

Working with Native Title: Linking native title and Council processes

2nd Edition, April 2002



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NATIVE TITLE
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National Native Title Tribunal (NNTT) and
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Legal Assistance Branch, Attorney-General's Department

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NATIONAL NATIVE
TITLE TRIBUNAL

Where can Council get 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

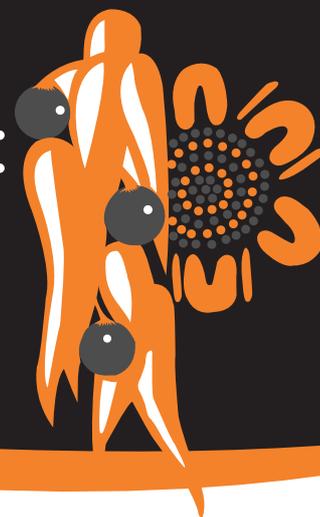
Commonwealth Attorney-General's Department (in relation to financial assistance),
Phone: 02 6250 6770
Website: www.ag.gov.au/aghomet/commaff/flad/legal_aid/ntguide.html

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

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

To order copies of the *Working with Native Title* and *Working out Agreements* Guides see order form on the back of this brochure.

Working with Native Title: Linking native title and Council processes



2nd Edition, April 2002

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 local Councils address environment and heritage functions.

What is native title?

Native title is the term used by the High Court to recognise the 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 a particular 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 will 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 (where they are not privately owned);
- Some leases, such as non-exclusive pastoral and agricultural leases, depending on the State/Territory legislation under which they were issued.
- Such lands and waters may at some time in the future be subject to a native title determination application, if they are not already subject to an application.

Generally speaking, full native title resembling anything like ownership will only be available 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 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.

Initially, when the *Native Title Act 1993* (Cth) was first enacted following the High Court's decision in *Mabo* (No. 2), it was not very clear exactly what types of tenures or activities extinguished native title rights and interests. When the *Native Title Act 1993* (Cth) was amended in 1998, the amendments included a list of the different types of land titles that Governments believe extinguish native title. The list includes some past acts. It also includes previous exclusive possession acts, which are acts done on or before 23 December 1996 (the date of the High Court's *Wik* decision). Such acts completely extinguish all native title rights and interests for an area.

The list of previous exclusive possession acts includes:

- a Scheduled interest listed in Schedule 1 of the *Native Title Act 1993* (Cth) and enacted in complementary State/Territory legislation;
- a freehold estate or privately owned land or waters (including family homes and privately owned freehold farms);
- residential, commercial, community purpose leases;
- an exclusive agricultural or pastoral lease;
- any lease (other than a mining lease) that confers exclusive possession over particular land or waters;
- certain vestings or reservations which are in the care, control or management of State/Territory agencies or local Councils; and
- the valid construction or establishment of any public work that was commenced 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.

In what situations may native title no longer exist?

In addition to extinguishment as outlined above, Aboriginal and Torres Strait Islander peoples' rights and interests in relation to land and waters may have been lost, as far as Australian law is concerned, in several ways.

The Federal Court may decide for a variety of reasons that native title no longer continues to exist for an area. Factors that may influence such a determination include:

- the native title holders ceasing to exist;
- the Aboriginal people or Torres Strait Islanders ceasing to observe their customary laws and traditions on which their title is based;
- loss of continuing connection with an area;
- the Aboriginal people or Torres Strait Islanders surrendering their native title to the Crown, possibly in exchange for other benefits.

Native title is not fixed for all time. It can change and evolve according to traditional laws and customs.

Native Title Timeline

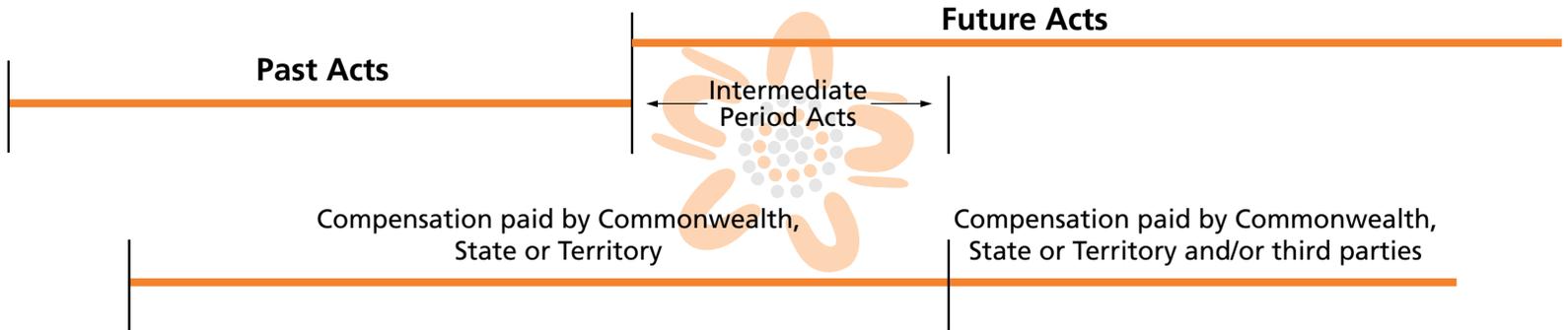
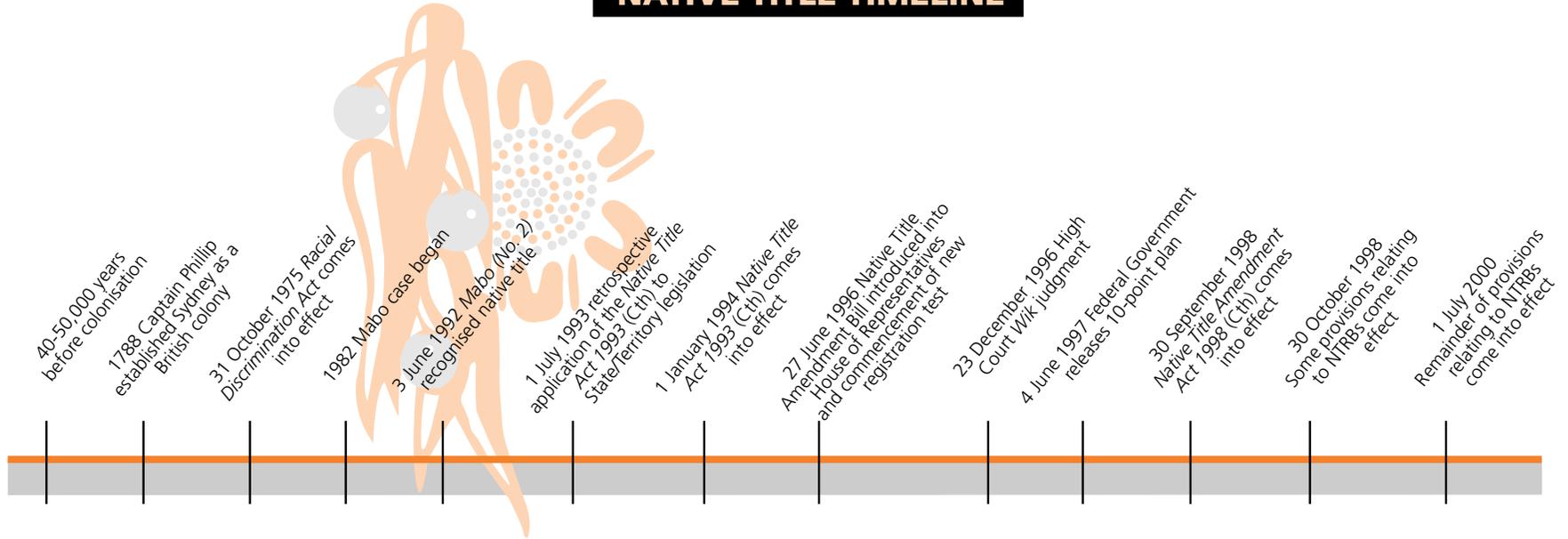
The operation of the *Native Title Act 1993* (Cth) revolves around several key dates. These dates and their purpose or relevant event, are shown on the opposite page.

The best way of understanding the effect of some of the provisions and key dates is to view them as a time line as shown in the diagram on page 4.

Native Title Timeline

| DATE | EVENT OR PURPOSE |
|--------------------------|---|
| 31 October 1975 | The date the <i>Racial Discrimination Act 1975</i> (Cth) came into effect. |
| 1 July 1993 | A date chosen by the Federal Government to ensure, retrospectively, that any State/Territory native title legislation is consistent with and/or complementary to the <i>Native Title Act 1993</i> (Cth). |
| 1 January 1994 | The date the <i>Native Title Act 1993</i> (Cth), as first enacted, came into effect. This is generally, apart from some specific exceptions, the first effective date for the future acts regime and the first effective date for intermediate period acts. |
| 27 June 1996 | The date the <i>Native Title Amendment Bill 1996</i> was introduced into the House of Representatives. |
| 23 December 1996 | The date of the High Court's judgment in <i>Wik Peoples v The State of Queensland and Ors</i> (1996) 141 ALR 129. This is the last effective date for intermediate period acts, previous exclusive possession acts and non-exclusive possession acts. It is also the last effective date for which the Commonwealth, States or Territories will accept responsibility for compensation for the extinguishment, loss, diminution or impairment of native title rights and interests arising from such acts. From this date on third parties may also be liable for compensation for certain future acts affecting native title rights and interests. |
| 31 March 1998 | The date on which the Federal Government deemed all legislation relating to pastoral lease land in the relevant jurisdictions contained wide discretions as to what could be done over the land. |
| 30 September 1998 | The date the <i>Native Title Amendment Act 1998</i> came into effect, with the exception of the provisions relating to Native Title Representative Bodies. |
| 30 October 1998 | The date Part 1 of Schedule 3 of the <i>Native Title Amendment Act 1993</i> (Cth) relating to Native Title Representative Bodies came into effect. |
| 1 July 2000 | The date Part 2 of Schedule 3 of the <i>Native Title Amendment Act 1998</i> (Cth) relating to Native Title Representative Bodies came into effect. |

NATIVE TITLE TIMELINE



The diagram on page 4 shows the key dates relating to:

Past Acts:

Past acts are generally activities that took place on or before 1 January 1994, the commencement of the *Native Title Act 1993* (Cth), or the making, repeal or amendment of legislation that occurred before 1 July 1993, and that affected native title. Past acts are made valid under the *Native Title Act 1993* (Cth) and cannot be undone. There are four categories of past acts. Native title is extinguished by the validation of some categories of past acts. The non-extinguishment principle applies to the validation of other categories of past acts.

Intermediate period acts:

Intermediate period acts are activities that took place between the commencement of the *Native Title Act 1993* (Cth) on 1 January 1994 and the *Wik* decision by the High Court on 23 December 1996 over areas that were at any stage subject to freehold, non-mining leasehold or public works, and that affected native title. These activities would otherwise be invalid because of failing to follow the future act processes, but were made valid by the amendments to the *Native Title Act 1993* (Cth) in 1998 and cannot be undone. There are four categories of intermediate period acts. Native title is extinguished by the validation of some categories of intermediate period acts. The non-extinguishment principle applies to the validation of other categories of intermediate period acts.

Future acts:

Future acts are activities taking place after 1 January 1994 (there are some exceptions) and legislative acts taking place on or after 1 July 1993, that are not past acts or intermediate period acts and are acts that affect native title. Unless a future act is covered by one of the provisions of the *Native Title Act 1993* (Cth), it is invalid to the extent that it affects native title. To ensure the validity of a future act the processes set out in the *Native Title Act 1993* (Cth) should be followed. Indigenous Land Use Agreements take precedence over other procedures for dealing with future acts. Unless otherwise stated in the *Native Title Act 1993* (Cth), the non-extinguishment principle generally applies to valid future acts. Only a limited number of types of valid future acts extinguish native title permanently.

Compensation:

In relation to compensation, the timeline shows who is liable for compensation for the effect of valid acts on native title rights and interests. In general,

Commonwealth, State and Territory Governments are liable for compensation for the extinguishment, loss, diminution or impairment of native title rights and interests on or before 23 December 1996 arising from certain valid past acts or intermediate period acts and from the confirmation of extinguishment by previous exclusive possession acts and non-exclusive possession acts (ss.23A-23J). From 23 December 1996 there are some circumstances where the third party responsible for certain kinds of valid future acts affecting native title will be liable to pay compensation. For example: a person seeking a grant of an interest in Crown land for development; a local Council changing the use of a reserve and undertaking public works or development on the land; a lessee seeking to exercise an existing right to upgrade and/or change the nature of use of a pre-23 December 1996 lease which did not exist prior to 23 December 1996.

Any person or agency who carries out an act that invalidly affects native title may be liable to pay compensation to the native title holders for the effects of the act on native title.

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, Councils will need to consider the impact of their activities on native title rights and interests. Acts or activities that affect native title are termed 'future acts' in the *Native Title Act 1993* (Cth).

There are processes set out in the *Native Title Act 1993* (Cth) that Council will need to follow to ensure validity or to be immune from injunctive action, particularly in rural and non-metropolitan parts of Australia and in some coastal areas. 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). If the correct procedures are not followed, an activity may be invalid and Council may 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.

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.

A six-step action plan

A six-step action plan has been developed by the Australian Local Government Association (ALGA) to assist Councils in adopting a precautionary approach. Implementing the Action Plan will assist Councils in making sure they fulfill their obligations in relation to native title matters. The Action Plan has been designed so that it can be applied as part of Council's strategic, corporate and operational decision-making or in relation to a specific area or project. Table 1 provides a brief overview of the Action Plan.

A full explanation of the action plan can be found in the ALGA's *Working with Native Title Guide*. The Guide provides background information and checklists for each step.

Table 1. An Action Plan for a precautionary approach to native title

| | |
|----------------|--|
| STEP 1. | Searching the Registers. Three formal Registers are held by the National Native Title Tribunal and an informal Schedule of Applications. The formal Registers are: the National Native Title Register; the Register of Native Title Claims and the Register of Indigenous Land Use Agreements. |
| STEP 2. | Analysing Council's responsibility for procedural rights. In certain circumstances native title holders and registered native title 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 <i>Native Title Act 1993 (Cth)</i> 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 full explanation of the Action Plan can be found in the *Working with Native Title Guide*. Background information and checklists are provided for each step. An order form is included on the back page of this brochure.

What scenarios are Councils likely to find?

There are four possible scenarios that Councils are likely to come across in relation to native title. Each scenario requires different responses, especially in relation to future acts (acts affecting native title). The table below sets out the four scenarios and the possible courses of action in relation to future acts.

| SCENARIO | PROPOSED ACTION |
|--|---|
| Scenario 1. | |
| An application for a determination of native title has been lodged with the Federal Court and is being processed. It may be a registered application or an unregistered application. | Native title may exist or has been extinguished. Before a determination is made by the courts, options include developing an ILUA or following the other processes for future acts in the <i>Native Title Act 1993</i> (Cth). |
| Scenario 2. | |
| A determination has been made that native title exists in some areas and/or has been extinguished in other areas. | If a determination has been made by the Federal Court or High Court that native title has been extinguished, then native title is no longer a consideration for that area. However, if a determination has been made by the courts that native title exists, then options include developing an Indigenous Land Use Agreement (ILUA) or following the other processes for future acts in the <i>Native Title Act 1993</i> (Cth). |
| Scenario 3. | |
| There are no known native title holders, but native title may exist or native title is found not to exist. | There are a wide range of reasons why native title may be found by the courts not to exist. If native is found not exist in a particular area, then native title is no longer a consideration. However, if native title may still exist in an area, then Council can lodge a non-claimant application with the Federal Court and may be able to obtain s24FA protection for a particular future act(s) in the area. |
| Scenario 4. | |
| There is a registered Indigenous land Use Agreement (ILUA) on the Register of Indigenous Land Use Agreements. | If a registered ILUA exists for a particular area then it may provide that certain procedures must be followed. If Council is a party to the ILUA, any future act processes under the ILUA must be followed. If not, then another ILUA can be negotiated, or the other processes for future acts under the <i>Native Title Act 1993</i> (Cth) will need to be followed. If the ILUA includes the surrender of native title for a particular area, then native title is no longer a consideration in relation to that particular area. |

Which Steps in the Action Plan are relevant to each Scenario?

The tables and flow charts on the following eight pages shows the steps in the action plan relevant to each of the four scenarios.

Scenario 1:

An application for a determination of native title has been lodged with the Federal Court of Australia.



| STEP 1 SEARCH | STEP 2 ANALYSE | STEP 3 BECOMING A PARTY | STEP 4 IDENTIFY | STEP 5 FUTURE ACTS | STEP 6 NEGOTIATE AGREEMENTS |
|---|---|---|--|---|--|
| <p>Check Registers and Schedule of Applications held by the National Native Title Tribunal.</p> <p>The applications may be registered or unregistered. If the Register of Native Title Claims shows there is a registered claimant application in the area, then Step 5 will apply. If the application is not registered (i.e. is on the Schedule of Applications), then Step 5 will not apply.</p> <p>GO TO STEP 2.</p> | <p>Analyse what procedural rights the registered native title claimants may have.</p> <p>GO TO STEP 3.</p> | <p>Consider whether to become a party to the application.</p> <p>If Council chooses to become a party, it will need to consider whether the best method of resolving the matter is by negotiation of an agreement or by litigation. It is becoming clear that the most cost effective method is through negotiation.</p> <p>GO TO STEP 6</p> <p>Or</p> <p>GO TO STEP 4.</p> | <p>Identify where native title may exist or has been extinguished by:</p> <ul style="list-style-type: none"> • conducting a land and water audit; • undertaking a tenure history search (if necessary); and • examining tenure histories and carrying out site inspections for any extinguishing events (Action 1 or Actions 2-5). <p>If native title continues to exist,</p> <p>GO TO STEP 5.</p> | <p>To carry out a future act in an area where native title exists or may exist, certain procedures must be followed. Council has an option of developing an ILUA (Actions 2 and 6)</p> <p>GO TO STEP 6</p> <p>Or</p> <p>Following the future act processes (Actions 4, 5 and 6).</p> | <p>Indigenous Land Use Agreements (ILUA) take precedence over other processes for resolving native title matters.</p> <p>Council may negotiate an agreement about native title matters at any stage.</p> <p>Refer to the Working out Agreements Guide for assistance.</p> |

A determination has been made by the Federal Court that native title exists

Scenario 2

Search (Step 1)

Are there any determinations that native title exists?

Yes.

Native title is determined to exist in a particular area. The registered native title body corporate for the area will be the primary point of contact for the native title holders. (Step 2)

Does Council want to carry out a future act in the area now?

Yes. The native title holders have certain procedural rights. (Step 5)

No

ILUAs take precedence over other processes. Negotiate an ILUA (Step 6)

OR

Follow the future act processes. (Step 5: Actions 4, 5 and 6.)

Negotiating an ILUA is always an option with native title holders at a later date if Council wants to carry out a future act some time in the future. (Step 6)

Native Title taken into consideration

Scenario 2:

A determination has been made by the Federal Court that native title exists.

2

| STEP 1 SEARCH | STEP 2 ANALYSE | STEP 3 BECOMING A PARTY | STEP 4 IDENTIFY | STEP 5 FUTURE ACTS | STEP 6 NEGOTIATE AGREEMENTS |
|---|---|-------------------------------|------------------------|--|--|
| <p>Check Registers and Schedule of Applications held by the National Native Title Tribunal.</p> <p>National Native Title Register shows a determination has been made by the Federal Court that native title exists in relation to particular area.</p> <p>GO TO STEP 2.</p> <p>If the determination is that native title has been extinguished or lost, then native title is no longer a consideration.</p> | <p>If a determination has been made, then there may be a registered native title body corporate.</p> <p>Analyse what procedural rights the registered native title body corporate or the native title holders will have.</p> <p>If Council wants to carry out a future act:</p> <p>GO TO STEP 5.</p> | <p>Not applicable.</p> | <p>Not applicable.</p> | <p>To carry out a future act, certain procedures must be followed. Council has an option of developing an ILUA (Actions 2 and 6)</p> <p>GO TO STEP 6.</p> <p>Or</p> <p>Following the future act processes (Actions 4, 5 and 6).</p> | <p>Indigenous Land Use Agreements (ILUA) take precedence over other processes for resolving native title matters.</p> <p>Council may negotiate an agreement about native title matters at any stage.</p> <p>Refer to the Working out Agreements Guide for assistance.</p> |

Scenario 3

There are no known native title holders

Search (Step 1)

Are there any applications, determinations or agreements on the Registers or Schedule of Applications?

No.

As an existing right, native title may still be a consideration. Analyse what Council should do where there are no holders, claimants or agreements in the area (Step 2)

Identify where native title exists or has been extinguished? (Step 4)

No extinguishing events. Native title may continue to exist.

Yes there has been an extinguishing event. Native title has been extinguished. Native title is therefore no longer a consideration. No further action is required.

Does Council want to carry out a future act in the area?

Yes. Follow the future act processes (Step 5). Where the potential native title holders are unknown, use non-claimant application (Action 3) or follow the future act processes (Actions 4-6).

No.

Native Title taken into consideration

Scenario 3:

There are no known native title holders.

3

| STEP 1 SEARCH | STEP 2 ANALYSE | STEP 3 BECOMING A PARTY | STEP 4 IDENTIFY | STEP 5 FUTURE ACTS | STEP 6 NEGOTIATE AGREEMENTS |
|--|--|-------------------------------|--|---|--|
| <p>Check Registers and Schedule of Applications held by the National Native Title Tribunal.</p> <p>There are no registered or unregistered claimant applications, no registered determinations of native title and no registered agreements.</p> <p>GO TO STEP 2.</p> | <p>Analyse what Council should do where there are no registered or unregistered native title claimant applications, no registered determinations and no registered agreements.</p> <p>GO TO STEP 4.</p> | <p>Not applicable.</p> | <p>Identify where native title may exist or has been extinguished by:</p> <ul style="list-style-type: none"> • conducting a land and water audit; • undertaking a tenure history search (if necessary); and • examining tenure histories and carrying out site inspections for any extinguishing events (Actions 2-5). <p>If native title is found not to exist because of an extinguishing event, then native title is no longer a consideration. No further action is required.</p> <p>If native title may continue to exist in an area, then</p> <p>GO TO STEP 5.</p> | <p>To carry out a future act, certain procedures must be followed. Council has the option of lodging a non-claimant application (Action 3)</p> <p>Or</p> <p>If potential native title holders become known in response to a non-claimant application, then Council has the option of developing an ILUA or following the future act processes (Actions 4, 5 and 6).</p> | <p>When the native title holders become known there is always the option of negotiating an agreement.</p> <p>Indigenous Land Use Agreements (ILUA) take precedence over other processes for resolving native title matters.</p> <p>Council may negotiate an agreement about native title matters at any stage.</p> <p>Refer to the Working out Agreements Guide for assistance.</p> |

There is a registered Indigenous Land Use Agreement on the Register of ILUAs

Scenario 4

Search (Step 1)

Are there any registered ILUAs in the area?

Yes.
Does the ILUA include the surrender of native title in relation to a particular area?

Yes.
Native title is no longer a consideration.

No.
Is Council a party to the ILUA?

Yes

No

Does Council want to carry out a future act in the area? (Step 5)

Does Council want to carry out a future act in the area? (Step 5)

Yes. Council must follow the processes established under the ILUA. (Step 6)

No

Negotiating a separate ILUA is always an option if Council wants to carry out a future act at a later date. (Step 6)

OR

Follow the future act processes. (Step 5: except Action 3, non-claimant applications)

Native Title taken into consideration

Scenario 4:

There is a registered Indigenous Land Use Agreement (ILUA) on the Register of ILUAs

4

| STEP 1 SEARCH | STEP 2 ANALYSE | STEP 3 BECOMING A PARTY | STEP 4 IDENTIFY | STEP 5 FUTURE ACTS | STEP 6 NEGOTIATE AGREEMENTS |
|---|--|-------------------------------|------------------------|--|--|
| <p>Check the Registers and Schedule of Applications held by the National Native Title Tribunal.</p> <p>The search reveals there is a registered Indigenous Land Use Agreement on the Register of ILUAs.</p> <p>GO TO STEP 2.</p> | <p>Analyse what procedural rights the parties to the ILUA may have under the <i>Native Title Act 1993</i> (Cth) or may have agreed to in the ILUA.</p> <p>GO TO STEP 5.</p> | <p>Not applicable.</p> | <p>Not applicable.</p> | <p>To carry out a future act, certain procedures must be followed.</p> <p>If Council is a party to the ILUA, the processes established under the ILUA must be followed.</p> <p>If Council is not a party to the ILUA, then the future act processes may need to be followed (Actions 1-2, 4-6).</p> <p>GO TO STEP 6.</p> <p>If the ILUA includes the surrender of native title in relation to a particular area, native title is no longer a consideration in relation to that particular area.</p> | <p>Negotiating a separate ILUA is always an option if Council wants to carry out a future act in an area already subject to an ILUA.</p> <p>Indigenous Land Use Agreements (ILUA) take precedence over other processes for resolving native title matters.</p> <p>Council may negotiate an agreement about native title matters at any stage.</p> <p>Refer to the <i>Working out Agreements Guide for assistance.</i></p> |

What are Indigenous Land Use Agreements?

An Indigenous Land Use Agreement (ILUA) is a voluntary agreement about the use and management of land and/or waters made between a native title group and other people, organisations or government agencies, including Local Government.

An ILUA can be one of the most practical ways to resolve native title matters. It allows people to make agreements about how land is to be used or managed without having to resort to litigation or relying on the other complex processes for dealing with future acts within the *Native Title Act 1993* (Cth).

An ILUA may be a stepping stone on the way to a native title determination or it may suit the parties better than a determination. ILUAs may be made about any matters the parties want to have an agreement about. ILUAs are binding just like other agreements, but unlike other agreements, when registered they are binding on all native title holders even if they are not a party to the ILUA.

The advantage of an ILUA is its flexibility - it can be tailored to meet the needs of the parties involved and their particular land use issues. By making agreements, Indigenous Australians may gain benefits such as recognition of their native title rights and interests, employment opportunities and/or compensation. Other parties to the agreement may obtain the use of land for development or for other purposes.

The issues involved for Local Government in relation to ILUAs are discussed in Issues Paper No. 4 which is available on the ALGA website, www.alga.com.au/nativeTitle.htm.

How can Indigenous Land Use Agreements be made?

Courts are not involved in the ILUA process - it is conducted entirely between the parties who wish to negotiate the agreement. Councils wanting to make an ILUA should first seek legal advice. The National Native Title Tribunal can provide assistance if requested, at any point prior to or during the negotiations of an ILUA.

There are three different types of ILUAs: body corporate agreements, area agreements, and alternative procedure agreements. The type of agreement will depend on the circumstances, the area involved and the nature of the issues to be resolved. It is important that the right type of agreement is selected.

Once an agreement is finalised, the parties can apply to the Registrar of the Native Title Tribunal to have it registered. If the ILUA satisfies all the conditions set out in the *Native Title Act 1993* (Cth), the Native Title Registrar is required to notify the public and others that the parties have applied for registration of the ILUA.

When all the conditions have been met and any other obstacles to registration (e.g. objections to registration, if relevant) have been resolved, the ILUA is placed on the Register of Indigenous Land Use Agreements. A registered ILUA binds all native title holders in the area, even if they were not involved in the agreement. It enables development to take place on the land or waters and generally limits compensation payable to the native title group.

The ILUA will then remain on the register unless it expires, parties advise the Registrar that they wish to terminate the agreement, or other specific circumstances occur (e.g. a determination is made and the native title holders are different to those who signed the ILUA).

What are low impact 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 is made that native title exists without public notice or negotiation with any potential native title holders. A low impact act may no longer be regarded as a low impact act once a determination has been made that native title exists in an area. However, after a determination has been made that native title exists, such acts may be able to continue by agreement with the native title holders. The difficulty arises, in part, because the *Native Title Act 1993* (Cth) does not define what constitutes a valid low impact act. The Act only identifies what low impact acts must not involve. It is important to have a clear understanding of what constitutes a low impact act as distinct from a high impact act to ascertain which procedural rights apply under the *Native Title Act 1993* (Cth). Council will therefore need to discuss these matters with native title claimants, preferably prior to a determination of native title, to reach agreement on what kinds of Council activities constitute low impact acts and what does not. Council may also need to seek independent expert advice on what constitutes a low impact act.

How can Council contact the native title claimants or holders?

The notification of a native title determination application Council receives from the National Native Title Tribunal will generally include the contact details for the nominated representative of 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.

If a determination has been made by the Federal Court that native title exists in relation to a particular area, then details of the determination will be entered onto the National Native Title Register held by the National Native Title Tribunal. The entry on the Register will include contact details for the native title holders or their representative.



At the launch of the 'Working with Native Title' Guide in November 1999, left to right, Lucy Macmillan, co-author of the Guide, the Hon Philip Ruddock MP, the then Minister for Immigration and Multicultural Affairs and Minister Assisting the Prime Minister for Reconciliation, Cr John Campbell, the then President of ALGA, Ed Wensing, then Native Title Project Manager and co-author of the Guide, and the Hon Daryl Williams AM QC MP, the Attorney-General, at Parliament House Canberra.

How the 'future acts' regime works¹

There are three critical factors involved in dealing with future acts:

1. working out whether the proposed act or activity is a future act, including whether it is a legislative or non-legislative future act;
2. who will be responsible for carrying out the future act (i.e. Council or the State/Territory);
3. working out which procedure must be followed for the act to be lawful and valid in so far as native title is concerned.

1. Is the proposed activity a 'future act'?

A future act has three essential characteristics. The act or activity:

- must occur on or after 1 January 1994 for non-legislative future acts or on or after 1 July 1993 for legislative future acts²;
- must occur in an area where native title exists or may exist (see Step 4 of the Action Plan in the ALGA's *Working with Native Title* Guide); and
- must affect (extinguish, impair, or in some way limit) the continued existence or enjoyment of native title.

In determining whether a proposed activity is a future act, the following questions will be of assistance.

- a) Is the act or activity to occur on or after 1 January 1994 for non-legislative future acts or on or after 1 July 1993 for legislative future acts?
- b) Is the act or activity going to occur in an area where native title exists or may exist?
- c) Will the act or activity "affect" native title?

For the act or activity to be a future act, the answer to all three questions must be 'yes'.

If an act does not affect native title in any way, the future act regime will not apply.

2. Who is going to carry out the future act?

It is important to establish clearly who is going to be responsible for carrying out the future act.

For example:

- Is the Council going to be carrying out the activity?
or
- Is the State/Territory going to be carrying out the activity? or
- Is the Council going to carry out the activity under delegated authority from the State/Territory?

This will assist in identifying who will be responsible for making sure the correct processes are followed and who should be parties to an Indigenous Land Use Agreement that validates the doing of a future act.

3. Which procedure must be followed?

Under the future act provisions of the *Native Title Act 1993* (Cth), native title holders and registered native title claimants are entitled to certain procedural rights. This means that they have a right to be notified of the proposed future act, or a right to object to the act, or any other right that is available as part of the procedures that are to be followed when it is proposed to do the act. These rights include:

- the opportunity to comment; or
- the right to be consulted; or
- the right to negotiate; or
- the same rights as an ordinary title holder (freeholder).

For an explanation of these procedural rights, see Issues Paper No. 3 '*Following the Future Act Processes under the Native Title Act 1993 (Cth)*', on the ALGA's web site - www.alga.com.au/nativeTitle.htm.

The 'future act' regime within the *Native Title Act 1993* (Cth) includes a number of categories for different types of future acts. (See Table on page 19)

In order to follow the correct procedure, it is necessary to identify the correct category:

- The first category relates to situations where the native title holders or claimants are known and provides for the making of Indigenous Land Use Agreements or ILUAs.
- The second category relates to situations where there are no known native title holders. The procedure available is referred to as a 'non-claimant application'. This is an application by a party that does not hold native title rights and interests for a determination that native title does not exist for a particular area. (See Issues Paper No. 2, '*Future Acts in areas where the native title holders are unknown*' - www.alga.com.au/nativeTitle.htm)
- The remaining categories relate to specific types of activities. That is, the nature of the proposed future act will determine which procedural right the native title holders or registered claimants will be entitled to in order for the future act to be lawful and valid in so far as it affects native title.

Table 1. Future act hierarchy in the *Native Title Act 1993* (Cth).

| FUTURE ACT CATEGORY AND SECTION OF THE <i>NTA 1993</i> (CTH) | OUTCOME OR PROCEDURAL RIGHTS |
|--|--|
| Indigenous Land Use Agreements (ILUA). (S24BA-24EC) | Does Council want to enter into an ILUA to validate a future act instead of using the other processes under the Act? Where relevant, ILUAs may provide for future act(s) to be done, or for the surrender of native title, or to validate future acts that have already been done invalidly. |
| Non-claimant applications. (S24FA) (unopposed) | Does Council want to lodge a non-claimant application in the Federal Court to find out whether or not native title exists in a particular area? If no potential native title holders respond within a prescribed period there is automatic s24FA protection for future acts. If potential native title holders come forward then Council can negotiate an agreement. Note: Cannot use this process if there are registered native title claimants for the area or if there is a determination that native title exists for the area. |
| Primary production and diversification and off-farm activities directly connected to primary production. (S24GB and s24GD) | Opportunity to comment applies. The upgrade of a pastoral lease to freehold requires a compulsory acquisition, which attracts the right to negotiate. (Note: Councils generally do not carry out or authorise these kinds of activities.) |
| Management of water and airspace. (S24HA) | Does Council regulate the management of water and airspace? If so, the opportunity to comment applies. |
| Renewals and extensions of leases and licences and grants of titles under pre-23 December 1996 agreements or commitments. (S24IA) | Does Council authorise the renewal or extension of leases and licences that arise from agreements or commitments made on or before 23 December 1996? If so, the opportunity to comment applies. (Note, in limited circumstances, the right to negotiate may apply (s24ID(4) in relation to mining). |
| Use of reserved land. Activities and dealings regarding pre-23 December 1996 reserve land consistent with purpose and leases to statutory authorities. (S24JA) | In the case of land reserved for particular purposes on or before 23 December 1996, is Council involved in authorising or undertaking activities on the land that are consistent with the purposes for which it was reserved? If so, the opportunity to comment applies |
| Facilities for services to the public. (S24KA) | The <i>Native Title Act 1993</i> (Cth) specifies what constitutes a ‘facility for services to the public’. Does Council’s proposed activity constitute a facility for services to the public? If so, the same procedural rights apply as an ordinary title holder would be entitled to. If over a pastoral lease, then the same rights as pastoral lessee. Note: This provision does not apply if the future act is or requires the compulsory acquisition of native title rights and interests. |
| Low impact future acts. (S24LA) | There are no procedural rights. Note: This provision applies only if the act is of low impact and takes place before and does not continue after a determination is made that native title exists in a particular area. |
| Acts that pass the freehold test. (S24MD) | Freehold test: if act could have been done had the native title holders instead had freehold and if legislation is in place to protect areas of Indigenous significance: <ul style="list-style-type: none"> • The right to negotiate may apply; • The right to be consulted may apply; or • Ordinary title rights apply. Note: The <i>Native Title Act 1993</i> (Cth) specifies a number of circumstances where the freehold test applies. Refer to the Act or the ALGA’s <i>Working with Native Title Guide</i> for details. |
| Acts affecting offshore places. (S24NA) | Procedural rights for native title holders are the same as if they hold non-native title rights. (Note: Councils generally do not carry out or authorise these kinds of activities.) |

¹ See also Issues Paper No. 3 - www.alga.com.au/nativeTitle.htm

² For an act to be a future act the act must consist of the making, amendment or repeal of legislation on or after 1 July 1993, or if it is any other act it must take place on or after 1 January 1994. However, if native title does not exist because of certain valid past acts or certain valid intermediate period acts or where the extinguishment of native title has been confirmed under the *Native Title Act 1993* (Cth) (ss23A to 23JA), then the future act provisions of the Act do not, indeed cannot, apply.

The future act hierarchy in the *Native Title Act 1993 (Cth)*

These future act provisions are hierarchical. To the extent that a future act is covered by a particular provision in the future act hierarchy in the *Native Title Act 1993 (Cth)*, it will be made valid by that particular provision and will not be covered by any provisions relating to a category lower in the list. It is also important to note that the provisions relating to Indigenous Land Use Agreements take precedence over all other procedures for dealing with future acts.

By checking the hierarchy and following the correct processes for the relevant category set out in the *Native Title Act 1993 (Cth)*, Council is able to ensure that a proposed future act will be valid. The future act requirements of the *Native Title Act 1993 (Cth)* can be satisfied by negotiating an Indigenous Land Use Agreement.

If a particular future act is not covered by any of the provisions in the future act hierarchy, it can only be validly done by way of an Indigenous Land Use Agreement (ILUA). Unless a future act is covered by one of the provisions in the future act hierarchy, including by way of an ILUA, the future act is invalid to the extent that it affects native title (s24OA of the Act).

Step 5 of the Action Plan in the 'Working with Native Title' Guide

If Council is responsible for carrying out the future act, Step 5 in the ALGA Action Plan identifies six actions.

- Action 1 is identifying whether the proposed act or activity is a future act.
- Action 2 is negotiating an Indigenous Land Use Agreement in relation to the future act or class of future acts.
- Action 3 is lodging a non-claimant application. This is an appropriate course of action in particular circumstances only.
- Action 4 involves following the appropriate procedures according to the category of future act in the future act hierarchy.
- Action 5 involves the compulsory acquisition of native title rights and interests. This is an appropriate course of action in particular circumstances only.
- Action 6 involves consideration of compensation for the extinguishment, impairment or diminution of native title rights and interests.

Actions 1 and 6 will always need to be considered. Actions 2-5 need to be assessed to determine which course of action is appropriate for the particular future act. Only one of Actions 2, 3, 4 or 5 will need to be followed.

A full explanation of these actions is set out in the ALGA's *'Working with Native Title'* Guide.

Glossary of Terms

Affect: An act or activity affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

Co-existence: To mutually exist together or at the same time. In some areas native title and other rights and interests exist together mutually. Although native title continues to exist in an area, the recognition of native title cannot displace any other rights and interests in the same area validly granted by governments. In other words, native title is subject to valid laws of the Commonwealth, States and Territories.

Compensation: Native title holders have the same rights to compensation 'on just terms' as all Australian property holders. Under the *Native Title Act 1993* (Cth), compensation is only payable once for acts that are essentially the same. It may include money, land or any other form of arrangement or combination of legal arrangements agreed to by Aboriginal or Torres Strait Islander peoples affected by the act and the persons or agencies obliged to pay compensation. Native title holders may request for all or part of the compensation to be paid by way of the transfer of property or the provision of goods or services. If the Court or the person liable to pay does not agree to such a request, compensation may only be in monetary form.

Extinguish: To put out or do away with something permanently. In relation to native title, it means that native title rights and interests are extinguished permanently and cannot revive. For example, in relation to areas of land the subject of public works (prior to 23 December 1996), private freehold, and leases granting exclusive possession.

Invalid: Some acts or activities or proposals in land or waters may be considered invalid because native title was not taken into consideration when they were carried out, or the correct processes were not followed. The effect of an invalid act on native title is less certain. Common law remedies, such as damages or an injunction, may be available to the native title holders for invalid acts that affect their native title rights and interests. Some invalid acts that took place in the past may be validated under the *Native Title Act 1993* (Cth).

Non-extinguishment principle: An act or activity done over an area where native title exists will not, either wholly or partly extinguish native title. However, native title rights and interests cannot affect the doing of the act. If the inconsistent act ceases to have effect, then the native title rights and interests again have full effect.

Valid: An act or activity is valid if it is 'of full force and effect' in terms of its effect on native title. Many acts that were carried out in the past will be valid in terms of their effect on native title, but others may be invalid in terms of their effect on native title because native title was not taken into account when the act was done. There are processes under the *Native Title Act 1993* (Cth) that must be followed when carrying out future acts in areas where native title exists or may exist to ensure that such acts are valid.

Validate: An act or activity that is validated under the *Native Title Act 1993* (Cth) is 'made valid' and is of full force and effect in terms of its effect on native title. Past acts and intermediate period acts are validated under the *Native Title Act 1993* (Cth) cannot be overturned because of native title.

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Working with Native Title: A Practical Guide for Local Government



'Working with Native Title: A Practical Guide for Local Government' (October 1999) provides a practical step-by-step Action Plan for considering Local Government's native title responsibilities. The Guide also contains helpful background information to the recognition of native title in Australia and details of the various agencies that Councils will come into contact with in relation to native title matters. The six-step Action Plan is premised, as is the *Native Title Act 1993 (Cth)*, on the basis that the best way of resolving native title matters is by negotiation and agreement. Hence, the Guide to *Working with Native Title* is a companion to the Guide to *Working out Agreements: A Practical Guide to Agreements between Local Government and Indigenous Australians*.

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The website contains a series of Information Papers and Issues Papers and other helpful information. This brochure and the checklists can also be accessed on the website.

This is a partnership project between ALGA, ATSIC, the NNTT and the Legal Assistance Branch of the Federal Attorney-General's Department.