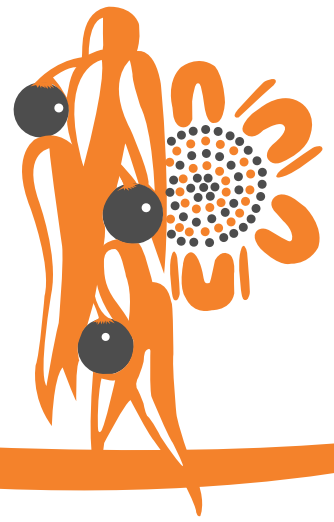


Native Title Checklist for a Local Government Legal Officer/Advisor



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 their law and custom over traditional lands and waters. 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.

What are the implications for local Councils?

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 this may be in areas where native title continues to exist 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.

Adopting a precautionary approach

Incorporating native title matters into Council's strategic, corporate and operational decision making 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.

The Australian Local Government Association (ALGA) has prepared two resource manuals designed to assist Councils in adopting a precautionary approach to native title matters. The *'Working with Native Title'* Guide contains a six-step action plan. The *'Working out Agreements'* Guide provides guidance on the development of agreements between local Councils and Indigenous Australians on any matters, including native title. Copies of the Guides can be obtained from ALGA. See contact details below.

Within the *Native Title Act 1993* (Cth), the provisions for agreements take precedence over all other procedures for dealing with future acts. The primary interest in the question of whether to litigate or negotiate, from any perspective, should be, which alternative produces the greatest possibility of satisfaction of a party's interests at least cost? Even on an intuitive level, the balance comes down firmly in favour of negotiation.

Financial Assistance by the Attorney-General in Native Title Cases

Financial assistance may be available to a party to a native title proceeding, including local Councils. The Attorney-General's Department has published guidelines and these can be accessed on the internet at:
http://www.ag.gov.au/aghome/commaff/flad/legal_aid/ntguide.html

Financial assistance is available to persons not only in litigation cases, but also in relation to Indigenous Land Use Agreements or for pursuing mediation and/or obtaining legal advice. Assistance may cover legal and other professional costs; counsel's fees; expert fees (i.e. anthropological, mediation); reasonable accommodation and travelling expenses; and other reasonable disbursements. For contact details see below.

The need for expert advice

While the Guides are a useful resource, there are several matters on which Council may need expert advice, especially in relation to any particular area. The following is a very brief outline of the key areas of concern for local Councils.

a) 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 of the areas where native title continues to exist, it will co-exist with the rights and interests of non-native title holders.

b) 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 public works on or before 23 December 1996.

These areas of land are described in the *Native Title Act 1993* (Cth) as previous exclusive possession acts, and cannot be included in an application for a determination of native title. All applications now include an outer boundary description and an exclusions clause identifying the types of tenures and areas that are excluded from the application.

Whether native title will be recognised at common law in relation to an area also depends on whether the parties claiming to hold native title can establish a continuing connection with the area in question. This is not an easy matter to establish and can only be determined by consent between the parties or by judicial determination in the Federal or High Courts.

c) Council's role in becoming a party to an application for a determination of native title

By becoming a party, Council gets to join in the process and be able to participate in mediation and, if necessary, in court. As a party to any applications for native

title determination in their area, Council will be kept informed as the application progresses through the Federal Court and the National Native Title Tribunal. It may indeed be necessary to enter into mediation so that Council will be able to continue carrying out its public functions in areas under its care, control and management. These matters can only be resolved through discussion and negotiation.

d) 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.

e) Council's responsibility for ensuring validity of future acts

Many things that Councils do in relation to land or waters may affect native title rights and interests. When carrying out day-to-day activities or when planning an activity or development in areas where native title exists or may exist, 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. Different procedural rights apply

to different types of activities. If these procedures are not followed, an activity may be invalid and Council may be exposed to an injunction and/or claims for damages and compensation. Indigenous Land Use Agreements take precedence over the other processes in the *Native Title Act 1993* (Cth). 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.

f) The development of Indigenous Land Use Agreements (ILUA)

These are formal agreements that can be made under the *Native Title Act 1993* (Cth) between various parties, including local Councils, and native title holders and/or claimants in relation to native title matters. They can be registered, and once registered an ILUA operates as a formal contract that is binding on all parties, including all native title holders for the area who are not party to an agreement. There are three types of ILUAs. (body corporate agreements, area agreements, and alternative procedure agreements). The type of ILUA to be used will depend on whether or not there has been a determination that native title exists over the area, and on the subject matter that needs to be addressed in the agreement.

g) Low impact future acts

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, an agreement can be made that the act may continue. Council will 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.

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.



AUSTRALIAN
LOCAL
GOVERNMENT
ASSOCIATION



ATSIC



NATIONAL NATIVE
TITLE TRIBUNAL



ATTORNEY-
GENERAL'S
DEPARTMENT