which carries out various functions in accordance with this instrument, as well as the NIAA, which administers the *Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)* that operates in conjunction with this instrument.

## **IMPACT ANALYSIS**

In consultation with the Office of Impact Analysis (OIA), the department determined that an impact analysis was not required for these Regulations. This is because these Regulations, while having more than a minor impact on individuals, businesses and community organisations, are remade without significant changes (OIA reference: OBPR22-02975).

Details of these Regulations are set out at **Attachment A**.

A Statement of Compatibility with Human Rights is set out at **Attachment B**.

## **NOTES ON SECTIONS**

### **PART 1 – Preliminary**

#### **Section 1 – Name**

This section sets out that the title of the instrument is the *Native Title (Indigenous Land Use Agreements) Regulations 2024*.

#### **Section 2 – Commencement**

This section sets out when the instrument commences.

#### **Section 3 – Authority**

This section notes that the *Native Title Act 1993* (Cth) (the Act) authorises the making of this instrument.

#### **Section 4 – Schedules**

This section describes the operation of Schedule 2.

#### **Section 5 – Definitions**

This section provides definitions of particular terms used in the instrument and notes that a number of expressions used in the instrument are defined in the Act.

This section also defines the 3 different types of Indigenous land use agreements (ILUAs):

- an alternative procedure agreement (as mentioned in section 24DA of the Act)
- an area agreement (as mentioned in section 24CA of the Act)
- a body corporate agreement (as mentioned in section 24BA of the Act).

#### **Section 6 – Meaning of complete description**

This section includes a revised definition of ‘complete description’ compared to the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (1999 Regulations), which no longer includes that a map of the area with geographic coordinates is required. Rather, as per paragraph 6(b), a map showing the boundaries of the area is now required. This revised definition better aligns with the requirements of applications under section 61 of the Act and is intended to enhance the accessibility of the application.

## **PART 2 – Applications to the Native Title Registrar**

### **Section 7 – Applications to register Indigenous land use agreements – prescribed documents and information**

Subsection 7(1) sets out the application of section 7.

Subsection 7(2) prescribes the documents and information that must accompany an ILUA application to the Registrar under sections 24BG, 24CG or 24DH of the Act. These requirements were previously set out in sections 6, 7 and 8 of the 1999 Regulations.

To the extent that this section may require the provision of personal information, that information must be handled in accordance with the Registrar’s obligations under the *Privacy Act 1988* (Cth). This information is required for the Registrar to perform their statutory functions under the Act. The information is therefore required for a legitimate purpose, and the requirement that personal information be provided is a reasonable, necessary and proportionate means of achieving that purpose.

### **Section 8 – Applications objecting against registration of alternative procedure agreements— form of application**

This section concerns applications to the Registrar to object to the registration of an alternative procedure agreement on the Register under section 24DJ of the Act.

Subsection 8(2) provides that Form 1 in Schedule 1 is the prescribed form for this application, for the purpose of paragraph 77A(a) of the Act.

## **SCHEDULE 1 – Forms**

### **Form 1 – Application objecting against registration of alternative procedure agreement**

Form 1 is the prescribed form for section 8 of this instrument and may be used to object to the registration of an alternative procedure agreement on the Register.

To the extent that this form may require the provision of personal information, that information must be handled in accordance with the Registrar’s obligations under the *Privacy Act 1988* (Cth). The Registrar may require this information to serve summons, and send documents and notifications in order to carry out their functions under the Act. The information is therefore required for a legitimate purpose, and the requirement that personal information be provided is a reasonable, necessary and proportionate means of achieving that purpose.

This form does not include a reference to providing a facsimile number (if any) for the purpose of service, unlike the form prescribed in the 1999 Regulations.

**SCHEDULE 2 – Repeals**

***Native Title (Indigenous Land Use Agreements) Regulations 1999***

**Item 1 – The whole of the instrument**

This Schedule repeals the 1999 Regulations.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### *Native Title (Indigenous Land Use Agreements) Regulations 2024*

This Disallowable Legislative Instrument, the *Native Title (Indigenous Land Use Agreements) Regulations 2024* (the Regulations) 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 (Cth)*.

### Overview of the Regulations

The *Native Title Act 1993 (Cth)* (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 and waters.

These Regulations replace the *Native Title (Indigenous Land Use Agreements) Regulations 1999* (the 1999 Regulations).

Indigenous land use agreements (ILUAs) are a key mechanism under the ‘future acts regime’ (Part 2, Division 3 of the Act) which support the operation of the native title system. ‘Future acts’ are defined in section 233 of the Act. Registration of an ILUA attracts the operation of Part 2, Division 3, Subdivision E of the Act which provides for the validation of future acts and other matters.

There are 3 different types of ILUA that are described by sections 24BA, 24CA and 24DA of the Act:

- body corporate agreements
- area agreements
- alternative procedure agreements.

These Regulations prescribe the documents and information required to accompany an application for each of the 3 different types of ILUAs.

The documents and information accompanying an application to register an ILUA ensure that there is sufficient information for the Native Title Registrar (the Registrar) to decide whether the ILUA should be included on the Register of Indigenous Land Use Agreements (the Register). The documents and information are also used by the Registrar to prepare material for the public notification process that occurs before an ILUA is registered.

These Regulations also prescribe the form for objection to the registration of an alternative procedure agreement.

In repealing and replacing the 1999 Regulations, these Regulations:

- collate the prescribed documents and information which must accompany an application to register the 3 different types of ILUA into one section
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These Regulations adopt current drafting practices, language and expressions promoting ease of use and accessibility.

**Ability to provide an extract of a determination of native title**

During consultations, the Attorney-General’s Department (department) received feedback which suggested that parties have difficulty providing a full copy of a determination (which can often be lengthy), for example, due to the size limits for email attachments. Paragraph 7(2)(g) in these Regulations provides applicants with the option to provide either a copy of a native title determination or an extract of the native title determination from the National Native Title Tribunal’s Register. This change reduces the administrative burden on parties seeking to register an ILUA.

**Removal of requirement for ILUA area geographic coordinates on map**

Consultations identified there is no requirement for native title applications under section 61 of the Act to include a map with geographic coordinates – see, for example, paragraph 62(2)(b) of the Act. Feedback noted that an absence of geographic coordinates in those native title applications has not created any issues with identifying the relevant boundaries of an application area.

Section 6 of these Regulations provides an updated definition of ‘complete description’ which is used by paragraphs 7(2)(i) and (j). This change does not prohibit the provision of a map which includes geographic coordinates, rather it removes a redundant requirement which is not required by native title applications made under section 61 of the Act.

## Human rights implications

This instrument engages the following rights and freedoms:

- *the right to self-determination* in Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 1 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- *the right to enjoy and benefit from culture* in Article 15 of the ICESCR and Article 27 of the ICCPR
- *the rights to equality and non-discrimination* in Article 26 of the ICCPR, Articles 2 and 3 of the ICESCR and Articles 1, 2 and 5 of the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD)
- *the right to effective remedy* in Article 2(3) of the ICCPR and Article 6 of the CERD
- *the right to privacy* in Article 17 of the ICCPR.

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

The right to self-determination is contained in Article 1 of the ICCPR and Article 1 of the ICESCR.<sup>1</sup> These articles both uphold the collective right to freely determine and maintain cultural, economic, social and political development. Article 27 of the ICCPR and Article 15 of the ICESCR entrench the right to enjoy and benefit from culture.<sup>2</sup> Article 27 of the ICCPR protects the right of those belonging to minorities to enjoy their own culture and Article 15 of the ICESCR protects the right to take part in cultural life.

These Regulations promote the rights to self-determination, and to enjoy and benefit from culture by prescribing documents and information required to accompany an application to register an ILUA. ILUAs are negotiated agreements about the doing of certain activities on native title land - a key feature of the 'future acts regime' (Part 2, Division 3 of the Act) which supports the operation of the native title system.

Simplification of supporting documentation requirements aids participation in the native title system, supporting native title holders and parties' rights to self-determination and to enjoy and benefit from culture.

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<sup>1</sup> *International Covenant on Civil and Political Rights* (New York, 16 December 1966) [1980] ATS 23 [REPRINT], UNTS 999 p.171 article 1; *International Covenant on Economic, Social and Cultural Rights* (New York, 16 December 1966) [1976] ATS 5, UNTS 993 p.3 article 1.

<sup>2</sup> *International Covenant on Civil and Political Rights* article 27; *International Covenant on Economic, Social and Cultural Rights* article 15.

*The right to equality and non-discrimination, and the right to effective remedy*

Article 26 of the ICCPR and Articles 2 and 3 of the ICESCR protect the right of equality and are complemented by Articles 1, 2 and 5(d)(v), 5(d)(vi) and 5(e)(vi) of the CERD.<sup>3</sup> Collectively these articles enshrine the rights of equality and non-discrimination. Article 14(1) of the ICCPR enshrines the rights to equality before courts and tribunals, and a fair trial and public hearing by a competent, independent and impartial tribunal.<sup>4</sup> Article 2(3) of the ICCPR enshrines the right to an effective remedy, complemented by Article 6 of the CERD which protects the right to an effective remedy for acts of discrimination contrary to that Convention.<sup>5</sup> Collectively these rights recognise the right to appropriate reparation where rights have been breached.

The Act and its instruments provide for the recognition and protection of native title rights and interests held by Aboriginal and Torres Strait Islander people. The Preamble to the Act states that the overarching purpose of the Act is to protect the human rights of Aboriginal and Torres Strait Islander people, those rights enshrined in the CERD, ICCPR and ICESCR and ratified by Australia.

These Regulations promote the right to equality and non-discrimination by setting out the information required to accompany an application to register an ILUA and provides the form to object to an alternative procedure agreement (a type of ILUA). Simplification of supporting documentation requirements aids participation in the native title system. The removal of the requirement to provide maps showing geographic coordinates for the area covered by an ILUA promotes fairness by facilitating consistency between processes across the native title system.

Further, paragraph 7(2)(n) of these Regulations requires applications for ILUA registration to include a certificate under regulation 9 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth). In addition, under paragraph 7(2)(h) of the Regulations, an application must be accompanied by a statement from each party to the ILUA, signed by, or on their behalf, that the party agrees to the registration application being made. Together, these documents help inform the Registrar's consideration of whether the ILUA should be included on the Register. This supports the rights to equality and non-discrimination.

These Regulations also promote the right to effective remedy by prescribing the form for applications to object to the registration of alternative procedure agreements. This process allows native title parties to participate in decisions that affect their native title rights and interests.

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<sup>3</sup> *International Covenant on Civil and Political Rights* article 26; *International Covenant on Economic, Social and Cultural Rights* articles 2 and 3; *International Convention on the Elimination of all Forms of Racial Discrimination* (New York, 7 March 1966) [1975] ATS 40, UNTS 660 p.195 articles 1, 2 and 5.

<sup>4</sup> *International Covenant on Civil and Political Rights* article 14(1).

<sup>5</sup> *International Covenant on Civil and Political Rights* article 2(3); *International Convention on the Elimination of all Forms of Racial Discrimination* article 6.

### *The right to privacy.*

The right to privacy is contained in Article 17 of the ICCPR and recognises that individuals have the right to be free from unlawful or arbitrary interference with their family, home, privacy or correspondence.<sup>6</sup> This right may be subject to permissible limitations where limitations on this right are provided by law and are non-arbitrary. In order to be non-arbitrary, any limitations on this right must be reasonable, necessary and proportionate, must seek to achieve a legitimate purpose and must be in accordance with the provisions, objectives and aims of the ICCPR and be reasonable in the particular circumstances.

Subsection 7(2) of these Regulations requires the name and address of each party to the ILUA to which the registration application relates to be provided to the Registrar. The address details may be personal information, subject to the particulars of the applicant (i.e. whether the application is lodged by an individual person or a registered native title body corporate (RNTBC)). However, ILUAs are commercial documents, and when an ILUA is registered on the Register, the Act requires that certain information be included on the Register (see section 199B of the Act) and made publicly available. Personal information which may be published on the Register is not subject to the *Privacy Act 1988* (Cth). Personal information which may be included in an application, but is not on the Register, is subject to the *Privacy Act 1988* (Cth), and therefore the Registrar must handle this information accordingly.

This right is not engaged in instances where an RNTBC or a native title representative body/service provider is a party to the ILUA, and organisational contact information, which would generally be publicly available, is provided.

Form 1 of Schedule 1 of these Regulations concerns persons, other than applicants, who object to the registration of an alternate procedure agreement. This application requires applicants to provide to the Registrar their name, address, contact details for service, representative's name and contact details (if any), and a statement of reasons about why it would not be fair and reasonable to register the agreement.

Subject to the particulars of the applicant, these details may be personal information. The right to privacy would not be engaged when the applicant's representative's contact information is publicly available.

The statement of reasons as to why it would not be fair and reasonable to register the ILUA may also contain information that the applicant considers should be restricted from publication for personal or cultural reasons. These Regulations, like the 1999 Regulations, do not prescribe any details which

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<sup>6</sup> *International Covenant on Civil and Political Rights* article 17.

need to be expressly included or addressed in the statement of reasons or information provided by the applicant to the Registrar. The applicant may provide sensitive and other information to the Registrar, for example:

- the native title rights or interests claimed to be held by the applicant with respect to the area covered by the ILUA, including any activities in exercise of those rights and interests
- the basis upon which those native title rights and interests (if any) are claimed to be held, including:
  - details of traditional laws and customs acknowledged and observed by the applicant
  - genealogical and group affiliation details which identify the person as a member of the society united by its acknowledgement and observance of those traditional law and customs.
- whether the applicant was consulted about the ILUA
- whether the applicant participated in the authorisation of the ILUA and the details of the decision-making process relating to the authorisation of the ILUA
- how the claimed native title rights and interests of the applicant would be affected by registration of the ILUA.

Depending on the nature of the information provided in this statement, including whether or not it is considered sensitive, the Registrar's collection, use, storage and sharing of this information for the purposes of these applications may engage, and limit, the right to privacy.

Together, the information required by these applications is information required for a legitimate purpose, and the requirement that personal information be provided is a reasonable, necessary and proportionate means of achieving that purpose. This is because the Registrar requires this information to perform their statutory functions, including in relation to the registration of an ILUA, maintaining the Register and notification of ILUAs.

There are existing protections in place with respect to the Registrar and the Tribunal's handling of personal information, which includes sensitive information (as defined under section 6 of the *Privacy Act 1988* (Cth)). As a Commonwealth agency, and in the instance of the Registrar, a prescribed authority, for the purposes of the *Privacy Act 1988* (Cth) the Registrar and Tribunal must act in accordance with the Australian Privacy Principles when handling personal information.

Under subsections 98A(2) and (3) of the Act, the Registrar has the power to keep particular information from the public if it would not be in the public's interest for it to be publicly available, and the Registrar must take into account the cultural and customary concerns of Aboriginal and Torres Strait Islander people in determining whether it would be in the public interest to make the information available to the public.

Furthermore, under section 199E of the Act, parties to an ILUA included on the Register may advise the Registrar in writing of sections of the ILUA that they do not wish to be made available to the public. However, under subsection 199E(2), this does not extend to details required to be published on the Register under subsection 199B(1), which includes the name of each party to the ILUA and the address that each party can be contacted at.

These Regulations engage, and limit, the right to privacy to the extent that the Registrar and Tribunal collect, use, store and share this personal and sensitive information. This limitation to the right to privacy is justified as this information is required for legitimate purposes – namely to enable the Registrar and Tribunal to carry out their statutory functions of registering ILUAs, maintaining the Register and notifying parties – and the requirement that personal information be provided is a reasonable, necessary and proportionate means of achieving that purpose. For this reason, this limitation is not inconsistent with the right to privacy set out in Article 17 of the ICCPR.

### **Conclusion**

These Regulations are compatible with human rights because they promote and enhance human rights. To the extent these Regulations may limit human rights, those limitations are reasonable, necessary and proportionate to achieve the objective of the Registrar and Tribunal processing and progressing ILUA registration applications and objection applications, contacting and notifying parties and maintaining the Register.