THE LAW SOCIETY
OF NEW SOUTH WALES

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4 May 2022

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia

By email: alex.kershaw@lawcouncil.asn.au

Dear Ms Nicoll,

Review of sunsetting legislative instruments of the *Native Title Act 1993* (Cth)

Thank you for the opportunity to contribute to the Law Council's submission to the Attorney-General's Department on the review of the sunsetting legislative instruments of the *Native Title Act 1993* (Cth) (**NTA**). This submission is informed by the Indigenous Issues Committee of the Law Society of NSW.

We raise a number of issues below for inclusion in the Law Council's submission.

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

The Notices Determination provides that notice of several types of future acts, and notice of determination/compensation applications and amended applications, must be published in newspapers, a "relevant special interest publication" and/or given by post (unless otherwise agreed by the person to be notified).

These modes of notification appear to be outdated and are no longer the most effective means of notifying people of applications made under the NTA.

There is no reference in the Notices Determination to digital means of notification, which seems to now be one of the most effective means of notification of applications. The Full Court in *Mace v State of Queensland* [2019] FCAFC 233 at [116] made some comment on the means of notification under the Act being outdated, without specific reference to the Notices Determination:

> Some weight should be given to the fact that there were no responses to the NNTT notifications. The weight this factor should be given is increased by the amount of time the non-claimant application has been on foot, and without any objections being brought to the Court's attention. However, as we have explained above, and as Ms Mailman's evidence demonstrates, the notification process can fail to reach even previous native title claimants who have been actively involved in native title claims over areas which include the non-claimant application area. That may be because the publication of notices in newspapers is no longer the most effective way to reach members of the Indigenous community. There may be a myriad of reasons. In this

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> non-claimant application, where it is common ground there were previous and sustained native title claims over the application area, the absence of responses to the notifications would have been an insufficient basis in and of itself to discharge the Mace applicant's burden of proof.

Although the general practice now appears to be that many meetings are notified by digital means, we suggest that there would be benefit in formalising how this can be done and identifying what should be in a digital form of notice as how people are notified digitally varies significantly depending on who is undertaking the task of notification.

Fee waivers and exemptions

We note that fee waivers for Federal Court forms and applications under s 75 of the NTA (which deals with expedited procedure objections and future act determination applications) currently do not extend to prescribed bodies corporate (**PBCs**) and claimants who are not assisted by a Native Title Representative Body. For expedited procedure objections, particularly in Western Australia where the State government has a blanket policy of considering that the expedited procedure applies to almost all exploration licences, this can be a significant cost impost on PBCs.

Further, there is currently there is no exemption for Local Aboriginal Land Councils (**LALCs**) to pay the prescribed fees. LALCs are active participants in claims and are required by s 42 of the *Aboriginal Land Rights Act 1983* (NSW) to make non-claimant applications. They are generally charitable bodies with limited resources, and they are the only entities that are required to make a non-claimant application before they are entitled to use their land. We note that LALCs are established under remedial and beneficial legislation. Given this, the Law Society submits that they fall within the class of bodies which ought to have a fee exemption or at the very least not have to pay a full corporate rate.

Thank you for the opportunity to comment. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

Joanne van der Plaat
President