

NATIVE TITLE (NOTICES) DETERMINATION 2024

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

Under paragraphs 22H(1)(e) 23HA(a), 24CH(1)(b), 24DI(1)(b), 24GB(9)(c) and 24GD(6)(a), subparagraph 24GE(1)(f)(i), paragraphs 24HA(7)(a), 24ID(3)(a), 24JAA(10)(a) and 24JB(6)(a) and (7)(a), subsections 24KA(8), 24MD(7) and 24NA(9), paragraphs 26A(5)(a) and 26B(6)(a), subsection 29(3), paragraph 66(3)(d), subparagraphs 66A(1)(e)(ii), (1A)(d)(ii) and (2)(b)(ii) and section 138 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.

The *Native Title (Notices) Determination 2024* (the Determination) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003* (Cth).

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.

The Determination replaces the *Native Title (Notices) Determination 2011 (No.1)* (2011 Determination). There are no statutory preconditions which must be satisfied for this instrument to be lawfully made.

Appropriate notification (including public notification) is important to many aspects of the operation of the Act. This Determination sets out how certain notifications required under the Act are to occur.

Certain provisions of the Act require public notice to be given in the determined way, including in relation to:

- registration of area agreements and alternative procedure agreements (2 different types of Indigenous land use agreement) on the Register of Indigenous Land Use Agreements

- certain activities before they can take place on lands and waters that may be subject to native title rights and interests
- native title determination and native title compensation applications, as well as amended native title applications, and
- special inquiries held by the National Native Title Tribunal (the Tribunal).

Under subsection 252(1) of the Act, the Commonwealth Minister determines, by legislative instrument, how the required public notice is to be given.

Under section 253 of the Act, section 19 of the *Acts Interpretation Act 1901* (Cth), and in accordance with the Administrative Arrangements Order signed by the Governor-General on 13 October 2022 (as amended up to 29 July 2024), the relevant Commonwealth Minister is the Attorney-General.

Sections 6 and 7 of this Determination address requirements for notifying the public (for the sections of the Act they apply to). Subsections 7(4) to 7(7) set out the details to be included in specific notices.

A number of sections of the Act require notices to be given, in the way determined by the Commonwealth Minister, to representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate (RNTBCs) and registered native title claimants. Section 8 determines how these notices are to be given.

Sections of the Determination address the coverage requirements for the different modes of public notification, how further information about an area described in a notice can be obtained, and minimum size of type for notices.

Changes from the 2011 Determination

In contrast to the 2011 Determination, this instrument:

- clarifies the newspapers in which notices must be published, particularly where there is no newspaper circulating generally in the area that may be affected
- confirms that recipients of some notices can agree to receive those notices by means other than post, for example, by email
- requires some public notices to be published on the website of the entity required to give the notice, and
- requires some notices to contain information about how a person can obtain further information about the area described in the notice.

This Determination adopts current drafting practices, language and expressions.

CONSULTATION

In accordance with the requirements of the *Legislation Act 2003* (Cth), the Determination has 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*, to align the sunseting date of 4 instruments made under the Act, including the 2011 Determination, in order to facilitate a holistic review. In early 2022, 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 National Native Title Tribunal (the Tribunal), Minerals Council of Australia, National Farmers’ Federation, National Indigenous Australians Agency, 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.

The availability of electronic notification has increased substantially since the enactment of the Act. During consultations, the department received feedback that suggested that notices could also be provided electronically alongside notices published through print media, radio broadcast or television transmission, but that electronic notices should not be the default means of communication. Publication via print, radio and television remain important ways to reach relevant audiences, such as for communities in regional and remote areas where there may be infrequent or non-existent mail delivery and unreliable or non-existent internet, telephone reception and mobile coverage.

The Determination was drafted in consultation with the Tribunal, which carries out various functions under the Act in accordance 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 the Determination. This is because the Determination, while having more than a minor impact on individuals, businesses and community organisations, is remade without significant changes (OIA reference: OBPR22-02975).

Details of the Determination 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 (Notices) Determination 2024*.

Section 2 – Commencement

This section sets out when the instrument commences.

Section 3- Authority

This section describes the various provisions of the *Native Title Act 1993* (Cth) (the Act) under which the instrument is made.

Section 4 – Schedules

This section describes the operation of the schedules.

Section 5 – Definitions

This section provides definitions of particular terms used in the instrument.

The definition of ‘clear description’ includes a note to see also section 10. Section 10 provides that if the instrument requires a notice to include a clear description for an area, the notice must also include information about how a person can obtain further information about the description for the area.

PART 2 – Notices

Section 6 – Notification by States and Territories of the validation of intermediate period acts etc. in relation to mining rights

Section 6 sets out the way in which the public is to be notified under paragraph 22(1)(e) of the Act of the details mentioned in subsection 22H(2) of the Act about the validation of intermediate period acts that are attributable to a state or territory.

Section 7 – Requirements for notifying public

This section sets out the publication and broadcasting requirements for the public notification required under several provisions of the Act. Subsections (4) to (7) of this section provide for certain details to be included in certain notices.

Subsection 7(1) provides a list of the notices under the Act to which the section applies.

Subsection 7(2) sets out the requirements for the notice to be published by advertisement, including that it be advertised in one or more newspapers, in a relevant special-interest publication and on the website of the entity required to give that notice. The concept of ‘coverage requirement’ used in the subsection is defined in section 9.

Subsection 7(3) provides that notices may also be broadcast, by radio broadcasts or television transmissions that satisfy coverage requirements. ‘Coverage requirements’ is defined in section 9 and includes radio or television streamed on a website (as further described in that section).

Subsection 7(4) provides requirements that must be included in the Minister’s notice under paragraphs 26A(5)(a) or 26B(6)(a) of the Act, including an invitation to the public to make submissions within a time period specified in the notice.

Subsection 7(5) provides requirements that must be included in a notice under subsection 29(3) of the Act.

Subsection 7(6) provides requirements that must be included in the Native Title Registrar’s (the Registrar) notice of native title applications and amended applications.

Subsection 7(7) provides requirements that must be included in the Registrar’s notice of a special inquiry under section 138 of the Act.

Section 8 – Requirements for notifying representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants

This section sets out notification requirements for several provisions of the Act which require some or all relevant representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants to be notified. Subsections (4) and (5) of this section also provide for certain details to be included in certain notices.

Subsection 8(1) lists the notices under the Act to which section 8 applies.

Under subsection 8(2) these notices must be given by post unless, under subsection 8(3), the person to be notified agrees to a different way of being notified. A different way of being notified might be by email.

Subsection 8(4) provides requirements that must be included in the notices mentioned in the paragraphs listed (i.e. paragraphs (1)(a) to (f), and (1)(h) and (1)(i); but not (1)(g)). These requirements include a requirement for a clear description, and provision for the person notified to be given an opportunity to comment within the period mentioned in the notice.

Subsection 8(5) sets out requirements for the notice mentioned in paragraph (1)(g) – a notice under paragraph 24JAA(10)(a) of the Act, which pertains to notice of public housing works. Additional requirements for this notice are provided for in subsection 24JAA(11) of the Act.

Section 9 – Coverage requirements for notices

This section sets out the geographical coverage requirements that must be met by newspapers, relevant special-interest publications, radio broadcasting services and television transmission services in relation to notices.

Subsection 9(2) provides that a newspaper meets coverage requirements for notices if it generally circulates, in hard-copy, in the area that may be affected by the act to which the notice relates. In instances where the affected area may be an offshore place, paragraphs 9(2)(b) set out the coverage requirements for the hard-copy newspaper in which the notice must be published. For example, if the area for a proposed act is in a marine park that is an offshore place, there would likely be no hard-copy newspaper in circulation for this affected area so, under paragraph 9(2)(b), notice of the proposed act must be published in the newspaper circulating in the closest onshore area. With respect to paragraphs 9(2)(a) and (b), newspapers can be national, state or territory, regional or local newspapers, provided they circulate in the relevant area. If paragraphs 9(2)(a) and (b) do not apply, under paragraph 9(2)(c), the notice must circulate in a hard-copy newspaper which circulates in the area closest to the affected area or to the onshore place referred to under paragraph 9(2)(b), and the notice must be in a newspaper which is available online in the affected area or closest onshore place. The newspaper referred to in paragraph 9(2)(c) can be a national, state or territory, regional or local newspaper, provided it circulates in the area.

A newspaper will generally circulate in an area even if there are occasional interruptions to its circulation (for example, because of an extreme weather event).

Subsection 9(3) provides similar coverage requirements to subsection 9(2), but for a relevant special-interest publication.

Subsection 9(4) provides that a radio broadcast or television transmission meets coverage requirements for a notice if it is broadcast or transmitted in, or is available for streaming on an internet site that is accessible in the area that may be affected by the act to which the notice relates, or the onshore area closest to the affected area for an act proposed for an offshore place.

Section 10 – Requirements for describing areas

This section provides that for notices required to include a clear description for an area, the notice must also include details of how a person can obtain more information about the description for the area. For example, the notice may contain information about how to access further maps, or provide contact details for a person who can provide more information.

Section 11 – Requirements for size of type in notices

The purpose of this section is to ensure that notices are apparent and legible within the relevant publication.

SCHEDULE 1 - Repeals

Item 1 – The whole of the instrument

This Schedule repeals the *Native Title (Notices) Determination 2011 (No.1)*.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Native Title (Notices) Determination 2024

This disallowable legislative instrument, the *Native Title (Notices) Determination 2024* (the Determination), 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 that will affect native title may proceed. The Act also provides certainty as to the effect of native title on other interests in land and waters.

Appropriate notification (including public notification) is important to many aspects of the operation of the Act. The Determination sets out how certain notifications required under the Act are to occur.

Certain provisions of the Act require public notice to be given in the determined way, including in relation to:

- registration of area agreements and alternative procedure agreements (2 different types of Indigenous land use agreement) on the Register of Indigenous Land Use Agreements
- certain activities before they can take place on lands and waters that may be subject to native title rights and interests
- native title determination and native title compensation applications, as well as amended native title applications, and
- special inquiries held by the National Native Title Tribunal (the Tribunal).

Sections 6 and 7 of the Determination address requirements for notifying the public (for the sections of the Act they apply to). Subsections 7(4) to 7(7) set out the details to be included in specific notices.

A number of sections of the Act require notices to be given, in the way determined by the Commonwealth Minister to representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate (RNTBCs) and registered native title claimants. Section 8 determines how these notices are to be given.

Sections of the Determination address the coverage requirements for the different modes of public notification, how further information about an area and acts described in a notice can be obtained and minimum size type for notices.

Changes to coverage requirements for notices and methods to deliver and receive notices

The availability of electronic notification has increased substantially since the enactment of the Act. During consultations, the Attorney-General's Department (the department) received feedback that suggested that notices could also be provided electronically alongside notices published through print media, radio broadcast or television transmission, but that electronic notices should not be the default means of communication. Publication via print, radio and television remain important ways to reach relevant audiences, such as for communities in regional and remote areas where there may be infrequent or non-existent mail delivery and unreliable or non-existent internet, telephone reception and mobile coverage.

In contrast to the 2011 Determination, this instrument:

- clarifies the newspapers in which notices must be published, particularly where there is no newspaper circulating generally in the area that may be affected
- confirms that recipients of some notices can agree to receive those notices by means other than post, for example, by email
- requires some public notices to be published on the website of the entity required to give the notice, and
- requires some notices to contain information about how a person can obtain further information about the area described in the notice.

The Determination adopts current drafting practices, language and expressions.

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 self-determination and the right to enjoy and benefit from culture

The right to self-determination is contained in Article 1 of the ICCPR and Article 1 of the ICESCR.¹ These articles both uphold the collective right to freely determine and maintain cultural, economic, social and political development. The right to enjoy and benefit from culture is enshrined in Article 15 of the ICESCR and Article 27 of the ICCPR.²

The Act, and its related instruments, give effect to the right to self-determination by providing mechanisms to recognise and protect native title rights and interests, and by providing native title holders with opportunities to manage, utilise and make decisions for their traditional lands.

The Determination promotes the rights to self-determination and to enjoy and benefit from culture by prescribing the way in which various notices required by the Act can be done. These notices include public notices and notices to representative Aboriginal/Torres Strait Islander bodies, RNTBCs and registered native title claimants because the notices relate to applications for native title or compensation, or proposed activities that may affect native title rights and interests in particular land or waters.

The Determination provides for notification through a number of platforms, such as electronically and in hard-copy newspapers. Allowing publication of notices in alternative forms of media addresses circumstances in which there may not be accessible internet or a newspaper circulating generally in the relevant area.

For certain provisions of the Act, Aboriginal/Torres Strait Islander bodies, RNTBCs and registered native title claimants are required to be notified so they can exercise their procedural rights in relation to the proposal. The Determination also requires many of the notices that must be given to Aboriginal/Torres Strait Islander bodies, RNTBCs and registered native title claimants to state that an opportunity to comment is provided and a timeframe for doing so. These measures promote timely and effective dissemination of notices and information to relevant affected parties and, by providing an opportunity to comment, promote the rights of self-determination and to enjoy and benefit from culture.

¹ *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.

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

The right to equality and non-discrimination

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) and 5(d)(vi) of the CERD.³ Collectively these articles enshrine the rights of equality and non-discrimination.

While the Act, and its instruments, collectively provide for the recognition and protection of native title rights and interests, specifically instilled in the Act's Preamble is its overarching purpose to protect the human rights of Aboriginal and Torres Strait Islander people, including human rights which were ratified by Australia under the CERD, ICCPR and ICESCR.

Notification under the Determination supports the right to equality and non-discrimination by ensuring registered native title claimants and RNTBCs are informed of opportunities to effectively participate in decision-making about proposals that may affect their native title rights and interests. Notification may be communicated through a number of platforms, such as electronically and in hard-copy newspapers. The Determination also enhances the right to equality by prescribing the coverage requirements for the newspaper, relevant special-interest publication, broadcasting and/or television transmission for the platform the notice can be published or transmitted by. This change addresses geographical barriers to participation. Allowing publication of notices in alternative forms of media also addresses circumstances in which there may not be accessible internet, poor telephone or radio coverage or no newspaper circulating generally in the area where relevant parties reside.

For certain provisions of the Act, representative Aboriginal/Torres Strait Islander bodies, RNTBCs and registered native title claimants are required to be notified. For example, when a plan for the management of national, State or Territory park is created, paragraph 24JB(7)(a) of the Act requires that a notice be provided so that representative Aboriginal/Torres Strait Islander bodies, RNTBCs and registered native title claimants can take up their opportunity to comment on the plan. Subsection 8(2) of the Determination allows representative Aboriginal/Torres Strait Islander bodies, RNTBCs and registered native title claimants to agree to receive those notices by means other than post, for example by email. This promotes the right to equality and non-discrimination by enabling the communication of notices to be tailored to the needs of representative Aboriginal/Torres Strait Islander people, registered native title claimants and RNTBCs, making it easier to be informed about and participate in decision-making about proposals that may affect their native title rights and interests.

³ *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.

The Determination also supports the public notification, as required by the Act, of registration of certain Indigenous land use agreements on the Register of Indigenous Land Use Agreements. Notification provides persons the opportunity to object to the Indigenous land use agreement being registered. This supports the right to equality and non-discrimination.

Conclusion

This Determination is compatible with human rights because it promotes and enhances human rights.