



**ATTORNEY-GENERAL'S DEPARTMENT**

**DISCUSSION PAPER**

**Proposed consultation and reporting requirements under  
subdivision JA of the *Native Title Act 1993***

2011

***Consultation and feedback:***

The Government invites you to make comments on the draft Determination outlined in this discussion paper. If you would like to make a submission, please forward it **no later than 29 February 2012** to:

Kathleen Denley  
Assistant Secretary, Native Title Unit  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

You may also email your submission to [native.title@ag.gov.au](mailto:native.title@ag.gov.au).

This paper is available at: <[www.ag.gov.au](http://www.ag.gov.au)>

The Government will not respond individually to submissions, but will have regard to each of them in deciding the final form of the Determination.

***Public information sessions:***

The Government is not proposing any public information sessions to discuss the draft Determination.

***Confidentiality:***

All submissions will be treated as public, and may be published on the Department's website, unless the author clearly asks it not to be.

A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

## **Introduction**

The *Native Title Act 1993* came into operation on 1 January 1994. Its main purpose is to recognise and protect native title. The Native Title Act provides for the recognition of pre-existing rights to land and waters, the doing of acts that impact native title rights and the resolution of claims for compensation.

The Government believes that native title can play an important role in helping to close the gap between Indigenous and non-Indigenous Australians. Importantly, meaningful engagement with native title parties can provide opportunities to build good will between all parties and to forge new, enduring relationships.

## **The Native Title Amendment Act (No.1) 2010**

The Native Title Amendment Act (No.1) 2010 inserted a new subdivision JA in the ‘future acts’ regime in Division 3, Part 2 of the Native Title 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 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 action body, as defined in the Act, to provide notice of an act to be done under this subdivision, provide an opportunity to comment on the act, and to consult with appropriate native title parties if requested. The subdivision also requires the action body to provide a written report on notice provided, and any comments received and consultations conducted. The Attorney-General intends to publish these reports in accordance with the subdivision.

An act to which Subdivision JA applies would 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.

## **The draft Native Title (Consultation and Reporting) Determination 2011**

The Attorney-General is considering making the draft Determination at **Attachment A** to set out consultation and reporting requirements under subdivision JA.<sup>1</sup>

The aim of the draft Determination is to ensure genuine consultation between action bodies and native title parties, to minimise the impact of an act done under subdivision JA on native title rights and interests. It also seeks to promote transparency and accountability, to ensure consultation builds community trust and acceptance about projects delivered under the subdivision. The Determination aims to provide procedural certainty for governments relying on subdivision JA to construct housing and infrastructure on land which is, or may be, subject to native title.

The explanatory statement to the Determination is at **Attachment B**.

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

### *Consultation requirements*

The draft Determination proposes that where an action body is required to consult with a native title party under subdivision JA, the action body must comply with the following consultation requirements:

- respond to requests to be consulted and commence consultation within the required timeframe
- if requested, provide additional information to native title parties
- if requested, give native title parties access to interpreters, and
- provide notice of consultation meetings.

The draft Determination proposes that action bodies will not have to satisfy a particular requirement if it is not reasonable to do so. Where this is the case, the action body will still be required to consult with the native title party, but that consultation will not need to fulfil the requirement that is not reasonable.

The draft Determination also proposes to give the action body the flexibility to conduct a joint consultation with multiple native title parties, if each native title party agrees, and to include any other person in the consultation if the government body and native title party (or parties) agree.

### *Reporting requirements*

The draft Determination proposes a method for providing reports required under subdivision JA to the Attorney-General. It also proposes that such reports must include information about the following:

- notice given in relation to the act, and any comments received about the act
- requests by native title parties to be consulted about the act
- requests by native title parties for relevant information
- any consultation meeting which was held, and issues discussed at the meeting, and
- how the action body dealt with, or proposes to deal with, concerns raised.

As the report is an important mechanism for enhancing transparency and accountability and promoting genuine consultation, the draft Determination proposes that action bodies will have specific and uniform reporting requirements.

### **Issues for discussion**

Discussion and submissions are invited on any aspect of the draft Determination. The issues outlined below identify some of the key matters which need to be considered, but are not intended to confine the comments sought.

- a) Does the draft Determination adequately deliver on the goals for consultation and reporting, namely:

- genuine consultation
  - transparency and accountability, and
  - procedural certainty?
- b) What, if any, additional consultation or reporting requirements would help fulfil these goals?
- c) Are the proposed consultation requirements adequate and appropriate? Specifically:
- time periods (eg, s 6, 10(3) and 13(2))
  - ‘reasonableness’ criteria (eg, s7(2), 7(3)(b), 9(2), 9(4)), and
  - interpreter requirements.
- d) Are the proposed reporting requirements practical and useful?