

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Native Title (Notices) Determination 2011 (No. 1)

Context and authority for making the instrument

Various provisions in the *Native Title Act 1993* (the Act) require notice to be given ‘in the way determined, by legislative instrument, by the Commonwealth Minister’ before certain activity takes place on land that may be subject to native title. These provisions are:

- section 23HA – notification
- subsection 24GB(9) – acts permitting primary production on non-exclusive agricultural and pastoral leases
- subsection 24GD(6) – acts permitting off-farm activities that are directly connected to primary production activities
- subsection 24GE(1) – granting rights to third parties etc on non-exclusive agricultural or pastoral leases
- subsection 24HA(7) – management or regulation of water and airspace
- subsection 24ID(3) – effect of Subdivision 24I (renewals and extensions etc) applying to an act
- subsection 27JAA(10) – public housing etc
- subsection 24JB(6) – treatment of acts covered by section 24JA
- subsection 24JB(7) – treatment of acts covered by section 24JA
- subsection 24KA(8) – facilities for services to the public
- subsection 24MD(7) – treatment of acts that pass the freehold test
- subsection 24NA(9) – acts affecting offshore places

The *Native Title (Notices) Determination 2011 (No. 1)* (the instrument) is the legislative instrument which determines how notice is to be given for the purposes of these provisions in the Act. The instrument revokes and replaces the *Native Title (Notices) Determination 1998* which commenced in 1998 (the previous determination).

The instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*, which provides a comprehensive regime for the management of Commonwealth legislative instruments.

Section 252 of the Act provides examples of how the notice ‘determined, by legislative instrument, by the Commonwealth Minister’ is to be given, such as in newspapers, radio broadcasts or television transmissions.

Under section 253 of the Act, section 19A of the *Acts Interpretation Act 1901* and as a result of the Administrative Arrangements Order signed by the Governor-General on 14 October 2010, the relevant ‘Commonwealth Minister’ is the Attorney-General. Therefore, the Attorney-General is the Minister responsible for making the instrument.

Commencement date

The instrument commences on 11 April 2011.

Purpose and operation of the instrument

The purpose of the notice requirements in the instrument is to alert people in a particular area to a proposed act or activity which is to take place on land which may be subject to native title. Notices issued under the instrument (by state or territory governments or other proponents) should enable people to consider whether they will be affected by the proposed act or activity. The affected people will usually be native title holders or registered native title claimants. Notification gives those affected the chance to avail themselves of relevant procedural rights or other opportunities under the Act.

Relevant activities are a ‘previous non-exclusive possession act’ (as defined by section 23B of the Act) or ‘proposed future act activity’ (as defined by section 233 of the Act).

The instrument determines the requirements of public notification by gazettal and internet publication (section 5), newspaper advertisement (section 6) and broadcast media (section 7) for certain activities, and direct notification by post (section 8) for other activities.

Consultation

Changes to the previous determination reflect comments received by the Attorney-General’s Department over a long period about necessary improvements. Stakeholders including the Federal Court, the National Native Title Tribunal and the former Aboriginal and Torres Strait Islander Social Justice Commissioner have requested changes to the previous determination.

Details of the new instrument and changes made to the previous determination

a) Title page

The title page of the previous determination stated that it was made under section 252 of the Act. This provision of the Act relates to notices given to the public under sections 6 and 7 of the instrument. The previous determination did not list the provisions of the Act that required notice to be given by post (under section 8 of the instrument). The instrument’s title page now lists all the provisions of the Act under which the instrument is made and more accurately reflects the Act.

While the Federal Court has held that the failure to have all of the relevant making provisions of the Act listed on the previous determination’s title page does not invalidate a notice given

under an unlisted section,¹ the complete list of the making provisions on the instrument's title page provides clarity for those giving notice under the Act.

b) A new definition of 'clear description'

The new definition (in section 4) provides an objective standard for determining whether a 'clear description' has been provided in the notice that contains enough information to work out the general location and approximate boundaries of an area. The clear description can be conveyed by a map drawn to scale or diagrams, but a map or diagram is not necessary if the boundaries can be ascertained from the written description provided. This change ensures there is no uncertainty over the relevant area of the notice. As procedural rights apply in these circumstances, the changes ensure persons are provided with all relevant information to identify whether their interests are affected.

c) Omission of previous section 4

Section 4 of the previous determination, which provided for the notice requirements under section 22EA of the Act, has been omitted. Section 22EA required that the Commonwealth give notice in relation to particular intermediate period acts attributable to the Commonwealth which may have been validated under section 22A of the Act. Under section 22EA, the Commonwealth was obliged to give these notices within six months of the commencement of section 22EA. As section 22EA commenced on 30 September 1998, section 4 of the previous determination is no longer required.

d) Omission of previous paragraph 6(2)(a)

Paragraph 6(2)(a) of the previous determination has been omitted. The *Native Title Amendment (Technical Amendments) Act 2007* (the Technical Amendments Act) amended subsection 24BH(1) of the Act to remove the requirement for the National Native Title Tribunal (NNTT) Registrar to give notice of a body corporate agreement to the public. As subsection 24BH(1) no longer requires public notification, paragraph 6(2)(a) of the previous determination is no longer necessary.

e) New references to subparagraph 66A(1A)(d)(ii)

A reference to subparagraph 66A(1A)(d)(ii) has been inserted at paragraph 6(2)(h) and in subsection 6(5) and at paragraph 7(2)(d). The Technical Amendments Act inserted subsection 66A(1A) into the Act which requires the NNTT Registrar, upon receipt of an amended application to re-include an area that was included in the original application, to 'notify the public in the determined way'. This term is defined in subsection 252(1) of the Act as meaning 'the way determined, by legislative instrument, by the Commonwealth Minister'. In keeping with other sections of the Act, the requirement to notify the public in subparagraph 66A(1A)(d)(ii) is now specifically referenced at subsections 6(2) and 6(5) of the instrument (notification by public print media advertisement), and paragraph 7(2)(d) (notification by public broadcast media) of the instrument.

¹ *Gurubana Gunggandji People of Yarrabah v Great Barrier Reef Marine Park Authority* [1999] FCA 437.

f) Omission of subsection 6(3)

Subsection 6(3) of the previous determination has been omitted. The Technical Amendments Act amended subsection 24BH(1) of the Act to remove the requirement for the NNTT Registrar to give notice of a body corporate agreement to the public. Because subsection 24BH(1) no longer requires public notification, the reference to subsection 24BH(1)(b) is no longer necessary and is not included in the instrument. Further, following the enactment of the Technical Amendments Act, it is no longer necessary for the instrument to specify the content of a notice under subsections 24CH(2) and 24DI(2) of the Act since the content requirements are set out in the Act. The notes in subsection 6(2) draw the reader's attention to the content requirements which are set out in the Act.

g) Substituted text at (previous) paragraph 6(4)(b)

The text at previous paragraph 6(4)(b) (now paragraph 6(3)(b)) of the instrument has been substituted from 'a clear description of the area that may be affected by the act or class of acts; and' to 'a clear description of the area to which the act or class of acts mentioned in the proposed determination relates; and'.

This addresses a language disparity between the Act and the previous determination which had led to confusion in interpreting section 6. This change makes it clear that the area that must be described in the proposed notice is the area to which the act or class of acts mentioned in the notice relates.

h) Substituted text at (previous) paragraph 6(5)(a)

The text at previous paragraph 6(5)(a) (now paragraph 6(4)(a)) of the instrument has been substituted from 'a clear description of the area that may be affected by the act; and' to 'a clear description of the area to which the act mentioned in the notice relates; and'.

This addresses a language disparity between the Act and the previous determination which had led to confusion in interpreting section 6. This change makes it clear that the area that must be described in the notice is the area to which the act mentioned in the notice relates.

i) Omission of paragraph 24BH(1)(b) at paragraph 7(2)(a)

A reference to paragraph 24BH(1)(b) in the previous determination at paragraph 7(2)(a) has been omitted. The Technical Amendments Act amended subsection 24BH(1) of the Act to remove the requirement for the NNTT Registrar to give notice of a body corporate agreement to the public. Because subsection 24BH(1) no longer requires public notification, the reference to subsection 24BH(1)(b) is no longer necessary.

j) Substituted text in subparagraph 7(2)(b)(i)

The text in subparagraph 7(2)(b)(i) of the instrument has been substituted from 'identification of the area that may be affected by the act or class of acts' (in the previous determination) to 'identification of the area to which the act or class of acts mentioned in the proposed determination relates'.

This addresses a language disparity between the Act and the previous determination. There was also a lack of clarity in section 7 of the previous determination which required a notice to 'identify the area that may be affected by the act'. This change aligns the instrument with the

Act and ensures there is no uncertainty over the relevant area of the notice. Parties giving the notice are now required to refer to the act to establish the relevant area to be identified.

k) Substituted text in subparagraph 7(2)(c)(i)

The text in subparagraph 7(2)(c)(i) of the instrument has been substituted from ‘identification of the area that may be affected by the act’ (in the previous determination) to ‘identification of the area to which the act mentioned in the notice relates’.

This addresses a language disparity between the Act and the previous determination which resulted in a lack of clarity in interpreting section 7. This change makes clear that the area that must be identified in the notice is the area to which the act mentioned in the notice relates.

l) Omitted text in subparagraphs 7(2)(e)(i) and 7(2)(e)(ii)

The references to a ‘proposed’ inquiry in subparagraphs 7(2)(e)(i) and 7(2)(e)(ii) of the previous determination have been omitted. As any inquiry will already be announced by way of a notice, it is incorrect to state the inquiry is still proposed. This also ensures consistency with subparagraph 7(2)(e)(iii).

m) Substituted text at paragraph 8(3)(a)

The text at paragraph 8(3)(a) of the previous determination has been substituted from ‘a clear description of the area that may be affected by the act or class of acts; and’ to ‘a clear description of the area to which the act or class of acts mentioned in the notice relates’.

This addresses a language disparity between the Act and the previous determination which had led to confusion in interpreting section 8. This change makes it clear that the area that must be described in the notice is the area to which the act or class of acts mentioned in the notice relates.

n) *Native Title Amendment Act (No. 1) 2010*

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

The instrument incorporates amendments made to the previous determination which outlined how notice must be given for acts covered by the new subdivision JA. This subdivision requires an action body (the Crown, or a local government body or other statutory authority of the Crown) to notify any registered native title claimant, any registered native title body corporate or any representative Aboriginal or Torres Strait Islander body in relation to the relevant area of land or waters (paragraph 24JAA(10)(a)).

Paragraph 8(1)(fa) of the instrument provides that the notice under paragraph 24JAA(10)(a) of the Act must be given by post. However, under subsection 8(2), a notice may be given by

a different means if the person to be notified agrees. Subsection 8(4) provides a list of information that must be included in the notice which is in addition to requirements provided under subsection 24JAA(11) of the Act.

Notice issued under the instrument enables any registered native title claimant, any registered native title body corporate or any representative Aboriginal/Torres Strait Islander body to avail themselves of relevant procedural rights under the new subdivision JA. When giving notice of an act, an action body must give a registered claimant, native title holder or representative body an opportunity to comment on the act. A registered claimant or body corporate may also request to be consulted about the doing of the act so far as it affects their registered native title rights and interests.

Following Royal Assent, the Act and the amended determination, incorporating the changes set out in this item (n), commenced on 16 December 2010.