

Explanatory Statement

Issued by the authority of the Minister for Indigenous Affairs

Native Title Act 1993

Native Title (Recognition as Representative Body—Cape York Land Council) Instrument 2016

Native Title (Recognition as Representative Body—Central Land Council) Instrument 2016

Native Title (Recognition as Representative Body—Goldfields Land and Sea Council) Instrument 2016

Native Title (Recognition as Representative Body—Kimberley Land Council) Instrument 2016

Native Title (Recognition as Representative Body—Northern Land Council) Instrument 2016

Native Title (Recognition as Representative Body—North Queensland Land Council) Instrument 2016

Native Title (Recognition as Representative Body—Yamatji Marlpa Aboriginal Corporation) Instrument 2016

These instruments are made under subsection 203AD(1) of the *Native Title Act 1993* (the Act).

Under subsection 203AD(1), the Minister may, by legislative instrument, recognise, as the representative body for an area or areas, an eligible body that has applied under section 203AB to be the representative body for the area or areas if the Minister is satisfied that:

- (a) if the body is already a representative body, it satisfactorily performs its existing functions; and
- (b) the body would be able to perform satisfactorily the functions of a representative body.

Subsection 203AD(3A) of the Act provides that the period of recognition specified in the instrument of recognition must be at least one year but no more than six years.

The following seven bodies are currently recognised as representative bodies for the period of 1 July 2015 – 30 June 2016 and it is proposed to recognise them for a further two year period from 1 July 2016 – 30 June 2018:

- Cape York Land Council Aboriginal Corporation.
- Central Land Council.
- Goldfields Land and Sea Council Aboriginal Corporation.
- Kimberley Land Council Aboriginal Corporation.
- Northern Land Council.
- North Queensland Land Council Native Title Representative Body Aboriginal Corporation.
- Yamatji Maripa Aboriginal Corporation.

In accordance with section 203A of the Act, the Minister invited the representative bodies listed above to apply for recognition as the representative body for the area described in the Schedules to each instrument of recognition as a Representative Body for the period of 1 July 2016 – 30 June 2018.

On the basis of the information provided, the Minister was satisfied each of the invited bodies satisfactorily perform its existing functions and would be able to continue to perform satisfactorily the functions of a representative body as required under section 203AD of the Act. The Minister subsequently decided to recognise each of the invited bodies for the areas described in the Schedules to each instrument of recognition as a Representative Body for the period of 1 July 2016 – 30 June 2018. In determining the period of recognition, the Minister considered the matters specified in subsection 203AD(3B) of the Act.

The instruments provide that the recognition of each of the invited bodies takes effect on 1 July 2016 and ceases to have effect on 30 June 2018.

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, 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 instruments also revoke, with effect from the date the recognition takes effect, the following current recognition instruments:

- ***Recognition as Representative Aboriginal/Torres Strait Islander Body 2015 (No. 1)***
- ***Recognition as Representative Aboriginal/Torres Strait Islander Body 2015 (No. 2)***
- ***Recognition as Representative Aboriginal/Torres Strait Islander Body 2015 (No. 3)***
- ***Recognition as Representative Aboriginal/Torres Strait Islander Body 2015 (No. 6)***
- ***Recognition as Representative Aboriginal/Torres Strait Islander Body 2015 (No. 7)***
- ***Recognition as Representative Aboriginal/Torres Strait Islander Body 2015 (No. 8)***
- ***Recognition as Representative Aboriginal/Torres Strait Islander Body 2015 (No. 9)***

The instruments are legislative instruments for the purposes of the *Legislation Act 2003*.

The Office of Best Practice Regulation has advised a Regulatory Impact Statement is not required.

Consultation

Applications from each of the invited bodies were subject to the required assessment process after which the Minister decided to continue to recognise each of the invited bodies as representative bodies for the areas described in the Schedules to each instrument of recognition as a Representative Body. In this context, the extent of consultation is reasonably limited to the representative bodies involved and the expert advice of Departmental Officers.

Statement of Compatibility with Human Rights

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

The instruments are 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*.

Overview of the Instruments

The instruments provide for the recognition of representative bodies in most areas where representative bodies are currently recognised as described in the schedules to the instruments. Among other things, the role of representative bodies is to facilitate and assist registered native title bodies corporate, native title holders and native title claimants to gain formal recognition of their native title rights and in the exercise of those rights.

Human rights implications

The instruments engage the following human rights:

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

The right to enjoy and benefit from culture

The right to enjoy and benefit from culture is contained in Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Article 27 of the ICCPR protects the rights of individuals belonging to minorities within a country to enjoy their own culture. Article 15 of the ICESCR protects the right of all persons to take part in cultural life.

The United Nations Human Rights Committee has stated that culture can manifest itself as a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples, which may include such traditional activities as fishing or hunting and the right to live on lands protected by law.¹ The United Nations Committee on Economic, Social and Cultural Rights has stated that Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected.²

The *Native Title Act 1993* (the Act) as a whole promotes the rights to enjoy and benefit from culture by creating processes through which native title can be recognised, and providing protection for native title rights and interests.

The right to self-determination

The right to self-determination is a collective right applying to groups of 'peoples'. This is in contrast to the rights to culture which protect the rights of individuals within a group. The right to self-determination, as set out in Article 1 of the ICCPR and

¹ United Nations Human Rights Committee, General Comment No. 23 (1994).

² The Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009).

Article 1 of the ICESCR, entails the entitlement of peoples to have control over their destiny and to be treated respectfully. This includes peoples being free to pursue their economic, social and cultural development.

The principles contained in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) are also relevant to the instruments. While the Declaration is not included in the definition of 'human rights' under the *Human Rights (Parliamentary Scrutiny) Act 2011*, it provides some useful context on how human rights standards under the international treaties apply to the particular situation of Indigenous peoples.

In particular, the following Articles are relevant to the instrument:

- Article 8(2)(a) provides that States shall provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving Indigenous peoples of their integrity as distinct peoples, or of their cultural values or ethnic identities.
- Article 8(2)(b) provides that States shall provide effective mechanisms for prevention of, and redress for any action which has the effect of dispossessing Indigenous peoples of their lands, territories or resources.
- Article 26(3) provides that States shall give legal recognition and protection to these lands, territories and resources.
- Article 27 provides that States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems, to recognise and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.

It is important that appropriate bodies are recognised to represent Aboriginal and Torres Strait Islander people and to assist them to pursue their native title rights and interests.

The instruments are a key component of the special procedures in the Act for recognising native title rights and interests. Providing ongoing recognition for the invited bodies will further advance the ability of Aboriginal and Torres Strait Islander peoples to achieve self-determination through pursuing economic, social and cultural development in relation to native title.

Conclusion

The instruments are compatible with human rights because they advance human rights particularly the right to enjoy and benefit from culture and the right to self-determination.