

**PRIVATE AND CONFIDENTIAL**

By Email: heather.michell@marion.sa.gov.au  
Ref: NLJM0239303F05168555

8 March 2018

Ms H Michell  
City of Marion  
PO Box 21  
OAKLANDS SA 5046

Dear Heather

**Kaurna Native Title Claim – Final instruction**

1. We refer to our previous correspondence in relation to the above matter, including our letter dated 2 March 2018. We confirm that, consistent with that letter and pursuant to orders made by Justice Mortimer, we filed the **enclosed** Notice on behalf of the Council. The purpose of this Notice is to confirm that the Council is satisfied that the terms of the consent determination properly preserve the Council's interests.
2. There is therefore now one last step in the entire Kaurna Native Title Claim proceeding for the Council to perform—namely, to instruct us to sign the consent determination on your Council's behalf.
3. We **enclose** orders made by the Court on the evening of 7 March 2018, setting out a timetable for the final stages in this proceeding. Pursuant to those orders, we must sign, file and serve the consent determination document on your Council's behalf by no later than 4pm on Wednesday 14 March 2018.
4. Could you therefore please instruct us at your earliest convenience, and in any event by close of business Tuesday 13 March 2018, that your Council consents to the Kaurna determination of native title. You can instruct us in one of the following ways:
  - 4.1 Signing the form which is included on the final page of this letter and emailing it back to us; or
  - 4.2 Otherwise confirming in an email that you instruct us to execute the Kaurna native title determination on the Council's behalf.
5. If it had been the plan that this matter should be put up to a meeting of elected members some time on or after 14 March 2018, then that plan will need to change due the very rapid evolution of the circumstances. The new Court orders prevent this course of action. If it happens to be possible/convenient to obtain a resolution from the elected members in the few days available before 14 March 2018 (such resolution being to the effect that "the Council consents to the Kaurna determination of native title"), then you might choose to do this. However, the very compressed timetable which the Court has provided to the parties realistically means this is probably not practical.

6. We therefore take this opportunity to reassure that this instruction to sign the Kaurua consent determination is not a matter which requires a Council resolution for any statutory reason (and indeed a number of Councils have already instructed us, simply via the relevant contact officers with whom we have been dealing, to sign the determination once it is available for us to sign). We are your retained legal representatives in this Court proceeding (we are recorded on the Court file as such), and the signing of the consent determination is strictly just like the signing of any other Court document.
7. We appreciate that some gravity may seem to surround this step of the proceeding and it may seem slightly ceremonial having to sign this final document. However, this step is simply taken because Section 87(1)(b) of the *Native Title Act 1993* (Cth) requires the Federal Court to have before it an agreement which is “*signed by or on behalf of the parties*” as a statutory precondition to its exercise of the power to make a consent determination.
8. There will not be any delegation on your Council delegations register about this scenario purely because this is not an instance of the exercise of a power conferred on the Council by statute—it is just the ordinary progression of a Court action. There is accordingly no statutory reason why you as our usual instructor, or another officer, cannot provide us, your retained legal representatives who appear on the Court file, with this final instruction to execute the final determination document that has already been agreed between the parties. We add that this is not a ‘policy’ decision of any sort, because the terms of the consent determination have already been agreed and the signing of the final document is merely a procedural necessity.
9. Further, we remind the Council that the ultimate settlement involves a formal determination that there is no native title at all in the Council area. The consent determination therefore can have no prejudicial effect on the Council’s interests with respect to native title, adding greater weight to the view that the instruction to resolve this litigation can be provided administratively.
10. Finally on this point, it is worth noting that since the State is consenting to the determination, any other respondent (such as a Council respondent) who withholds consent would likely bear the cost of any trial which results from the failure of the settlement. We raise this to indicate that it is exceptionally unlikely that any council or other respondent will be withholding consent.
11. However, if there is nevertheless an internal Council procedural reason why this matter must go to the elected membership, and if this cannot occur until 14 March 2018 or later, then we will instead need to be instructed to apply to the Court for leave to withdraw the Council from the proceedings (see Order 7(a) in the enclosed orders). There will be some legal cost associated with making such an application. We confirm our view that it is preferable to provide consent if possible rather than withdraw. As discussed above and in our earlier letters, there is no adverse impact upon the Council whatsoever of this consent determination in respect of native title issues.
12. Upon reviewing the enclosed orders, you will see that the orders contemplate that the Court may make an order extending time for consent. However, the seeking of such an extension would require the filing of an application and suitably persuasive affidavit material (all involving further legal cost). In any event, we consider that the Court ultimately would not in any circumstance extend the deadline on account of your Council due to the fact that, on the terms of the determination, there is to be no native title in the Council area.

13. If you do not respond to this letter sufficiently in advance of 4pm on 14 March 2018, we will be forced to advise the Court that you have not responded and will indicate to the Court that we do not have instructions. The Court may then remove the Council from the proceeding, if the Court considers it is able to do so without hearing from the Council. This outcome may have adverse costs consequences for the Council, and so we strongly advise against this.
14. You will note also from the enclosed orders that the formal consent determination hearing is listed for 9.30am on 21 March 2018 in the Federal Court building in Adelaide. At that hearing, Justice Mortimer will deliver some remarks, and the Kurna determination of native title will formally be made. This will be open to the public. We will liaise with the Court to ascertain what number of local government representatives can be specifically accommodated in the space available (many Kurna persons will also be in attendance), and so please advise us if the Council would like to send any representative/s along.
15. We will provide a concluding letter to the Council after the consent determination hearing.
16. We now set out a space (see below) for you or another officer to sign in order to instruct us to execute the Kurna consent determination on the Council's behalf. Please do not hesitate to contact the writer, or Chris Alexandrides (8210 1299 or [calexandrides@normans.com.au](mailto:calexandrides@normans.com.au)), if you would like to discuss the matters outlined in this letter.

Yours faithfully  
Norman Waterhouse



Nick Llewellyn-Jones  
Principal  
Direct Line: (08) 8210 1269  
e-mail: [nllewellyn-jones@normans.com.au](mailto:nllewellyn-jones@normans.com.au)

I, .....  
instruct Norman Waterhouse Lawyers, who are recorded on Federal Court file SAD6001/2000 as the Council's legal representatives, to execute the Kurna determination of native title on behalf of City of Marion.

Signed .....

Date .....