

Native Title Checklist for CEO's/GM's



Local Councils and Native Title

Local Councils need to have a good understanding of the processes involved in native title legislation. As government bodies, local Councils are custodians of substantial tracts of land and carry out functions on behalf of the wider community, sometimes in areas where native title exists or may exist. Therefore, native title matters should be addressed in Council's strategic, corporate and operational decision making in the same way that Council addresses environment and heritage functions.

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 and will vary between different groups as well as from place to place. People who hold native title have the right to continue to practice certain of their law and custom over traditional lands and waters so long as those activities are consistent with Australian law. This 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.

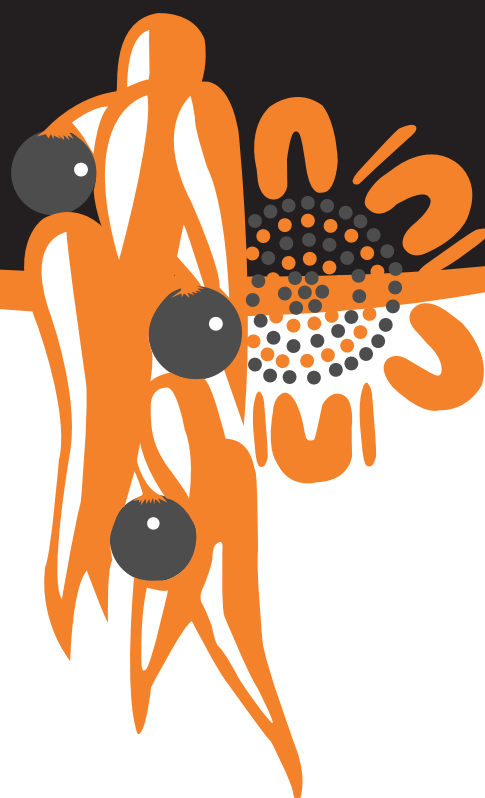
The common law dealing with native title is still evolving. The Federal and High Courts continue to clarify the extent to which native title rights and interests can be recognised and protected at common law.

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.

Generally speaking, full native title resembling anything like ownership will only be found to exist over some unallocated Crown land, certain Aboriginal reserves and some pastoral leases held by native title holders. This means that, for most of the areas where native title is determined by the Federal Court to exist, it will co-exist with the rights and interests of non-native title holders.



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;
- Areas 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 an application.

What are the implications for local Councils?

Many things that Councils do in relation to land or waters may affect native title rights and interests. When carrying out certain types of activities or when planning an activity or development in areas where native title exists or may exist and it affects native title, Councils will need to consider the impact of their activities on native title rights and interests.

There are processes that Council will need to follow for the activity to be valid, or for it to be immune from injunctive action, particularly in rural and non-metropolitan parts of Australia and in some coastal areas. If these procedures are not followed, an activity may be invalid and Councils 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 relation to 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 such a determination is made. 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. The *Act*

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.

Adopting a precautionary approach

Incorporating native title matters into Council's operations will minimise the risk of future claims for damages and/or injunctions for invalid actions affecting native title rights and interests, and will minimise the potential for community division in relation to these matters.

Environmental and heritage protection legislation have evolved and developed over the last two decades and we now regard these factors as acceptable components of sound planning and land management practices. In the same way that local Councils ensure compliance with these obligations, compliance with native title processes needs to be included as a component of any proposal for dealing with land or waters where native title exists or may exist.

CHECKLIST:



1. Has Council considered adopting a precautionary approach?

Council can adopt a precautionary approach to native title matters.

This involves:

- identifying where native title continues to exist or may continue to exist, and where native title no longer exists;
- considering becoming a party to relevant native title determination applications in the Federal Court and participating in mediation with the National Native Title Tribunal;
- consulting with and developing a working relationship with native title holders or applicants and the relevant Native Title Representative Body; and
- having a reasonable understanding of what procedures the Council will need to follow in order to carry out particular activities in areas where native title exists or may exist.

The reasons for adopting a precautionary approach to native title matters are:

- the need for local Councils to recognise everyone's lawful rights;
- the need to minimise the exposure of Council to injunctions or claims for damages and compensation;
- following the proper procedures in native title legislation will ensure that development outcomes are lawful and valid (in so far as they affect native title); and
- the need for Councils to develop and maintain productive ongoing working relations with Aboriginal or Torres Strait Islander people.



2. Have native title matters been incorporated into Council's strategic, corporate and operational decision making?

While there is no specific necessity under the *Native Title Act 1993* (Cth) for Council to refer to native title matters in its strategic or corporate planning processes, it makes good management sense to ensure the rights and interests of native title holders are taken into account at the earliest possible stages in Council's planning and management processes. As these documents are such key documents, Council may wish to consider reviewing these documents to include native title matters.

Where native title exists, Council has a responsibility to ensure that its planning, development and management activities are carried out in ways that respect and protect native title rights and interests in accordance with the *Native Title Act 1993* (Cth) and the *Racial Discrimination Act 1975* (Cth).

It may be necessary to make changes in the timing of particular routine activities or practices or allow more time to liaise with native title holders or registered native title applicants. These matters should be discussed with the relevant parties and, if possible, agreements negotiated in relation to procedural requirements.

The six-step action plan developed by the Australian Local Government Association can assist Council in making sure it fulfils its obligations (discussed below).



3. How does Council contact the native title claimants?

The notification Council receives from the National Native Title Tribunal will generally include the contact details of the nominated representative for the claimants. You can contact this person or you can approach the Native Title Representative Body.

The *Native Title Act 1993* (Cth) enables the Federal Minister with responsibility for Aboriginal and Torres Strait Islander matters to appoint Native Title Representative Bodies (NTRB's) to represent the interests of Aboriginal peoples or Torres Strait Islanders within a particular region on native title matters. These bodies may be local Indigenous land councils or legal aid services that have a special responsibility to assist and represent native title holders and claimants. To find the relevant NTRB for your area visit the NTRB website at www.ntrb.net

The NTRB has a responsibility to ensure you make contact with the correct traditional owners for an area.

They may also be able to assist with protocols and communication with the native title holders or claimants. It is advisable therefore, to establish good working relations with the relevant NTRB.



4. Which parts of Council operations need to be familiar with native title processes?

Any parts of Council that are involved in land planning and management activities will need to be familiar with native title processes. Activities or developments that may impact on native title include:

- Changing the use of an area (e.g. land development);
- Renewing or issuing licences, permits or leases for an area;
- Constructing buildings or facilities, such as community centres, recreation facilities and parks;
- Maintaining and providing services to the public, such as upgrading roads or other new public infrastructure;
- Approving or carrying out any kind of new activity on a reserve or unallocated land.

Native title should be added to all checklists dealing with land and waters and incorporated into all planning and management documents and processes.



5. A six-step action plan.

The Australian Local Government Association (ALGA) has developed a six-step action plan to assist Councils in adopting a precautionary approach. Implementing the Action Plan will assist Council in making sure it fulfils its obligations in relation to native title matters

ALGA ACTION PLAN

ALGA Action Plan

- 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.
- 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. Council also needs to know what to do in the event that there are currently no known native title holders for an area.
- Step 3. Becoming a party to an application for a determination of native title.**
Council will need to decide, or may have decided, to become a party to an application for a determination of native title. Being a party means that Council is able to be part of the process and to participate in mediation and, if necessary, be able to appear in court.
- 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.
- 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
- Step 6. Negotiate agreements.**
Indigenous Land Use Agreements take precedence over all other processes and can be negotiated at any time.

* A more comprehensive brochure on the different scenarios and the relevant steps that need to be actioned is also available from ALGA or on the ALGA's website. More details on the Action Plan are contained in the ALGA's *Working with Native Title* Guide. See the contact details below. 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/flldad/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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