

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Native Title (Consultation and Reporting) Determination 2011

Authority for making the instrument

Section 24JAA(15) of the *Native Title Act 1993* requires that consultation in accordance with a request made under s 24JAA(13) of the Act must comply with ‘any requirements determined, by legislative instrument, by the Commonwealth Minister. Similarly, s 24JAA(16) of the Act requires that a report provided to the Minister on the things done under s 24JAA(10) to (12) and (14) and (15) of the Act must be provided in writing ‘in accordance with any requirements determined, by legislative instrument, by the Commonwealth Minister.’

As a result of a variation to the Administrative Arrangements Order, and under section 253 of the Act and section 19A of the *Acts Interpretation Act 1901*, the relevant ‘Commonwealth Minister’ under the Act is now the Attorney-General. Accordingly, the Attorney-General is the Minister responsible for issuing this instrument.

The instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Background

The *Native Title Amendment Act (No.1) 2010* inserted subdivision JA in the ‘future acts’ regime in Division 3, Part 2 of the Act. The future acts regime sets out how acts that affect native title (called ‘future acts’) can be done. In particular, it sets out procedural rights which must be observed before particular kinds of future acts are done. Subdivision JA provides for a new future act process to facilitate the construction, on Indigenous held land, of public housing, public education facilities, public health facilities, police facilities, emergency facilities, staff housing provided in connection with this housing or facilities, and related public infrastructure.

Subdivision JA requires the responsible government body (the action body) to provide notice of an act (s 24JAA(10)-(12)) to be done under this subdivision, and provide an opportunity to comment on the act. If a native title party affected by the act requests to be consulted, the action body must consult with the native title party about ways of minimising the act’s impact on registered native title rights and interests, and any access to land or waters or the way in which anything authorised by the act might be done (s 24JAA(13)-(15)). The subdivision also requires the action body to provide a written report on the notice, comments received, and consultation, regardless of whether or not comments or requests to be consulted about the act are received (s 24JAA(16)). Under s 24JAA(16), the Attorney-General may publish these reports.

An act to which Subdivision JA applies will be invalid if notification, comment and reporting requirements were not met before the act is done or commenced, or the act is done or commenced before the end of the consultation period (s 24JAA(5)-(6)).

Purpose

The purpose of the instrument is to set out how consultation under s 24JAA(13)-(15) is to take place, as well as to specify requirements for the content and provision of the report which must be provided under s 24JAA(16).¹ These requirements seek to ensure genuine consultation between governments and native title parties about how a future act covered by subdivision JA takes place, so as to minimise any impact on native title rights and interests. They also seek to ensure transparency and accountability, so that governments regard notification and consultation as processes which build community trust and acceptance about projects done under subdivision JA. These requirements further aim to provide procedural certainty for governments seeking to rely on subdivision JA to construct public housing and associated infrastructure on land which is, or may be, subject to native title.

Details

The instrument is divided into three parts. Part 1 deals with Preliminary matters including commencement and definitions. Part 2 deals with consultation requirements, while Part 3 deals with reporting requirements.

Part 1 – Preliminary

Section 1

Section 1 provides that the name of the instrument is the *Native Title (Consultation and Reporting) Determination 2011*.

Section 2

Section 2 provides that the instrument is to commence on the day after it is registered.

Section 3

Section 3 defines key terms used in the instrument. Terms defined are: *Act, action body, consultation meeting, consultation period, consultation process, native title party, participants, and registered native title rights and interests.*

Part 2 – Consultation requirements

Section 4

Section 4 makes clear that Part 2 applies where an action body is required under s 24JAA(14) of the Act to consult with a native title party that has made a request under s 24JAA(13) of the Act to be consulted about the doing of an act.

¹ Notice requirements are set out in the *Native Title (Notices) Determination 2011 (No.1)*.

Section 5

Section 5 makes clear that for s 24JAA(15) of the Act, the action body must comply with consultation requirements as set out in sections 6 to 10 of Part 2 of the instrument.

Section 6

Section 6 sets out how an action body must respond to a request to be consulted. This section requires an action body to begin consultation within 7 days after the day the action body receives a request for consultation.

This section also provides examples of forms of consultation.

The purpose of this requirement is to place the onus on the action body to begin a discussion with the native title party about how consultations should take place.

Section 7

Section 7 sets out how an action body is expected to respond to requests for further information about the future act and its possible impact. Essentially, an action body is required to provide the information if the request is reasonable, taking into account relevant factors. The action body must provide the information within a reasonable period to enable the native title party to consider before the end of the consultation period. The section sets out factors which go to assessing reasonableness.

Under this provision, an action body would not be expected to provide information before a consultation meeting if the request was made just before the meeting is scheduled to take place, or the information could not be expected to reach the native title party in time for the native title party to consider it before the end of the consultation period.

Section 8

Section 8 allows an action body to hold a joint consultation with more than one native title party, if more than one native title party affected by the act has requested consultation. It also allows an action body to include any other person in the consultation or joint consultation, if the action body and the native title party (or parties) agree.

This provision is intended to give action bodies flexibility in how they schedule consultations, and allow for efficiencies where possible. By allowing people other than native title parties to be included in consultations, this provision also aims to facilitate openness and transparency in the consultation process. Examples of these persons could include native title representative bodies, the media, civic leaders or other members of the community.

Section 9

Section 9 requires that if the native title party requests, the action body must arrange for a suitable interpreter to attend the consultation meeting. This requirement is intended to enable native title parties to participate fully in consultation. However, an action body will not have to arrange an interpreter if it is not reasonable to do so, taking into account circumstances including the availability of a suitable interpreter, and the time available before the end of the consultation period.

The purpose of this requirement is to give native title parties the ability to choose to consider information in their own language, so that they are placed in the best possible position to consider information about the future act and its impact.

Section 10

Section 10 requires the action body to give written notice of a consultation meeting to the native title party and, if agreed between the action body and the native title party, any other person to be included in the consultation. The section sets out requirements for the content of the notice, and requires it be given no later than 7 days before the meeting unless the native title party agrees to a shorter period.

The purpose of this provision is to ensure action bodies provide adequate notice of consultations to native title parties, and to ensure native title parties have adequate time to prepare for consultation. This section also provides necessary flexibility for the action body and native title party to agree to a shorter notice period. Importantly, the section requires the action body to set out in the notice the issues to be discussed at the meeting, so that the native title party has time to consider these issues prior to consultation.

Part 3 – Consultation reporting requirements

Section 11

Section 11 makes clear that Part 3 applies if an action body is required under s 24JAA(16) of the Act to give a report to the Commonwealth Minister about a future act.

Section 12

Section 12 makes clear that for s 24JAA(16)(a)(i) of the Act, the action body must comply with sections 13 to 20 of this Part.

Section 13

Section 13 sets out how an action body is to give a report to the Commonwealth Minister. The section requires the action body to give the report to the Minister no later than 14 days before a future act is done or commenced, unless the action body and native title party agree that the report may be given to the Minister after this date. However, for the act to be valid, the report must still be provided before the act is done or commenced.

This requirement aims to ensure that the Minister has an opportunity to consider the report before the act is done or commenced, thereby increasing accountability and transparency in the consultation process.

Sections 14 to 19

Sections 14 to 19 set out requirements for the content of the report. These sections make clear that the report must include details about how the action body has met the consultation requirements set out in sections 6 to 10 of the instrument. These requirements relate to the following matters:

- Notification and comments (s 14)

- Requests to be consulted (s 15)
- Requests for information (s 16)
- Consultation arrangements (s 17)
- Interpreters (s 18), and
- Consultation meeting (s 19).

The purpose of requiring reports to contain this information is to ensure action bodies are accountable for how they consult with action bodies, and to ensure as much transparency as possible in the consultation process.

Section 20

Section 20 stipulates that the report must give details about any relevant concern raised about the future act during consultations and outline all correspondence between the action body and other participants in the consultation. The section also requires the report to state how the action body proposes to deal with each concern, including whether it will result in any change to the future act and, if so, how.

The purpose of this provision is to encourage the action body to actively consider and take into account the views of native title parties, and change the future act to accommodate these views if appropriate. It also aims to provide evidence action bodies are engaging in genuine consultations, with an open mind, and not simply approaching consultation as a procedural requirement without any intention of listening to the concerns of native title parties.

Consultation

The Department of Families, Housing, Community Services and Indigenous Affairs, and State and Territory Governments have been consulted on this instrument. The instrument was also released for public consultations, and **XX** submissions on the instrument were received in response.