



February 2023

# Review of sunseting instruments under the *Native Title Act 1993 (Cth)* - Reform options

*The Attorney-General's Department acknowledges the traditional owners and custodians of country throughout Australia and their continuing connection to land, waters and community. We pay our respects to the people, the cultures and the elders past and present.*

## Background

The Attorney-General's Department (the department) is conducting a review of 4 legislative instruments (the Instruments) made under the *Native Title Act 1993 (Cth)* (the NT Act), which are due to sunset on 1 October 2023. These Instruments are:

- *Native Title (Federal Court) Regulations 1998*
- *Native Title (Tribunal) Regulations 1993*
- *Native Title (Indigenous Land Use Agreements) Regulations 1999*
- *Native Title (Notices) Determination 2011 (No.1)*

The Instruments support native title application and agreement-making mechanisms through prescribing Court and Tribunal forms and fees, as well as prescribing procedural and notice requirements for applications. In doing so, the Instruments provide an interface between native title Applicants/ holders and the native title system. For the native title system to continue to operate effectively, the Instruments cannot be allowed to sunset and must be remade, with or without amendments. Further details about the Instruments is at **Attachment A**.

## Purpose and scope of the review

The review will assess whether the Instruments continue to be fit-for-purpose, and examine options to improve and streamline processes for stakeholders. The review will also consider whether amendments to the NT Act are required to implement further amendments to the Instruments. This review will not examine options for broader reform of the NT Act.

In early 2022, the department sought preliminary views from native title stakeholders on whether the Instruments remain fit-for-purpose, and sought views on possible amendments 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 advice for the department to consider in progressing the review. The ETAG is comprised of representatives from across the native title system, including from the Federal Court of Australia, Minerals Council of Australia, National Farmers' Federation, National Indigenous Australians Agency, National Native Title Council and its members, National Native Title Tribunal, and state and territory government.

The proposed options to reform the Instruments outlined in this paper are informed by preliminary feedback from stakeholders as well as the ETAG.

This paper seeks views on a range of options proposed by native title stakeholders and the ETAG to amend the Instruments. Submissions on the merits of these proposals – and other measures not canvassed by this paper but within the scope of review – are welcomed.

## Making a submission

### Share your views

The Attorney-General's Department welcomes stakeholders' views on issues raised in this discussion paper, and you can share your views through making a submission. You can find where to make submissions through the Attorney-General's Department website on the consultation hub webpage using the following link: <https://consultations.ag.gov.au/>.

**Submissions are requested by 3 April 2023.** Please note that submissions may be made publicly available and will generally be subject to freedom of information provisions. Please indicate if you wish your submission to be confidential.

## Additional consultation channels

If you would like to discuss your feedback in person or via a video or phone call, please contact [native.title@ag.gov.au](mailto:native.title@ag.gov.au).

During the consultation period, the Attorney-General's Department may conduct targeted in-person and online consultation sessions on particular aspects of the review as required.

## Privacy

The Attorney-General's Department is collecting your personal information in this consultation process for the purpose of reviewing and considering amendments to the Instruments. For the same purpose, we may provide this information to relevant Ministers and government agencies (including contractors).

Your participation in further consultations about the Instruments, or in responding to this discussion paper, is voluntary. If you choose not to provide us with your personal information we may be unable to contact you about the consultation, however we will still consider your comments. Submissions received within the scope of the discussion paper may be published on the Attorney-General's Department website in the interest of transparency and sharing of views.

Except as indicated above, the Attorney-General's Department will not provide personal information collected from you to anyone else outside the department unless you have given consent for us to do so, or we are authorised or required to do so by law. However, the department may disclose or publish your de-identified information for the purposes set out above. The privacy and security of your personal information is important to us, and is protected by law.

The department's Privacy Policy can be found at <https://www.ag.gov.au/about-us/accountability-and-reporting/privacy-policy> which explains how the department handles and protects the information provided by you. The department's Privacy Policy also explains how you can request access to or correct the personal information we hold about you, and who to contact if you have a privacy enquiry or complaint.

If you require a copy of our Privacy Policy contact the Privacy Officer at [privacy@ag.gov.au](mailto:privacy@ag.gov.au).

## List of questions for consideration

### ***Native Title (Federal Court) Regulations 1998 (the Federal Court Regulations)***

#### *Transfer responsibility of all native title forms to the Federal Court*

1. Should responsibility for native title forms be transferred to the Federal Court?

#### *Reforms to both Form 1 and Form 4*

2. Should the Federal Court Regulations be amended to clearly require all Applicants to file a Form 1 in all cases where a determination of native title is sought (as contemplated by NTA s 13(2))?
3. Should there be a separate compensation form (e.g. Form 4a) for when a native title claim has already been determined as opposed to only having a Form 4, which presupposes a native title claim and a compensation claim concurrently?
4. Are the current requirements for disclosure of authorisation processes in Form 4 adequate? Should Schedule R of Form 1 be replicated in Form 4?
5. Is there other information regarding Applicant parties and the authorisation process that is followed which should be required by Form 4?
6. Are the current details requested by each of the Items and Schedules in Forms 1 and 4 as canvassed on pages 9-10 below necessary? Please specify and justify any suggested amendment or removal.
7. Would the revisions to Forms 1 and 4 canvassed on pages 10-11 below be beneficial for stakeholders?

#### *Form 1 (Determination Application) of the Federal Court Regulations*

8. How can Schedules B and F in Form 1 be amended to clarify what information is required?

#### *Form 4 (Compensation Application)*

9. How could Schedule E be amended to more clearly require specification of the relevant native title rights and interests affected by compensable acts?
10. Should Schedule E be amended to require rights and interests to be set out in relation to the date(s) of the compensable act(s)?
11. Should Form 4 be split into 2 forms for Registered Native Title Bodies Corporate and compensation claim groups respectively?
12. Should Form 4 require additional information about compensable acts? What detail could usefully be added to Schedule I?
13. Which of the mechanisms detailed on page 15 below would be most effective in ensuring consistency between related compensation claims?
14. Are there any other mechanisms to address this issue which the department should consider?
15. How could the current notification requirements for compensation applications be improved?

***Native Title (Tribunal) Regulations 1993***

16. Should the fee structure be revised consistent with the approach outlined at page 17 below? Are there other ways in which the approach to fees could be modified?

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

17. Should the ILUA Regulations be amended so that instead of requiring a full copy of a native title determination for applications made under regulations 6(2)(a), 7(2)(a) and 8(2)(a) of the ILUA Regulations, a copy of an extract from the National Native Title Register is acceptable?
18. Should the ILUA Regulations be amended so that the requirement to provide a full copy of a PBC Regulation 9 certificate is removed, and a written statement from the relevant Registered Native Title Body Corporate, confirming that the certificate has been prepared, is instead required?
19. Would removing the requirement to provide geographic coordinates improve the ILUA application process?
20. Are the requirements under the ILUA Regulations adequately clear?
21. How should other agreements made between some or all of the parties to the agreement in connection with the doing of an act which the agreement relates be treated?

***Notices under the Native Title (Notices) Determination 2011 (No. 1)***

22. In what circumstances should electronic transmission of notices be permitted?
23. In relation to public notification, would notification in digital newspapers be sufficient where there are no print editions of newspapers? Are there other communication methods that could be employed to ensure effective public notification?
24. Should the circulation requirement be changed to be geographically close to the area to which the notice relates?

***Further suggestions to amend Instruments***

25. Please provide any further suggestions to reform or amend the four Instruments.

## Reform options

### ***Native Title (Federal Court) Regulations 1998***

The *Native Title (Federal Court) Regulations 1998* (the Federal Court Regulations) specifies the requirements for native title and compensation application forms. It also specifies that notice to the Federal Court of an intention to be a party to a native title or compensation application (as required by s 84(3)(b) of the NT Act), may be given in accordance with Form 5 of the Schedule to the Federal Court Regulations.

The Federal Court Regulations prescribe five forms altogether. Feedback from stakeholders has suggested that those forms be prescribed by the *Federal Court Rules 2011* (the Federal Court Rules) instead. This issue is explored further below.

Additionally, stakeholders have proposed reforms specifically to Form 1 (the application form for a determination of native title) and Form 4 (the application form for a determination of compensation under s 50(2) of the NT Act). These proposed reforms are outlined below and broadly include updating both forms to be fit-for-purpose, as well as improving the compensation application (Form 4) process, including requiring a distinct process for compensation claims where native title has already been determined, contrary to where a claim for native title and compensation are sought together.

### **Transfer responsibility of all native title forms to the Federal Court**

#### **Overview**

The Federal Court of Australia has considerable experience with the preparation of forms used in civil litigation through the Federal Court Rules. If Forms 1 to 5 of the Schedule to the Federal Court Regulations are transferred to the Federal Court Rules, future amendments to the forms will be able to be implemented more quickly, without remaking delegated instruments, and judicial officers may be better placed than the department to propose amendments as key users of the forms.

By way of example, in practice, while s 61 of the NT Act requires the prescribed form to be used, Applicants do not always use the current version of the prescribed form, particularly Forms 1 and 2 (claimant and non-claimant native title determination applications). As a result, all required information may not be submitted for registration by the Applicant and this becomes a barrier to applications being registered and gaining procedural rights in an expeditious manner.

Additionally, Division 34.7 of the Federal Court Rules contains rules concerning native title proceedings and a number of forms have been prescribed for that purpose (Forms 107-115). If Forms 1-5 were transferred to also be vested in the Federal Court Rules, practitioners and litigants would have a single point of reference to identify the appropriate rules and forms.

#### **Possible reform**

The department is considering a suggestion to transfer Forms 1 to 5 of the Schedule to the Federal Court Regulations to the Federal Court Rules. This proposal would require further related amendments to sections 61, 62, 190B and 190C of the NT Act to implement.

### *Intended effect*

The intended effect of this reform is that all native title forms can be accessed through the Federal Court Rules, consistent with many other areas of civil law, leading to increased use of the correct form and, subsequently, more expeditious registration of claims and access to procedural rights for Applicants. Additionally, as Federal Court officers are key users of the forms in practice, any identified future amendments to the forms can be appropriately initiated and progressed more efficiently by the Federal Court.

### **Question**

1. Should responsibility for native title forms be transferred to the Federal Court?

## **Reforms to both Form 1 and Form 4**

### **Requiring distinct processes for compensation claims where native title already determined versus where determination of native title is sought together with compensation**

#### **Overview**

In order for the Federal Court to make a determination of compensation, there must be an approved determination of native title made in relation to the whole or part of the area concerned (s13(2) of the NT Act). Currently, it is potentially unclear whether an Applicant seeking compensation without already having a determination of native title is required to file both a Form 1 (determination application) and a Form 4 (compensation application).

This potentially creates complexity because of the differing requirements between the two forms. Claim applications through Form 1 will also attract the registration test (see ss 190A, 190B and 190C of the NT Act) whereas applications made through Form 4 will not.

#### **Possible reforms**

- Where a determination of native title is sought in conjunction with a claim for compensation:
  - revise the Federal Court Regulations to make it clear Form 1 must be lodged in all cases where a determination of native title is sought; and
  - streamline Form 4 to remove unnecessary details already requested in Form 1.

### *Intended effect*

The intended practical effect of requiring Form 1 to be lodged, whenever seeking a determination of native title, is that all native title applications, including compensation applications, follow a known process and are subject to consistent case law. Additionally, if Form 1 is required where native title is sought together with compensation, by streamlining Form 4, Applicants will not have to repeat detail already provided in Form 1.

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- Where a native title determination has already been finalised:
  - have a separate compensation form. This 'Form 4a' could be streamlined to take account of that determination and remove unnecessary or duplicative details.

### *Intended effect*

This reform would result in two compensation forms; one tailored specifically for when there is already a determination of native title and the other for when there is no such determination made yet, which may require different details to be included in the form.

### **Questions**

2. Should the Federal Court Regulations be amended to clearly require all Applicants to file a Form 1 in all cases where a determination of native title is sought (as contemplated by NTA s 13(2))?
3. Should there be a separate compensation form (e.g. Form 4a) for when a native title claim has already been determined as opposed to only having a Form 4, which presupposes a native title claim and a compensation claim concurrently?

### **Information regarding the authorisation process for Forms 1 and 4**

#### **Overview**

Currently, Item 2 of Part A in Forms 1 and 4 (and 3) specifies that the Applicant is entitled to make the relevant application in the 'capacity in which the Applicant claims to be entitled to make the application', e.g. the Registered Native Title Body Corporate or a person authorised by the compensation claim group.

For Form 1, the department has received a suggestion to adopt the wording used in section 61(1) of the NT Act to add clarity as to what detail should be provided and to bring consistency with the authorisation requirement for determination applications as stipulated in the NT Act.

For Form 4, the department received a suggestion to require Applicants to include information similar to that used in an Indigenous Land Use Agreement process. This information could be meeting notices, resolutions, attendance register etc., which provides evidence pertaining to authorisation by a compensation claim group. Feedback suggested that even though requiring this information from Applicants would add to the application process, this information would provide certainty to all parties and could be beneficial to the Court by providing assurance at the start of the process that they are dealing with properly authorised Applicants.

Additionally, Schedule R of Form 1 requires an Applicant to disclose information about the authorisation process followed. This includes a requirement that if the application has been certified by each representative Aboriginal/Torres Strait Islander body, the Applicant must provide a copy of this certificate.



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In the current Form 4, there is no equivalent of Schedule R which requires a copy of a representative Aboriginal/Torres Strait Islander body certificate. However, compensation Applicants must comply with other disclosure requirements in relation to the authorisation process, including producing an affidavit (s 62(3) of the NT Act) which states that:

- if the application is authorised by a compensation claim group—that the Applicant is authorised by all the persons in the compensation claim group to make the application and to deal with matters arising in relation to it;
- if the application is authorised by a compensation claim group—the details of the process of decision-making complied with in authorising the Applicant to make the application and to deal with matters arising in relation to it;
- if the application is authorised by a compensation claim group and there are no conditions under section 251BA of the NT Act on the authority that relate to the making of the application—that there are no such conditions; and
- if the application is authorised by a compensation claim group and there are any conditions under section 251BA of the NT Act on the authority that relate to the making of the application—that the conditions have been satisfied and how the conditions have been satisfied.

Stakeholders have suggested that revising Form 4 to include a mirror provision of Schedule R in Form 1 would enhance transparency in relation to authorisation processes, which would also ensure that court resources are only invested in applications which are appropriately authorised.

### **Possible reforms**

- Amend Item 2 of Part A in Form 1 to be consistent with the wording in section 61(1) of the NT Act so that rather than only referencing s 61(1), this item includes the more comprehensive detail specified under s 61(1) of the NT Act, in relation to a native title determination application, at paragraphs (1) to (4) in the column titled 'Persons who may make the application'.

#### *Intended effect*

This reform aims to clarify what information is required by Applicants in relation to the authorisation process.

- Insert a new schedule in Form 4 that mirrors Schedule R in Form 1 or require the inclusion of information similar to that used in an Indigenous Land Use Agreement process, such as meeting notices, resolutions, attendance register etc.

#### *Intended effect*

To make the information requirements for native title determination applications and compensation applications similar (where relevant) and to provide certainty to all parties and the Court that the application is properly authorised.

## Questions

4. Are the current requirements for disclosure of authorisation processes in Form 4 adequate? Should Schedule R of Form 1 be replicated in Form 4?
5. Is there other information regarding Applicant parties and the authorisation process that is followed which should be required by Form 4?

## Update requirements specified in Forms 1 & 4

### Overview

#### Removal of certain details required in the forms

Stakeholder feedback has identified a number of further revisions to requirements specified in certain Items and Schedules in Forms 1 and 4 that are unnecessary or duplicative. These are summarised below.

#### *Application under section 61(1) of the NT Act*

Item 1 of Part A in Form 1 stipulates that the Applicant applies for a determination of native title under s 61(1) of the NT Act. Feedback has noted that this simply duplicates a similar statement in Note 1, which appears directly above Item 1 of Part A in Form 1.

#### *Searches for non-native title rights and interests*

Schedule D in both Forms 1 and 4 requires inclusion of details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the area covered by the application in a determination application. Feedback indicates that this schedule is rarely completed consistently with the requirements. Additionally, searches do not materially assist with case management by the Court and the National Native Title Tribunal conducts its own searches.

#### *Current activities by native title claim group*

Schedule G in Form 1 and Schedule H in Form 4 require the inclusion of details of any activities in relation to the land or waters currently carried on by the claim group. Feedback suggests that these activities are already required to be described by Schedule E (as required by s 62(2)(d)) in both Forms 1 and 4.

#### *Notifications of acts that pass the freehold test and of parties affected*

Schedules HA and I in Form 1 require details of notifications under s 24MD(6B)(c) and s 29 of the NT Act respectively to be provided in a determination application. Feedback has suggested that while it is relevant to the registration test, the National Native Title Tribunal conducts its own searches and this information is of little assistance to the Court and is often inadequately completed. Similarly, feedback has suggested that schedules in Form 4 that mirror Form 1 (particularly Schedules KA and L) are not relevant to compensation applications.

*Physical connection and prevention of access*

Details of physical connection and prevention of access are required by Schedules M and N of Form 1. Feedback suggests that this detail is not particularly useful for the Federal Court, however, is required to be taken into account by the National Native Title Tribunal Native Title Registrar in considering a claim for registration under s 190A of the NT Act. Feedback has suggested that given changes in case law since 1998, consideration should be given as to whether these issues should continue to be requirements of the registration test. Similarly, details of physical connection and prevention of access is required by Schedules O and P of Form 4, even though this information is not relevant to compensation applications.

*Tenure over which extinguishment is disregarded*

Item 1(e) of Schedule L in Form 1 requires detail of tenure over which the NT Act allows extinguishment to be disregarded. Feedback has indicated that these details are usually unavailable at the time a determination application is filed.

*Membership of other native title groups*

Schedule O of Form 1 requires details of membership of other native title groups. Stakeholder feedback suggests that in practice this detail is rarely completed in a fulsome manner by the Applicant and the National Native Title Tribunal relies on its own records to ascertain whether s 190C(3) is satisfied.

*Exclusive possession of offshore place and ownership of Crown resources*

Schedules P and Q of Form 1 require disclosure of details to address s 190B(9), which stipulates areas and resources that cannot be the subject of a native title claim. Feedback suggests that in practice, a response is seldom elicited and moreover, these Schedules provide no assistance to the Court's management of cases.

*Draft order*

Schedule J of Form 1 requires a draft of the order to be sought if the determination application is unopposed. Stakeholder feedback has indicated that in practice, this tends to generate a repetition of the rights and interests claimed as it is difficult to anticipate what the final orders would look like after either a litigated or consensual process.

Specific revisions to the forms

Additionally, stakeholder feedback has proposed requiring specific details in Forms 1 and 4 to assist the Federal Court in managing applications received, and further, that all forms be updated to reflect modern forms of communication.

**Possible reforms**

- Remove the Items and Schedules outlined above on the grounds that they are duplicative, unnecessary, or rarely completed. Some of these proposals may require amendments to the NT Act.
- The following suggestions have been proposed in relation to Forms 1 and 4 that would allow the Federal Court to more efficiently assess native title determination and compensation applications:
  - Requiring a checklist to ascertain extent of connection/ tenure work done/ discussions with the State/ draft orders or timetable prepared etc.

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- Requiring details of the relevant Registered Native Title Body Corporate and whether they have been consulted. This mechanism is proposed to ensure a degree of transparency and accountability on applications brought by claim groups to maximise consistency in approach and avoid undue contestation from the relevant body corporate. This is particularly relevant for Form 4 as the potential for multiple compensation applications and Applicants is high. This could be linked to the “Authorisation” section of the form.
- Reformatting both Forms 1 and 4 without boxes, perhaps using a similar style to the form used in South Australia (Applicant details at the front, explanation of schedule content, checklists etc.)
- Remove references to ‘DX’ and ‘Facsimile’ in all forms as they are outdated forms of communication the Court no longer uses.

### *Intended effect*

The intended practical effect is to streamline the forms, and simplify the application process by removing requirements that are unnecessary or duplicative.

### **Questions**

6. Are the current details requested by each of the Items and Schedules in Forms 1 and 4 as described above necessary? Please specify and justify any suggested amendment or removal.
7. Would the revisions to Forms 1 and 4 listed above be beneficial for stakeholders?

## **Form 1 (Determination Application) of the Federal Court Regulations**

Stakeholder feedback specifically in relation to Form 1, aside from those already discussed, is limited to suggested revisions to Schedules B and F to clarify what information is required.

### **Clarify required descriptions on area and basis on which native title exists**

#### **Overview**

Schedule B in Form 1 requires information identifying the boundaries of the area covered by the application to be included in a determination application. However, it does not require the description to be consistent with the map provided in the form, which would assist the National Native Title Tribunal to apply the registration test efficiently.

Schedule F in Form 1 requires a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist. Feedback from stakeholders suggests this requirement is unclear as it merely replicates s 62(2)(e) of the NT Act without providing guidance that the information is required for assessing whether connection is established for the purposes of s 223 of the NT Act.

### **Possible reforms**

- Amend Schedule B to require that the information identifying the boundary of the area must be consistent with the map provided with Form 1.

#### *Intended effect*

This would make the native title application process more efficient as the National Native Title Tribunal, in assessing the application for registration, would be able to more easily identify the relevant area if the description of the boundaries and map aligned with each other.

- Amend Schedule F to clarify that information should address s 223 of the NT Act, including connection.

#### *Intended effect*

This would allow Applicants to understand more clearly what information is required and its relevance in the determination process, i.e. that the information is required for assessing whether there is a connection in accordance with s 223 of the NT Act.

### **Question**

8. How can Schedules B and F in Form 1 be amended to clarify what information is required?

## **Form 4 (Compensation Application) of the Federal Court Regulations**

Stakeholder feedback suggested a number of reforms specifically in relation to Form 4, which could be achieved by revising certain requirements specified in Form 4 and changing the application and notification processes.

### **Description of native title rights and interests**

#### **Overview**

Schedule E of Form 4 requires Applicants to include the following information in an application for compensation:

*A description of the native title rights and interests in relation to particular land or waters (including any activities in exercise of those rights and interests) for which compensation is claimed. The description must not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that existed, or have not been extinguished, at law.*

#### **Possible reform**

The department is considering whether it is possible to amend Form 4 so it requires Applicants to more clearly and specifically detail the description of native title rights and interests in relation to the date(s) of the relevant compensable act(s). Given the content of Form 4 (and in particular the description of native title rights and interests) may vary depending on whether a claim is brought by a Registered Native Title Body Corporate or a compensation claim group, the department is interested in hearing from stakeholders about

whether they consider this would merit two separate Form 4s (e.g. one each for Registered Native Title Bodies Corporate and claimant groups respectively). Alternatively, the department is considering creating different sections within a revised Form 4 to reflect the different information required.

### *Intended effect*

The intended objective of this possible reform option is to provide clarity on what the required description of native title rights and interests should entail, which might be clearer if Form 4 was tailored specifically for applications lodged by a Registered Native Title Body Corporate or a compensation claim group.

### **Questions**

9. How could Schedule E be amended to more clearly require specification of the relevant native title rights and interests affected by compensable acts?
10. Should Schedule E be amended to require rights and interests to be set out in relation to the date(s) of the compensable act(s)?
11. Should Form 4 be split into 2 forms for Registered Native Title Bodies Corporate and compensation claim groups respectively?

### **Identification of compensable acts**

#### **Overview**

Schedule I of Form 4 requires that '*details of the act which it is claimed extinguished or affected native title rights and interests for which compensation is claimed*' be included in Form 4.

It is essential that Applicants adequately identify compensable acts, as without identification there is no apparent cause of action. These acts determine the parties involved, and the evidence which will be required in a matter.

The recent Federal Court cases of *Bigambul* and *Kooma* highlighted the importance of clearly articulating compensable acts (*Saunders on behalf of the Bigambul People v State of Queensland (No 2)* [2021] FCA 190; *Wharton on behalf of the Kooma People v State of Queensland (No 2)* [2021] FCA 191). On 11 March 2021, the Federal Court struck out the *Bigambul* and *Kooma* compensation claims, on the basis that the originating applications did not contain the required information, being any 'act(s)' affecting native title interests, and therefore, no specific area(s) in which acts occurred. This was found to not comply with s 61(5)(c) of the NT Act, which requires applications to contain prescribed information.

Another recent case of *Tucker* (*Tucker v State of Western Australia* [2022] FCA 1379), illustrates that a failure to identify compensable acts in and of itself does not necessarily or automatically warrant summary dismissal of a compensation application. In *Tucker*, the Federal Court took a holistic approach in summarily dismissing the compensation application where there was a failure to identify any compensable act as required under Schedule I of Form 4 (see [56], [62]), in conjunction with the lack of authorisation provided as prescribed by s 61(1) of the NT Act (see [49], [62]). Relevantly, the Court considered that if the application had been properly authorised, "it is highly unlikely that there would have been a total absence of specified compensable acts [...] [as the relevant] native title holders would have had to be properly informed of what

kind of compensation application they were authorising, and what events were alleged to have affected their native title” ([60]).

The Court further noted in *Tucker* that it was preferable to exercise its summary dismissal powers (pursuant to s 31A of the *Federal Court Act 1976* and r 26.01 of the Federal Court Rules), than to exercise its powers to strike out (as it did in *Bigambul* and *Kooma*) for failure to comply with requirements of the NT Act under s 84C of the NT Act, which it considered is concerned more with form rather than the merits of the application. If this approach is followed in future cases, it is indicative that compliance with the requirement to include prescribed detail in Form 4, such as identification of compensable acts, is less relevant to whether the application as a whole has reasonable prospects of success.

*Tucker* also made it clear that the merits of a compensation application (including whether compensable acts have been appropriately identified), are matters of substance for the Court to consider and not for Court Registry staff to decide at the filing stage. The Court noted that how much detail should be required before a compensation application is accepted for filing involves matters of judgment, which would be too burdensome for Registry staff. Additionally, it noted a decision of a Registrar of the Court to refuse to accept documents for filing is still subject to review, leaving the matter less conclusive ([32]-[36]).

### **Possible reform**

The department is considering whether Form 4 could be improved to require clearer identification of compensable acts. The department is also conscious of not unduly burdening compensation claimants so as to create a practical bar to compensation claims being properly brought. However, improvement to Form 4 could be achieved by adding additional requirements to Schedule I, such as the dates of compensable acts, type of act, responsible entity, search results/ tenure, area or mapping and validation provision(s) in the NT Act.

### *Intended effect*

While some flexibility regarding detail may be appropriate depending on the nature of the claimed compensable act(s), the intended practical effect of implementing such a reform option is to prompt Applicants to consider relevant information and include sufficient detail to establish a reasonable cause of action.

### **Question**

12. Should Form 4 require additional information about compensable acts? What detail could usefully be added to Schedule I?

## **Ensuring consistency between related compensation claims**

### **Overview**

Under s 61 of the NT Act, a compensation claim can be brought by either a Registered Native Title Body Corporate or a person or persons authorised by a compensation claim group. This means claims brought post-determination for the same compensable acts could be brought by different parties (either a Registered Native Title Body Corporate or compensation claim group or sub-group). Stakeholders have noted that this could result in conflicting approaches between different parties across similar compensation claims.

### **Possible reform**

The department is considering developing a mechanism to help Applicants minimise conflicting approaches to compensation applications prior to lodgement. Possible mechanisms could include:

- Requiring endorsement by the relevant Registered Native Title Body Corporate of a compensation application prior to lodgement.
- Requiring Applicants to consult with the relevant Native Title Representative Body or Service Provider prior to bringing a compensation application.
- Amending Form 4 to allow for cross-referencing of related compensation claims.

### *Intended effect*

The intended practical effect is to minimise conflicting approaches between related compensation claims.

### **Questions**

13. Which of the mechanisms detailed above would be most effective in ensuring consistency between related compensation claims?
14. Are there any other mechanisms to address this issue which the department should consider?

### **Notification of a compensation application**

Currently, notice of a compensation application must be provided by the Native Title Registrar to a wide range of parties (s 66 of the NT Act), including 'any person who holds a proprietary interest in relation to any or part an area covered by an application for native title' (s 66(3)(a)(iv)). Stakeholders have suggested that this requirement is unnecessary and unhelpful in circumstances where the government is the only respondent party named as being liable for compensation. For example, stakeholders have indicated that widespread notification to land owners in a claim area (against whom compensation *is not* claimed) creates uncertainty and concern. The department notes that any changes to the notification requirements would require legislative amendments.

### **Question**

15. How could the current notification requirements for compensation applications be improved?



## ***Native Title (Tribunal) Regulations 1993***

*The Native Title (Tribunal) Regulations 1993* (the Tribunal Regulations) specifies requirements for forms in relation to right to negotiate applications including: an objection to inclusion in an expedited procedure application (Form 4); future act determination application (Form 5); notice of intention to become a party to an application (Form 6); and summons to give evidence (Form 7). The Tribunal Regulations also specify related procedures in relation to the payment, waiver and refund of fees, identification of parties in relation to applications, and procedural requirements for summons and service.

Regulation 7 prescribes the applicable fees for applications and Regulations 8 and 8A of the Tribunal Regulations provide the criteria for exemptions and fee waivers.

A number of stakeholders expressed concern about the fee structure contained in the Tribunal Regulations, and suggested removal of application fees and/ or alteration of the available exemption criteria. Applicable sections of the NT Act are s 76(d) and s 215(c).

### **Fee reform**

#### **Overview**

Expedited procedure objection applications typically arise in the context of mineral exploration. Where a government party asserts that a proposed exploration tenement is subject to the expedited procedure (which does not require good faith negotiation), a native title party may object and the National Native Title Tribunal is required to determine whether the expedited procedure applies. Native title parties who are assisted by representative bodies or service providers are exempt from paying an application fee when lodging an objection.

Feedback from stakeholders is that the fee for right to negotiate applications and expedited procedure objections under the NT Act is not achieving the intended purpose and is hindering the proper administration of the future act regime.

The National Native Title Tribunal has raised concerns that the current system is adversely affecting the participation of Registered Native Title Bodies Corporate in the expedited procedure process as many of those bodies choose to represent themselves or seek independent representation. Fee waivers may be available in some, but not all, cases. Further, the current refund provisions extend only to circumstances where the National Native Title Tribunal makes a determination. The refund provisions do not contemplate resolution by agreement, which occurs in the majority of cases.

Overall, the National Native Title Tribunal considers the payment of fees for expedited procedure objection applications is leading to inequity in the participation of Registered Native Title Bodies Corporate in the expedited procedure process and is administratively burdensome.

**Possible reforms**

- Removing fees for expedited procedure objection applications.
- Expanding the grounds for refunding the fee by removing the requirement under reg 9(c) that there be a 'favourable' determination under s 162 of the NT Act.
- Extending the fee waiver to Registered Native Title Bodies Corporate and registered native title claimants who are not assisted by a native title representative body.

*Intended effect*

The intended practical effect is to improve the fairness of the fee structure, including so that Registered Native Title Bodies Corporate who represent themselves or seek representation independent of representative bodies or service providers can file an expedited procedure objection without paying a fee in all cases.

**Question**

16. Should the fee structure be revised consistent with the approach outlined above? Are there other ways in which the approach to fees could be modified?

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

Indigenous Land Use Agreements (ILUAs) are described in Part 2, Division 3 of the NT Act. The *Native Title (Indigenous Land Use Agreements) Regulations 1999* ('ILUA Regulations') specify requirements for applications for registration of ILUAs, the registration of alternative procedure agreements, and the requirements for an application objecting against registration of alternative procedure agreement (Form 1).

### **Provision for the use of an extract of a determination**

#### **Overview**

Currently, regulations 6(2)(a), 7(2)(a) and 8(2)(a) of the ILUA Regulations require a full copy of a native title determination for each party that is a Registered Native Title Body Corporate to accompany applications for registration of body corporate agreements, area agreements and alternative procedure agreements. Feedback suggests that some parties have difficulty providing a full copy of the determination, for example as a result of size limitations with email attachments.

#### **Possible reform**

Revise each subregulation to allow the submission of a copy of an extract from the National Native Title Register.

#### *Intended effect*

To reduce the administrative burden on parties seeking to register body corporate agreements, area agreements and alternative procedure agreements, as a full copy of the determination is not necessary.

#### **Question**

17. Should the ILUA Regulations be amended so that instead of requiring a full copy of a native title determination for applications made under regulations 6(2)(a), 7(2)(a) and 8(2)(a) of the ILUA Regulations, a copy of an extract from the National Native Title Register is acceptable?

### **Replacement of a Regulation 9 Certificate with a Registered Native Title Body Corporate statement**

#### **Overview**

Currently, regulations 6(2)(e), 7(2)(g) and 8(2)(e) of the ILUA Regulations require a full copy of a certificate (PBC Regulation 9 certificate) certifying that a Registered Native Title Body Corporate consulted with and obtained consent from the relevant common law holders in relation to an application to register a body corporate agreement (r 9 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth)).

It is not uncommon for applications for registration to not include a PBC Regulation 9 certificate, and this results in significant delays to the ILUA registration process.

#### **Possible reform**

Remove the requirement for a full copy of a PBC Regulation 9 certificate and instead allow for a written statement from the relevant Registered Native Title Body Corporate that the certificate has been prepared.

*Intended effect*

To improve the efficiency of the application process for registration of a body corporate agreement.

**Question**

18. Should the ILUA Regulations be amended so that the requirement to provide a full copy of a PBC Regulation 9 certificate is removed, and a written statement from the relevant Registered Native Title Body Corporate, confirming that the certificate has been prepared, is instead required?

**Remove requirement for ILUA area geographic coordinates**

**Overview**

Regulation 5 of the ILUA Regulations defines ‘complete description’ in relation to an area to include ‘a map of the area that shows geographic coordinates’. However, key stakeholders identify there is no requirement for s 61 applications to have a map including coordinates under s 62(2)(b) of the NT Act, and an absence of geographic coordinates in those applications has not created any compliance issues. It is suggested that a similar approach for ILUAs would achieve comparable results.

**Possible reform**

Remove requirement for geographic coordinates from the ILUA Regulations.

*Intended effect*

This reform would remove what appears to be a redundant requirement.

**Question**

19. Would removing the requirement to provide geographic coordinates improve the ILUA application process?

**Guidance for Registrars in the ILUA Regulations**

**Overview**

Section 199C(1) of the NT Act imposes a positive duty on the Registrar to remove certain details of an ILUA from the Register of ILUAs unless the Federal Court has made an order to the contrary. However, feedback has indicated that in practice it will rarely be apparent to the Registrar when s 199C(1) is applicable and the Registrar will rely on parties to an ILUA to advise when this duty arises. While no concern has been raised about this practice, feedback has suggested that consideration could be given as to whether the ILUA Regulations should contain information providing guidance as to how the Registrar can consider this subsection and what information parties will need to provide to the Registrar.

**Possible reform**

Revise s 199C(1) to include guidance for the Registrar in discharging their duty to remove details of an ILUA from the Register. This would require legislative amendment of the NT Act.

*Intended effect*

This would allow the Registrar to better perform their functions in relation to maintaining the Register of ILUAs.

**Other regulations that may warrant clarification**

Regulations 6(3)(e), 7(3)(f) and 8(3)(f) in the ILUA Regulations require information to be provided as to *'whether or not there is any other written agreement made between some or all of the parties to the agreement in connection with the doing of an act to which the agreement relates'*.

Feedback has questioned whether the inclusion of this requirement is necessary and what its intended purpose is given the provision of this information will not affect whether an application for registration of an agreement can proceed to notification and be considered for registration.

Other feedback suggested that requiring greater transparency around the content of other agreements made between parties that are relevant to a registered ILUA would be helpful, so that the full context of the relevant ILUA is more easily able to be understood by all traditional owners and native title holders.

**Questions**

20. Are the requirements under the ILUA Regulations adequately clear?
21. How should other agreements made between some or all of the parties to the agreement in connection with the doing of an act which the agreement relates be treated?

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

### **Allowing for electronic transmission of notices**

#### **Overview**

The *Native Title (Notices) Determination 2011 (No. 1)* ('Notices Determination') governs the provision of notices under the NT Act. This includes notices:

- specifically directed to parties e.g. of acts to be done under the future acts regime; and
- published and circulated more generally to notify the public of issues arising under the NT Act.

Currently, specific notices must be sent via mail. However, notice may be given by a different means if the party to be notified agrees. General notices must be published in a newspaper and can also appear on radio and television.

#### **Possible reforms**

Noting that the availability of electronic means of notification has increased substantially since the future acts regime was first enacted, some stakeholders have suggested that notices should be provided electronically, rather than through print media or TV/radio. Electronic notification such as online through digital newspapers, or emailed notices could be substantially cheaper, faster and potentially more accessible than public notices in print editions of newspapers and postal notification. However, stakeholders have also raised concerns that electronic notice would place too much of an onus on the public and the relevant Native Title Representative Body or Service Provider to notify native title groups of proposed development on their country. Concerns have also been raised that for onshore places, the requirement that newspapers circulate generally throughout the area to which the notice relates, creates issues where no newspapers circulate in the relevant area. Suggestions have been made that consideration should be given to amending this requirement to a geographical area closest to the relevant area, like for offshore places.

The department is considering options to amend the Notices Determination to allow for electronic communication, including amendments to:

- make electronic communication the default method for notices under the NT Act where email addresses are available;
- allow registered native title claimants or Registered Native Title Bodies Corporate to elect to receive notices electronically; and
- allow notices to be circulated in areas that are geographically close to the area to which the notice relates.

#### ***Intended effect***

Implementing these reforms would be to ensure notifications are effective to achieve public notification, especially in remote areas, and reach relevant persons.

**Questions**

22. In what circumstances should electronic transmission of notices be permitted?
23. In relation to public notification, would notification in digital newspapers be sufficient where there are no print editions of newspapers? Are there other communication methods that could be employed to ensure effective public notification?
24. Should the circulation requirement be changed to be geographically close to the area to which the notice relates?

## Attachment A – Details of Instruments under review

LEGISLATION TITLE	PURPOSE
Native Title (Federal Court) Regulations 1998	<p>Specifies <b>requirements for native title and compensation application</b></p> <p><b>Forms:</b></p> <ul style="list-style-type: none"> <li>- Form 1 - Native title determination application — claimant application</li> <li>- Form 2 - Native title determination application — non-claimant application</li> <li>- Form 3 - Revised native title determination application</li> <li>- Form 4 – Compensation application</li> <li>- Form 5 -Notice of intention to become a party to an application</li> </ul> <p>It also specifies that notice under section 84(3)(b) of the NT Act may be given in accordance with Form 5.</p>
Native Title (Tribunal) Regulations 1993	<p>Specifies requirements for <b>Forms in relation to right to negotiate applications:</b></p> <ul style="list-style-type: none"> <li>- Form 4- Objection to inclusion in an expedited procedure application</li> <li>- Form 5 - Future act determination application</li> <li>- Form 6- Notice of intention to become a party to an application</li> <li>- Form 7 - Summons to give evidence</li> </ul> <p>It also specifies related procedures in relation to:</p> <ul style="list-style-type: none"> <li>- Payment, waiver and refund of fees</li> <li>- Notification of parties in relation to applications</li> <li>- Summons and service</li> </ul>
Native Title (Indigenous Land Use Agreements) Regulations 1999	<p>Specifies requirements for <b>applications for registration of Indigenous Land Use Agreements (ILUAs)</b>, being:</p> <ol style="list-style-type: none"> <li>i. body corporate ILUAs</li> <li>ii. area ILUAs</li> <li>iii. alternative procedure agreements</li> </ol> <p>It also specifies the requirements for Form 1 - Application objecting against registration of alternative procedure agreement</p>
Native Title (Notices) Determination 2011 (No.1)	<p>Specifies <b>requirements for providing notice under the NT Act</b>, including when and how notice must be provided:</p> <ul style="list-style-type: none"> <li>- Under s 22H for validation of acts attributable to a State or Territory</li> <li>- By advertisement (including in newspapers and <i>Gazettes</i>)</li> <li>- By broadcasting (including radio or television)</li> <li>- By post</li> </ul>