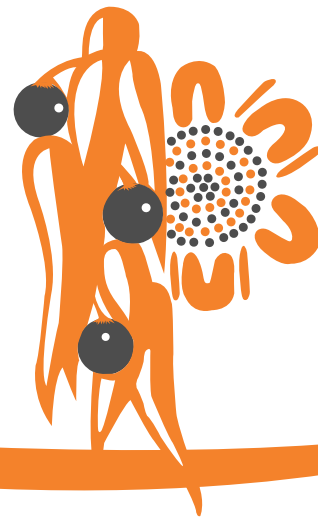


Native Title Checklist for LG Asset Managers and Property Officers



What is native title?

Native title is the term used by the High Court to recognise certain communal, group or individual rights of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs.

The native title of a particular group will depend on the traditional laws and customs of those people. The content of native title may include a variety of rights and interests, such as, living, hunting, gathering, fishing, ceremonial, rights of access, use and occupation, and visiting to protect important places. It may include the right to be consulted about decisions or activities that could affect the enjoyment of native title rights and interests.

Where does native title exist?

An application for a determination of native title can only be made in areas where it has not been extinguished (removed). Native title may exist on:

- Unallocated Crown land;
- State forests, national parks, public reserves and certain land reserved for particular purposes or uses;
- Some kinds of Crown-to-Crown grants, including grants from a State/Territory to a local Council (except land validly granted and held in fee simple by Council);
- Land set aside for the benefit of or granted to Aboriginal and Torres Strait Islander people;
- Oceans, seas, reefs, lakes and inland waters;
- Some leases, such as non-exclusive pastoral and agricultural leases, depending on the State/Territory legislation under which they were issued.

In most areas where native title is determined by the Federal Court to exist, it will co-exist with the rights and interests of others.

Where has native title been extinguished (removed)?

The Australian legal system does not recognise native title rights and interests in some areas where things have been done to extinguish native title. In those areas native title may be partly or wholly extinguished.

Native title has been wholly extinguished on areas such as:

- Privately owned land (including family homes and privately owned freehold farms);
- Residential, commercial, community purpose and certain other leases;
- where governments have built roads, schools and other public works on or before 23 December 1996.

These areas of land cannot be included in an application for a determination of native title. They are generally excluded from the area description in the application.

What are the implications for Asset Managers and Property Officers?

Asset Managers and Property Officers may, particularly in rural and non-metropolitan parts of Australia and in some coastal areas, need to consider the impact of their activities on native title. Native title rights and interests should be taken into account when acquiring Crown lands from State or Territory Governments; when disposing of Council owned land that came to Council by way of a Crown-to-Crown grant, or when renewing or approving new permits, licences or leases in areas where native title exists or may exist. If the activity affects native title, there are processes that Council will need to follow for the activity to be valid, or for it to be immune from injunctive action. If the proper procedures are not followed, an activity may be invalid and Council may at some time in the future be exposed to an injunction and/or claims

for damages and compensation. Compensation may be payable in any event. Even where the activity would be valid notwithstanding that the processes are not followed, native title holders may succeed in getting an injunction to prevent the activity being undertaken.

Council may carry out low impact acts in areas where native title exists or may exist without having to follow any future act procedures under the *Native Title Act 1993* (Cth) or complementary State or Territory legislation. The *Act* operates on the assumption that certain low impact acts will have minimal impact on native title. A low impact act can take place over an area before a determination that native title exists is made without public notice or negotiation with any potential native title holders. Low impact acts cannot continue after a determination is made that native title exists in a particular area. However, after a determination has been made that native title exists in a particular area, such acts may be able to be carried out by agreement with the native title holders. The *Native Title Act 1993* (Cth) does not define what constitutes a valid low impact act. It only identifies what it must not involve. Council will therefore need to discuss these matters with native title holders or claimants and may need to seek independent expert advice on what constitutes a low impact act.

CHECKLIST:

The Australian Local Government Association has developed a six-step Action Plan* to assist Councils in adopting a precautionary approach.

ALGA Action Plan

An Action Plan for Asset Managers

Step 1.

Searching the Registers.

Three formal Registers of native title and an informal Schedule of Applications are held by the National Native Title Tribunal.

Asset Managers and Property Officers need to know whether or not a particular area of land or waters is subject to a native title determination or a registered application or a registered Indigenous Land Use Agreement. The formal Registers of native title and the Schedule of Applications need to be searched. (See pp79-81 of WWNT Guide.)

Step 2.

Analysing Council's responsibility for procedural rights.

In certain circumstances native title holders and registered claimants (also known as applicants) are entitled to certain procedural rights. That is, the right to be notified and given an opportunity to comment, or the right to be consulted, or the right to negotiate.

Asset Managers and Property Officers need to understand in what circumstances native title holders or registered native title applicants are entitled to certain procedural rights. Asset Managers and Property Officers also need to understand who to contact in the event that there are currently no known native title holders for an area if Council is proposing to carry out certain activities in an area where native title exists or may exist or the correct native title holders where native title exists. This can be done by contacting the relevant Native Title Representative Body. (See pp88-93 of WWNT Guide.)

Step 3.

Becoming a party to an application for a determination of native title.

Being a party means that Council gets to join in the process and be able to participate in mediation and, if necessary, in court.

Asset Managers and Property Officers may need to assist Council in deciding whether or not Council should become a party to an application for a determination of native title in the Federal Court so that it can participate in mediation and be able to continue to carrying out its functions. (See pp95-109 of WWNT Guide.)

Step 4.

Identifying where native title exists or has been extinguished.

It is possible to identify in general terms, areas where native title exists or has been extinguished.

Asset Managers and Property Officers need to know where native title exists, may exist or has been extinguished, especially for land or waters under Council's care, control and management. This is an area where Council may need expert advice. (See pp111-151 of WWNT Guide.)

Step 5.

Future acts: Council's responsibility for validity.

There are processes under the *Native Title Act 1993* (Cth) for ensuring activities are valid and lawful in so far as they affect native title rights and interests.

Asset Managers and Property Officers need to be familiar with the relevant processes under the *Native Title Act 1993* (Cth) for ensuring their activities are lawful and valid in so far as they affect native rights and interests. Different procedural rights apply to different types of activities. Indigenous Land Use Agreements take precedence over the other processes for future acts in the *Native Title Act 1993* (Cth). (See pp161-200 of WWNT Guide.)

Step 6.

Negotiate agreements.

Indigenous Land Use Agreements take precedence over all other processes and can be negotiated at any time.

Asset Managers and Property Officers need to be aware of the opportunities for Indigenous Land Use Agreements (ILUA) and when it may be appropriate to register an ILUA. (See pp214-220 of WWNT Guide.)

* More details on the Action Plan are contained in the ALGA's *Working with Native Title* (WWNT) Guide. Implementing the Action Plan will assist Council in making sure it fulfils its obligations in relation to native title matters.

WHO TO CONTACT FOR ASSISTANCE:

Your State/Territory Local Government Association.

Australian Local Government Association,
Phone 02 6122 9400. Email: alga@alga.com.au
Website: www.alga.com.au/nativeTitle.htm

Commonwealth Attorney-General's Department (in relation to financial assistance),
Phone 02 6250 6770. Website: www.ag.gov.au/aghome/commaff/flad/legal_aid/ntguide.html

National Native Title Tribunal,
Phone freecall 1800 640 501. Website: www.nntt.gov.au

To find the relevant National Title Representative Body for your area visit the NTRB website at www.ntrb.net and click on the map of NTRB's for Australia.



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