

Working With Native Title: Linking Native Title and Council Processes

- Ed Wensing and Lucy Macmillan*

WHAT IS NATIVE TITLE?

Native title is an existing right that originates in indigenous law and custom. It is not a grant from the Crown. As such, it pre-exists European settlement and does not depend on Australian common law for its existence. It is the term used by the common law to recognise the rights of Aboriginal peoples and Torres Strait Islanders in relation to, and their pre-existing connection with, land and/or waters. While native title exists independently of the common law, its relationship to other Australian laws is defined by the extent to which it is recognised at common law. The recognition and protection of native title is set out in the *Native Title Act 1993* (Cth).

In order for native title rights and interests to be recognised as existing in a particular area at common law, the traditional connection between those lands and/or waters and a particular group must be demonstrated. A court determination provides a formal recognition of the historical title, and describes the content of the rights and interests, which may vary from one location to another and between different groups of Aboriginal peoples and Torres Strait Islanders.

As a common law right native title may already exist over areas of land or waters owned, controlled or held in trust by Councils, irrespective of whether there are any native title claims or determinations in the area. Native title will be a necessary consideration for Councils when doing anything in relation to these areas. For example, “unallocated” Crown lands are not blank or empty landscapes void of cultural relationships to places and country. However, the extent to which native title exists can only be made by the Federal Court of Australia or a recognised State/Territory body.

Dealing with native title considerations is now another part of Local Government’s responsibilities as land managers and developers.

SOME BASIC FACTS ABOUT NATIVE TITLE

A basic understanding of the nature of native title rights and interests and their interaction with non-native title interests is essential to working effectively with native title.

Native title:

- is an existing right;
- arises from pre-existing traditional laws and customs;
- can be lost where the connection with the relevant land or waters is lost;
- is *sui generis* (unique within the law). It varies according to the traditional laws acknowledged and customs observed by Aboriginal people and Torres Strait Islanders;
- is recognised by the common law of Australia;
- is not a grant or “*an act of grace or favour*”, as land rights grants are;
- is not a registrable interest at the titles office in each State/Territory. The Native Title Registrar is required, however, to notify the relevant State/Territory land titles office of any determinations or decisions;
- is extinguished permanently by private freehold title, except in some circumstances where it reverts to Crown land or Aboriginal reserve and the native title claimants currently occupy the Crown land or reserve;
- applications over private freehold property cannot proceed;
- is displaced by inconsistent statutory rights and interests in land or waters, but it may co-exist with other statutory rights and interests;
- may co-exist with public access rights provided the public access rights have been validly created, and may be jointly managed by native title holders and Commonwealth, State/Territory or Local Governments;
- may be suppressed during the term of a grant of interest (e.g. a lease) which is wholly inconsistent with native title rights and interests (the non-extinguishment principle);
- is inalienable, it cannot be bought or sold;
- is communally owned;
- is subject to Commonwealth and State or Territory laws and regulations;
- can be surrendered to governments by the native title holders or compulsorily acquired by governments with compensation “*on just terms*”; and
- the common law dealing with native title is still evolving.

HOW DOES NATIVE TITLE AFFECT LOCAL GOVERNMENT?

Any kind of Council activity that takes place in an area where native title exists or may exist, could affect native title rights and interests.

Under the *Native Title Act* 1993 (Cth) and complementary State/Territory legislation, specific processes must be followed when carrying out certain activities in areas where native title exists or may exist, to ensure that the activity is valid in so far as it affects native title. If the correct processes are not followed, native title holders may be entitled to damages or other common law remedies for any Council activities that invalidly impact on their native title rights and interests. Following the correct native title processes and adopting a precautionary approach to native title matters will ensure that Council activities are valid in so far as they affect native title.

At the very least, Local Government needs to:

- identify the areas where native title can no longer be recognised by law, for example areas covered by private freehold, grants of exclusive possession or public works;
- highlight the areas where native title may continue to exist at law;
- keep an inventory of where native title has been determined by the Federal Court;
- consult with registered native title bodies corporate, registered native title claimants and/or unregistered native title applicants to obtain a better understanding of native title matters; and
- have a reasonable understanding of what Councils can and cannot do in terms of native title rights and interests in areas affected by native title.

Understanding the *Native Title Act* 1993 (Cth) and complementary State/Territory legislation is a matter of prudent management for local Councils. Becoming familiar with native title matters is important, if for no other reason than adopting a precautionary approach.

COUNCIL'S ROLE IN RESOLVING NATIVE TITLE MATTERS

Part of Council's role in promoting a cohesive community encompasses the need to develop effective practice in relation to native title matters. Local Councils are in the unique position of being able to play a leadership role in the resolution of native title matters, as they represent the diverse interests of all constituents. *Working with Native Title: A Practical Guide for Local Government* will assist Councils in providing important leadership in relation to native title matters.

How are native title matters resolved?

Council may consult and negotiate agreements at any time with respect to any kind of matter relating to native title. In addition, there are three other ways in which Council may have to work with native title.

a) *Future acts*

The most likely contact Councils will have with native title is in relation to the carrying out of future acts. There are specific processes to follow when carrying out acts that could affect native title. These are known as future act processes and are set out in the *Native Title Act* 1993 (Cth) and complementary State or Territory legislation. Council will need to engage in negotiation for those future acts to which the right to negotiate applies.

b) *Applications for determination of native title*

Council may be involved with native title as a party to an application for a determination of native title, usually in conjunction with the State or Territory Government. The different types of determinations include:

- Consent determinations. A determination of native title (that it exists or no longer exists) arrived at by mediation or by direct negotiation between the parties to a native title application and confirmed by the Federal Court or a recognised State/Territory body;
- Contested determinations. A litigated determination of native title applications (that it exists or no longer exists) by the Federal Court or a recognised State/Territory body;
- Unopposed applications. In some cases, the Federal Court or a recognised State/Territory body may make an order on the terms sought by the applicant where the native title determination application is unopposed;
- Compensation determinations. A determination by the Federal Court or a recognised State/Territory body on native title holders' entitlement to compensation for the loss, diminution, impairment or other effect of an act on their native title rights and interests.

c) *Compulsory acquisition*

Native title rights and interests may be compulsorily acquired or surrendered by way of agreement in the course of a compulsory acquisition to Commonwealth, State or Territory Governments. This is a complex process and there will generally be other avenues available to the parties.

Leadership

The challenge for Local Government is to resolve any uncertainties regarding native title in ways that lead to social cohesion and economic efficiency, and to do that within the existing social and legal framework of Australian society. Resolution of native title applications must be through a process of agreement and/or through litigation. Native title applications are usually first referred to mediation for their resolution.

In deciding whether to be a party to litigation or mediation from an economic perspective, the primary interest should be finding the alternative that produces the greatest possibility of satisfaction of a party's interests at the least cost. Experience internationally, and in our short domestic history of native title, indicates that agreement is the most economically and socially efficient way of

resolving uncertainties about land title, access to land/ waters and the doing of future acts.

Local Histories

Often, a good place to start is in sharing local histories. Local communities can develop and build relationships between different interest holders through the development of coherent and comprehensive shared histories that are inclusive of Aboriginal and Torres Strait Islander peoples and the wider Australian community. Local histories are an important way of acknowledging the past, reconciling it with the present and building a foundation for the future.

RESOURCE MATERIALS #1:
Working with Native Title: A Practical Guide for Local Government

Working with Native Title: A Practical Guide for Local Government provides an introduction to the concepts and processes that Local Government should be familiar with when working with native title. The Guide has been produced by the Australian Local Government Association (“ALGA”), with the support of the Aboriginal and Torres Strait Islander Commission and the National Native Title Tribunal.

Working with Native Title is divided into two parts, Part A and Part B. Part A contains a practical step-by-step action plan that Councils may use to navigate their way through the processes established under the *Native Title Act 1993* (Cth) and complementary State or Territory legislation. Part B contains additional information that Councils need to know to work effectively with native title matters.

Working with Native Title: A Practical Guide for Local Government is premised on the basis that agreements are the most effective way of resolving native title matters. This Guide should be read in conjunction with the Australian Local Government Association’s Guide to *Working out Agreements: A Practical Guide to Agreements between Local Government and Indigenous Australians*.

Incorporating Native Title Into Council Processes: An Action Plan For Good Governance

In areas where native title exists or may exist, Council will need to assess how it may continue to carry out its broader land planning and management functions effectively on behalf of the entire community. The *Working with Native Title* Guide sets out processes for Council to follow to minimise claims for damages and/or injunctions for invalid actions affecting native title rights and interests, and to minimise community division over these matters. Following these processes will also maximise potential opportunities and benefits that arise as a result of working constructively with native title matters.

As a prudent management strategy, Councils should include native title as a consideration in all dealings involving land or waters where it cannot be established beyond doubt that native title has been extinguished. Adoption of a precautionary approach in relation to native title matters will ensure Council meets its obligations under

the *Native Title Act 1993* (Cth) and complementary State or Territory legislation.

Part A of *Working with Native Title* provides a simple six-step Action Plan (see below), which is designed for Councils (or indeed any other interest holder) to use as a basis for developing a precautionary approach to native title, even where there are no native title applications or determinations in the area. Council may also use it as a guide to identify where native title exists or may continue to exist and what Council should do in carrying out its functions in those areas.

The Action Plan:

- assists Councils with ensuring they comply with their legal obligations arising from the *Native Title Act 1993* (Cth) and complementary State/Territory legislation;
- provides Councils with a strategy for delivering good governance to the community, thereby enabling Councils to maximise the benefits and opportunities that arise from working with native title;
- outlines the processes that Councils will need to follow under the *Native Title Act 1993* (Cth) and complementary State/Territory legislation when carrying out activities that affect native title. These processes include negotiating agreements, lodging non-claimant applications, following the future act processes and/or carrying out compulsory acquisitions.

Incorporating native title into Council processes by applying the Action Plan will enable Council to continue carrying out its broader land and water management functions effectively and legally on behalf of the entire community. Information and checklists on how to carry out each step of the Action Plan is provided in detail in *Working with Native Title: A Practical Guide for Local Government*.

The Guide to *Working out Agreements* is a companion to *Working with Native Title* and was specifically designed to assist local Councils in working out agreements with Indigenous Australians, including in relation to native title and related matters.

Background Information on Native Title

Part B of *Working with Native Title* provides additional information on native title that Councils need to know, including:

- native title and its recognition at common law;
- the relationship of the *Native Title Act 1993* (Cth) with other concepts and legislation, such as land rights and heritage protection;
- the roles of the various agencies that local Councils will need to deal with on native title matters, including the Federal Court and the National Native Title Tribunal;
- an overview of the States’ and Territories’ native title regimes;
- the rateability of land subject to native title;

- learning from other jurisdictions such as New Zealand and Canada; and
 - a list of resources and other reference material that may be of assistance to Councils involved with native title matters. Contact details of
- relevant organisations, from which Local Government may seek information or assistance at national, State and Territory levels with respect to native title matters, are included.

ACTION	DESCRIPTION
1. Search	Examine the Registers and the Schedule of Applications held by the National Native Title Tribunal or the equivalent State/Territory body to establish whether there are any determinations of native title, registered Indigenous Land Use Agreements (“ILUAs”), registered claimant applications or unregistered native title determination applications in the Council area. As an existing right, native title may exist in an area irrespective of whether or not there is an application or determination of native title.
2. Analyse	Analyse what Council should do where there are any registered native title bodies corporate, registered native title claimants, or unregistered native title applicants on the Registers or the Schedule of Applications, or where there are no native title holders/claimants entered on the Registers or the Schedule. Remember that native title may exist in an area whether or not there are any applications or determinations in an area.
3. Becoming a Party	Council may need to decide whether or not to become a party to any native title applications in the area, and, if it chooses to become a party, whether the best method of solving the matter is by negotiation of an agreement or by litigation. It is becoming clear that the most cost-effective method of resolving issues is through negotiation.
4. Identify	<p>Identify where native title may exist or has been extinguished in relation to all land or waters owned, controlled or held in trust by Council.</p> <p>4A. Audit Establish an inventory of all land and waters within the Council area that are owned, controlled or held in trust by Council.</p> <p>4B. Tenure History Conduct a tenure history search and establish from s23 of the <i>Native Title Act</i> 1993 (Cth), and State/Territory legislation enacted pursuant to s23E of the <i>Native Title Act</i> 1993 (Cth), whether there have been any extinguishing events in any of the land or waters owned, controlled or held in trust by Council.</p> <p>4C. Examine Examine all tenure histories and site inspection reports to identify any acts that took place in the past and that may have extinguished native title by being completely inconsistent with its continued existence or co-existence. This is a complex step. An alternative approach is to reach an agreement with any native title holders/claimants for the relevant areas.</p>
5. Future Acts	Council may be proposing to carry out an activity in relation to an area where native title exists or may exist. If so, it should do so validly and follow the correct processes.
6. Negotiate Agreements	Whatever Council’s involvement, Council should be knowledgeable about the kinds of agreements that can be made about native title matters. Council may negotiate an agreement about native title matters at any stage.

RESOURCE MATERIALS #2:***Working out Agreements: A Practical Guide to Agreements between Indigenous Australians and Local Government***

Working out Agreements has been prepared and updated by the ALGA in cooperation with the Aboriginal and Torres Strait Islander Commission and the National Native Title Tribunal. This Guide provides practical step-by-step advice for developing agreements between local Councils and Indigenous Australians. Agreements with Indigenous Australians may be about all kinds of matters, including umbrella or framework agreements, native title and land-use agreements, local and regional development, service delivery, protocols, resource development, cultural heritage management, and Indigenous cultural and intellectual property agreements.

Working out Agreements discusses how to select the appropriate type of agreement, and how to identify the issues, the geographic factors, and the content of an agreement. It provides tools for implementing an agreement and for ensuring commitments are met, as well as suggesting procedures for review. Case studies show the different agreements already in place at the local level around Australia.

TRAINING

The Australian Local Government Association ("ALGA"), with the support of the Legal Aid Branch of the Federal Attorney-General's Department, the National Native Title Tribunal and the Aboriginal and Torres Strait Islander Commission, has developed training workshops in the use and application of *Working with Native Title* and *Working out Agreements*. Training workshops are being planned to be delivered in regional centres throughout Australia through State/Territory Local Government Associations. Enquiries can be directed to the Australian Local Government Association in the first instance.

Copies of *Working with Native Title* and *Working out Agreements* can be purchased from:

Australian Local Government Association
8 Geils Court
Deakin ACT 2600

Telephone: 02 6281 1211

Facsimile: 02 6282 2110

Email: alga@alga.com.au.

- * Ed Wensing and Lucy Macmillan are the authors of *Working with Native Title: A Practical Guide for Local Government*. Ed Wensing BA(Hons) (ANU) LESCTe, FAPI, MRAPI is a consultant to the Australian Local Government Association on native title matters, and Lucy Macmillan BA/LLB (ANU), Grad Dip (Legal Practice) (ANU) was the Native Title Project Officer at the Australian Local Government Association.