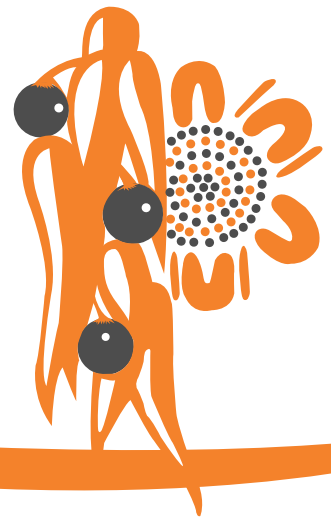


Native Title Checklist for LG Planners



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?

Native title can only be claimed 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 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 the application.

What are the implications for Planners?

Local Government Planners may, particularly in rural and non-metropolitan areas and in some coastal areas, need to consider the impact of their activities on native title. When developing new planning documents or amending existing planning documents for an area where native title exists or may exist, it will be in Council's and everyone's best interests to ensure that native title matters are taken into consideration and that Aboriginal and Torres Strait Islander people are able to be involved in planning processes just as other people are able to be involved.

Do statutory planning documents affect native title rights and interests?

There are many unanswered questions in relation to the impact of land use planning processes on native title. At this stage it is clear that native title holders are subject to existing Commonwealth, State and Territory and local laws, including land use planning schemes, health and building by-laws and environmental protection legislation in relation to their native title rights and interests.

Generally, all State/Territory and Local Government laws apply to native title provided they are consistent with the *Native Title Act 1993* (Cth). Care must be taken in applying land use planning and environmental protection controls to the exercise of traditional native title rights and interests so as not to breach the *Racial Discrimination Act 1975* (Cth).

If the outcome of new statutory planning documents or amendments to existing statutory planning documents will affect native title rights and interests, then 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.

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 Planners
Step 1.	<p>Searching the Registers. Three formal Registers of native title and an informal Schedule of Applications are held by the National Native Title Tribunal.</p>	<p>Planners need to know whether or not the area they are working in 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 need to be searched. (See pp79-81 of WWNT Guide.)</p>
Step 2.	<p>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.</p>	<p>Planners need to understand when and how the procedural rights apply and may need to adjust planning and consultation processes to take account of Indigenous interests, including native title matters, as early in planning processes as possible. Planners also need to understand who to contact and consult in the event that there are currently no known native title holders for an area. (See pp88-93 of WWNT Guide.)</p>
Step 3.	<p>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.</p>	<p>Planners need to know whether or not Council is party to an application for a determination of native title in the Federal Court and whether Council is currently involved in mediation. Council's long term planning needs and intentions may need to be taken into consideration. (See pp95-109 of WWNT Guide.)</p>
Step 4.	<p>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.</p>	<p>Planners need to know, in general terms, where native title exists, may exist or has been extinguished, especially if new planning documents are being created or existing planning documents are being amended for area where native title exists. (See pp111-151 of WWNT Guide.)</p>
Step 5.	<p>Future acts: Council's responsibility for validity. There are processes under the <i>Native Title Act 1993</i> (Cth) for ensuring activities are valid and lawful in so far as they affect native title rights and interests.</p>	<p>Planners need to be familiar with the relevant processes under the <i>Native Title Act 1993</i> (Cth) for ensuring 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 <i>Native Title Act 1993</i> (Cth) (See pp161-200 of WWNT Guide.)</p>
Step 6.	<p>Negotiate agreements. Indigenous Land Use Agreements take precedence over all other processes and can be negotiated at any time.</p>	<p>Planners need to be aware of the opportunities for agreements and when it may be appropriate to register an Indigenous Land Use Agreement. (See pp214-220 of WWNT Guide.)</p>

* 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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