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Native Title  
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AUSTRALIAN LOCAL GOVERNMENT ASSOCIATION



# Working with native title

Linking native title and local government processes

3rd edition – August 2009

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### **National Native Title Tribunal**

**Freecall:** 1800 640 501

**Website:** [www.nntt.gov.au](http://www.nntt.gov.au)

### **Native Title Representative Body or Native Title Service Provider**

**Website:** [www.ntrb.net](http://www.ntrb.net)

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*On the cover: Ipswich City Council, Queensland. Ross Anderson, Tanya Oertel, Owen Anderson and Councillor Victor Attwood.*

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# Working with native title

## How native title affects local government

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.

Native title can potentially affect local government in two ways:

### Claim resolution

Local government can be a respondent party to a native title determination application ('a claim') filed in the Federal Court. By becoming a party,

council gets to join in the process and will be able to participate in mediation and, if necessary, in court. As a party to any native title determination applications in council's area, council will be kept informed as the application progresses. The preferred approach to resolving native title claims is through negotiation and agreement rather than through litigation as many of the legal precedents about where native title exists or has been extinguished have already been determined.

This brochure outlines how local government can be involved in the claim resolution process. Councils need to consider very carefully whether they need to be a party to a native title claim as it can be a very costly exercise.

### Compliance procedures

Local government activities may trigger the native title compliance procedures detailed in the *Native Title Act 1993* (Cwlth). This compliance process can be complex.

The compliance procedure required for many (but not all) local government activities involves, among other things, providing native title claimants/holders with a written notice about the proposed activity and an opportunity to comment, the same procedural rights as an ordinary titleholder or the right to negotiate, or in some cases no procedural right, depending on the nature of the future act. These procedures apply where native title exists including some areas where a native title claim has not been made, although legally they only apply where native title does exist. Because it is often difficult to tell whether native title exists in relation to particular land and waters, a council will have to do a risk assessment in relation to this issue. This is discussed in more detail later in this brochure. Council officers need to understand if and when compliance processes are triggered and which procedure applies.

This brochure provides a general overview of the statutory native title compliance regime for future acts and also explains how a council may use an indigenous land use agreement (ILUA) to fulfil its obligations.

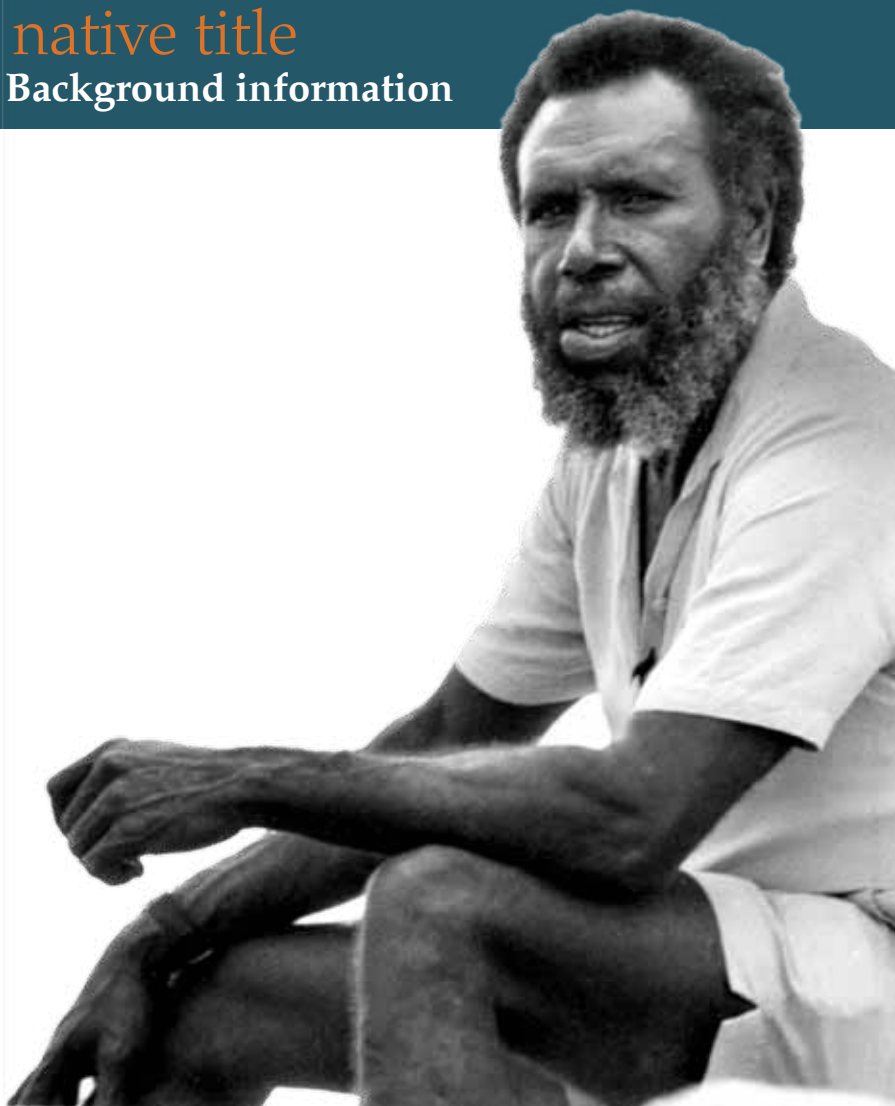


*The Native Title Act commenced in 1994. Local government activities may trigger the native title compliance procedures detailed in the Act.*

# Working with native title

## PART 1 – Background information

*Eddie Mabo, and others on behalf of the Meriam People, took their claim to the High Court of Australia and were the first to have their native title rights recognised. The landmark decision paved the way for recognition of native title across Australia and led to the introduction of the Native Title Act.*



### What is native title?

Native title is the recognition in Australian law that some Aboriginal and Torres Strait Islander people continue to hold rights to their lands and waters which come from their traditional laws and customs.

Native title has its source in the body of law and custom acknowledged and observed by Aboriginal and Torres Strait Islander people when Australia was colonised by Britain.

### How is native title recognised?

Legal recognition of a particular group's native title rights and interests is sought through a native title determination application filed in the Federal Court.

To gain recognition:

- there must be evidence to show the group has a 'traditional connection' to the area from sovereignty to present day
- the group continues to observe traditional laws and customs that give rise to the rights and interests they want recognised, and

- the traditional rights sought are recognised by Australian law.

A claim can be resolved by agreement when all the respondent parties are satisfied with the evidence provided and how their specific interests will be recognised and protected in any proposed consent determination. A claim can also be resolved by agreement either by withdrawal of the application or a determination that native title does not exist and some form of alternative settlement reached. If agreement cannot be reached, the court will make a final determination after hearing evidence at a trial.

## Where does native title exist?

An application for a determination of native title can only be made in areas where native title has not been extinguished (not recognised). Native title may exist on:

- unallocated (vacant) crown land
- some state forests, national parks and public reserves depending on the effect of state or territory legislation establishing those parks and reserves
- beaches, oceans, seas, reefs, lakes, rivers, creeks, swamps and other inland waters that are not privately owned
- some leases, such as non-exclusive pastoral and

agricultural leases, depending on the state or territory legislation they were issued under, and

- some land held by or for Aboriginal people or Torres Strait Islanders.

Generally speaking, full native title rights resembling something like freehold ownership will only be available over some unallocated (vacant) 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 successfully claimed, the country will be shared by the native title holders and other people with rights and interests in the same area. This sharing is sometimes called coexistence.

Native title rights and non-native title rights can be recognised over the same area, but the native title rights cannot interfere with the rights of other interest holders.

## Where has native title been extinguished?

The Australian legal system does not recognise native title rights and interests in some areas where actions have been taken that extinguish native title. In those areas, native title may be partly or wholly extinguished. 'Extinguish' means to permanently not recognise native title rights and interest in an area (s. 237A Native Title Act). Except in very limited circumstances, there is no possibility for extinguished rights to be recognised after extinguishment occurs, even if the extinguishing act ceases to have effect.

Native title has been wholly extinguished on areas such as:

- privately owned freehold land (including family homes and privately owned freehold farms)
- pastoral or agricultural leases that grant exclusive possession
- residential, commercial, community purposes and certain other leases, and
- in areas where governments have built roads, airports, railways, schools and other public works on or before 23 December 1996.



*Native title can be recognised only in relation to certain areas of land. In most cases where native title is found to exist, the country will be shared by native title holders and others with rights and interests in the area.*

These areas cannot be included in a native title determination application and are generally excluded from such applications.

### **In what situations may native title no longer exist?**

In addition to extinguishment as outlined above, Aboriginal and Torres Strait Islander people's 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 or Torres Strait Islander people ceasing to observe their customary laws and traditions on which their title is based
- loss of continuing connection with an area
- the Aboriginal or Torres Strait Islander people surrendering their native title to the Crown, possibly in exchange for other benefits.

Native title is not fixed for all time. The ways rights and interests are exercised can change and evolve according to traditional laws and customs.

### **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. The provisions for ILUAs were introduced into the Native Title Act to provide an alternative way of resolving native title matters.

An ILUA allows people to negotiate flexible, pragmatic agreements to suit their particular circumstances without having to resort to litigation or relying on the other processes for dealing with future acts within the Native Title Act.

An ILUA can be negotiated over areas where native title has, or has yet, to be determined to exist. They can be part of a native title determination, or settled separately from a native title claim. ILUAs may be made about any native title matters the parties want to have an agreement about. For example, ILUAs can be made on the following matters:

- native title holders agreeing to a future development
- how native title coexists with the rights of other people
- access to an area
- extinguishment of native title rights and interests
- compensation.



*Indigenous land use agreements allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances without resorting to litigation.*

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, Aboriginal and Torres Strait Islander people may gain benefits such as recognition of their native title rights and interests, employment opportunities and/or compensation. Other parties to the agreement may be able to proceed with new uses or development of their land for other purposes.

### **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 may provide assistance if requested, to negotiate 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

Native Title Registrar to have it registered. If the ILUA satisfies all the conditions set out in the Native Title Act, the Native Title Registrar is required to notify the public (only for area agreements and alternative procedure agreements) and others that the parties have applied for registration of the ILUA.

If 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. It takes about six months to register area and alternative procedure agreements. Body corporate agreements can be registered in a speedier manner but are only available if there is one or more Registered Native Title Bodies Corporate for the whole of the agreement area. A registered ILUA binds not only all the parties to the terms of the agreement, but also all the native title holders to the area even if they were not involved in the agreement. An ILUA can bind the parties for only a stated period, or may bind the parties in perpetuity subject to agreed termination conditions. A registered ILUA may enable development to take place on the land or waters and generally limits compensation payable to the native title group to that provided for in the agreement.

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).

### **Template ILUAs for local government**

The Local Government Association of Queensland has developed a template local government ILUA that covers all the issues outlined above, as well as cultural heritage compliance and related local issues. This template can be downloaded from [www.lgaq.asn.au](http://www.lgaq.asn.au).

The Local Government Association of South Australia has developed a template local government ILUA that sets out an alternative native title and cultural heritage compliance process. This template can be downloaded from [www.lga.sa.gov.au](http://www.lga.sa.gov.au).

These templates may be helpful in working out what needs to be included in an ILUA involving local government, noting that the templates may need to be adapted to meet the particular circumstances.

A range of information and publications are also available on the National Native Title Tribunal's website at [www.nntt.gov.au](http://www.nntt.gov.au).





*Template agreements for local government are available from both the Queensland and South Australian local government associations.*

### **Native title registers**

The Native Title Registrar maintains three formal registers:

- the National Native Title Register
- the Register of Native Title Claims
- the Register of Indigenous Land Use Agreements.

If a claimant application fails the registration test or is waiting to be considered for registration, the details are kept on a Schedule of Applications at the National Native Title Tribunal.

All three formal registers and the Schedule of Applications can be searched by the public.

### **How can council contact native title claimants or holders?**

The notification of a native title determination application that 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 relevant Native Title Representative Body (NTRB) or Native Title Service Provider (NTSP).

The Native Title Act enables the Federal Minister responsible for Aboriginal and Torres Strait Islander matters to appoint NTRBs or NTSP 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 NTRBs or NTSP for your area visit [www.ntrb.net](http://www.ntrb.net).

For any notices sent to the NTRB or NTSP that relate to land or waters within their area of responsibility, the NTRB or NTSP has a responsibility to bring to the attention of any person who they are aware of that holds or may hold native title in relation to the land or waters and to advise them of any time limits that may apply. The NTRB or NTSP also has the

role of assisting native title holders or applicants by representing them or facilitating their representation in consultations, mediations, negotiations and proceedings in relation to native title applications, future acts, ILUAs or other agreements relating to native title matters, rights of access, and any other matters relating to native title or the operation of the Native Title Act. They may also be able to assist council with protocols and communication with the native

title holders or claimants. It is advisable therefore, to establish good working relations with the relevant NTRB or NTSP.

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 usually include

contact details for the native title holders or their representative once a native title body corporate for the area has been determined. There may be a gap between the determination of a native title claim by the Federal Court that native title exists in a particular area and the determination of the Prescribed Body Corporate that will hold the native title rights and interests on trust for the common law holders or be the agent for the native title holders.



*A list of Native Title Representative Bodies and Native Title Service Providers is available from [www.ntrb.net](http://www.ntrb.net).*

## Case study: Indigenous land use agreement

### Ipswich land use agreement

Signed in January 2008 between the Ipswich City Council and the Jagera, Yuggera and Ugarapul People.

The entire Ipswich City Council region is covered by the Jagera, Yuggera and Ugarapul People's native title claim, which was lodged over an area in Queensland's south-east. Soon after the claim was lodged in 2003, the council indicated a

willingness to start negotiating. The first mediation meeting was convened by the National Native Title Tribunal in July 2005. A memorandum of understanding was signed in November 2006 and an agreement in principle was reached in November 2007. Once the agreement was authorised by both parties the indigenous land use agreement was formally signed on 30 January 2008.

Deputy mayor Victor Attwood said of the agreement: "I wholeheartedly recommend that local government resolve native title issues through negotiation. I hope that the Ipswich agreement, which is the first of its kind in Queensland, can pave the way for other local governments. I am proud that Ipswich City Council has been able to demonstrate world-class leadership in the areas of native title and Aboriginal cultural heritage protection through this agreement. The Ipswich agreement has already been used as a template by the Toowoomba City Council which was able to negotiate an ILUA with the Jagera, Yuggera and Ugarapul People over the Table Top Mountain area."



*Ipswich City Council, Queensland. Councillor Victor Attwood, Tanya Oertel, Owen Anderson and Ross Anderson.*

# Working with native title

## PART 2 – Specific information for local government

### Claim resolution and local government

The native title claim resolution process commences when an application for a determination of native title is filed in the Federal Court. A number of years may elapse between the filing of an application and its finalisation by a court determination stating either that native title rights and interests exist, exist in relation to only part of the claim area or do not exist in relation to part or all of the area.

Local government will receive a notice about how to become a respondent party to any claim within its area. This notice which is sent by the National Native Title Tribunal, advises of the date by when a council must inform the court that it wants to be a party. A council may become a respondent party after the notice period closes by filing a formal application that must then be heard by the court. Before the notice period closes, the council need only complete and return a form to the court. Only a respondent party can be heard by the court and participate in mediation.

A claim may be resolved in four ways:

- consent determination – native title is/is not recognised with the agreement of all necessary respondent parties over some or all of the area
  - contested final hearing – there is a final court hearing because the agreement of all necessary respondent parties cannot be achieved
  - very rarely, and usually as part of a comprehensive agreement, native title is surrendered to the state and the claim is discontinued. There may also be an agreement to a consent determination being made that native title does not exist, in conjunction with, or without, a surrender
  - a native title claim can also be struck out, dismissed by the court or discontinued by the applicants by leave of the court and before final determination orders are made.
- There have been several landmark and important contested cases, but in recent years many more claims are being resolved through mediation and consent determination rather than through litigated hearings. At such hearings, the main participants are the applicant claim group and the state or territory governments. Contested hearings are expensive, time consuming and when the court determines that native title continues to exist in a particular area, all the affected parties (including local government) may need to negotiate about what this means ‘on the ground’ in terms of sharing the same area of land or waters.

### Resolution by agreement

Local government can reach agreement with a claimant group to ensure its interests are recognised and taken into consideration regardless of how a claim is resolved. What may be needed is agreement on how the rights and interests can interact. Such an agreement provides local government with legal certainty and also an opportunity to work constructively with native title claimants and the local Aboriginal or Torres Strait Islander community on broader community outcomes of mutual benefit.

Negotiations can commence at any time in the claim resolution process. A mediator can assist parties reach a workable agreement.

Upon application, the Commonwealth Attorney-General may provide financial assistance to meet council’s legal costs associated with the resolution of a claim through negotiation. Limited assistance is available for contested court hearings. Details about this scheme are available at [www.ag.gov.au](http://www.ag.gov.au).

Local government should seek professional legal advice before commencing native title negotiations as it is a very complex and technical area of law.

## Native title compliance and local government

Some things that councils do in relation to land or waters may affect native title rights and interests (whether or not native title has been formally recognised in a particular area). 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 possible impact of their activities on native title rights and interests. Acts that affect native title are termed future acts in the Native Title Act.

The Native Title Act includes a compliance regime and these procedures should be captured in local government operational risk assessments, in a similar way to statutory obligations for environmental and heritage protection.

Aboriginal and Torres Strait Islander cultural heritage protection is also an important issue that should be included in local government operational risk assessments. This is a separate and distinct legal issue governed by state or territory legislation. Local government should be familiar with its state or territory legislation and seek to address

native title and cultural heritage compliance issues concurrently.

### What scenarios are councils likely to find?

A native title assessment should be carried out at the beginning of any work plan or project assessment process. The first step is to ascertain which of the following scenarios may be applicable in the location of the proposed activity or future act.

There are five possible scenarios that councils are likely to come across in relation to native title. Each scenario requires a different response. The table on the next page sets out the five scenarios and the possible courses of action in relation to future acts.

### How the future act regime works

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

- working out whether the proposed act or activity is a future act
- who will be responsible for carrying out the future act (i.e. council, state government or private person/organisation)
- 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 1 July 1993 for legislative future acts<sup>1</sup>
- must affect an area where native title exists or may exist and
- must affect (extinguish, impair, or in some way limit) the continued existence or enjoyment of native title.

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 and who is responsible for ensuring its validity?

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 or territory going to be carrying out the activity? or
- is the council going to carry out the activity under delegated authority from the state or territory?

*1 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 (ss. 23A to 23JA), then the future act provisions of the Act do not, indeed cannot, apply.*

Scenario	Proposed action
<p><b>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.</b></p>	<p>Native title may exist or may have been extinguished. Council needs to undertake a risk assessment and ascertain whether the proposed act is in an area where native title exists or may exist. Before a determination is made by the courts, options include developing an ILUA or following the other processes for future acts in the Native Title Act.</p>
<p><b>The applicants may have discontinued an application with the leave of the court, or the court may have struck out or dismissed an application.</b></p>	<p>As with the above scenario, native title may exist or may have been extinguished. Council needs to undertake a risk assessment to ascertain whether the proposed act is in an area where native title exists or may exist.</p>
<p><b>A determination has been made that native title exists in some areas and/or has been extinguished in other areas.</b></p>	<p>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. If this is the case, and it is appropriate to do so, council may wish to work with the native title party to seek associated outcomes. Aboriginal or Torres Strait Islander heritage protection may still need to be considered.</p> <p>However, if a determination has been made by the courts that native title exists, then options include developing an ILUA or following the other processes for future acts in the Native Title Act as required.</p>
<p><b>There are no known native title holders, but native title may exist.</b></p>	<p>Council needs to undertake a risk assessment and ascertain whether the proposed act is in an area where native title exists or may exist. 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 s. 24FA protection for a particular future act(s) in the area.</p> <p>Aboriginal or Torres Strait Islander heritage protection may still need to be considered.</p>
<p><b>There is a registered ILUA on the Register of Indigenous Land Use Agreements.</b></p>	<p>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 already agreed under the ILUA must be followed. If not, then another ILUA can be negotiated, or the other processes for future acts under the Native Title Act will need to be followed.</p> <p>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. However, Aboriginal or Torres Strait Islander heritage protection may still need to be considered.</p>

This will assist in identifying who will be responsible for making sure the correct processes are followed and, where an ILUA is used, who should be parties to the ILUA. The state or territory government may not need to be party to the ILUA so long as it is satisfied that a registered ILUA covers the doing of a future act.

A council may identify the officer responsible on a project-by-project basis, or allocate this responsibility for all projects to a specific officer. It should be clear who is responsible within a council for either completing or overseeing the completion of the necessary native title clearance compliance procedures.

### 3. Which procedure must be followed?

If an ILUA is not used, the future act provisions of the Native Title Act provide the native title holders and registered native title claimants with certain procedural rights. This means that they have certain rights that should be afforded as part of the procedures that are to be followed when it is proposed to do a future act. Depending on the act involved, these rights include:

- the right to be notified and
- the opportunity to comment or
- the right to be consulted or
- the right to negotiate or
- the right to object or

- the same rights as an ordinary title holder (freeholder).

The future act regime within the Native Title Act includes a number of categories for different types of future acts (see table on page 17).

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 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 person who holds a non-native title interest in relation to the area, for a determination that native title does not exist for that area. Some councils have used this procedure to be sure their future act is valid and can’t be undone at a later date. However, this procedure is not available where there are registered native title claimants for the area or there is a determination that native title exists for the area
- the remaining categories relate to specific types of activities. That is, the nature of the proposed future act will determine which procedural right to which the native title

holders or registered claimants will be entitled.

### The future act hierarchy in the Native Title Act

The future act provisions are hierarchical (see table 1). To the extent that a future act is covered by a particular provision in the future act hierarchy in the Native Title Act, 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 where a future act is covered by a registered ILUA the other procedures for dealing with future acts do not have to be considered.

By checking the hierarchy and following the correct processes for the relevant category set out in the Native Title Act, council is able to ensure that a proposed future act will be valid. Identifying which category in the future act hierarchy applies and how the procedures are to be complied with can be a difficult task and if a council does not have a specialised officer trained in this area it may be necessary to obtain professional advice.

In some circumstances the future act requirements of the Native Title Act can be satisfied by negotiating an ILUA, provided the relevant parties are willing to negotiate an agreement and have it registered. Sometimes ILUAs may be difficult to negotiate and get registered so

it may be simpler and more cost-effective for council to follow the appropriate processes in the other relevant provision for future acts in the Native Title Act.

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 ILUA or following compulsory acquisition of the native title rights and interests. 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 (s. 24OA of the Act).

If it is not possible or appropriate to use an ILUA, then the compliance procedures under the future act hierarchy must be followed in areas where native title exists or may exist. The

Native Title Act also stipulates who must receive notification of a proposed future act. These vary depending on the circumstances, but generally include:

- the Native Title Representative Body or Native Title Service Provider funded to perform the relevant functions of a Native Title Representative Body
- the Registered Native Title Body Corporate in an area where a determination has been made by the Federal Court that native title exists and there is a registered native title body corporate for the area
- the registered native title applicants where
  - a native title determination application has been filed with the Federal Court and entered on the Register

of Native Title Claims maintained by the National Native Title Tribunal and

- a determination that native title exists has been made by the Court but a determination as to the Prescribed Body Corporate to hold those rights or act as agent of the native title holders is still pending.

#### **What are low impact acts?**

If there has not yet been a determination of native title, a 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. 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.



*The Native Title Act sets out the correct processes for future acts. Following the correct processes enables council to ensure proposed future acts will be valid.*



**Table 1 – Future act hierarchy in the Native Title Act**

Future act category	Outcome or procedural rights
<p><b>Indigenous land use agreements (ILUA) (s. 24BA-24EC)</b></p>	<p>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 the surrender of native title, or to validate future acts that have already been done invalidly. In some circumstances it may not be possible to use an ILUA. For example, where there are competing claimants and there may not be sufficient time to negotiate an ILUA where the different claimant communities cannot agree on the carrying out of a future act.</p>
<p><b>Non-claimant applications (s. 24FA) (unopposed)</b></p>	<p>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 over which it has a non-native title interest? If no potential native title holders respond within a prescribed period there is automatic s. 24FA protection for the future acts. If potential native title holders make a claim within the relevant period which is subsequently registered then council may be able to negotiate an agreement or will have to use other relevant future act processes.</p> <p><b>Note:</b> This procedure has no utility where there already are registered native title claimants for the area or there is a determination that native title exists for the area.</p>
<p><b>Primary production and diversification and off-farm activities directly connected to primary production (s. 24GB and s. 24GD)</b></p>	<p>Opportunity to comment applies. The upgrade of a pastoral lease to freehold requires compulsory acquisition, which attracts the right to negotiate.</p> <p><b>Note:</b> Councils generally do not carry out or authorise these kinds of activities.</p>
<p><b>Management of water and airspace (s. 24HA)</b></p>	<p>Does council regulate the management of water and airspace? If so, the opportunity to comment applies.</p>
<p><b>Renewals and extensions of leases and licences and grants of titles under pre-23 December 1996 agreements or commitments. (s. 24IA)</b></p>	<p>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.</p> <p><b>Note:</b> In limited circumstances the right to negotiate may apply (s. 24ID(4)) in relation to mining.</p>
<p><b>Use of reserved, proclaimed, or dedicated land. Activities and dealings regarding pre-23 December 1996 reserve land consistent with purpose and leases to statutory authorities (s. 24JA)</b></p>	<p>In the case of land reserved, proclaimed, dedicated, or conferred by some permission or authority 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 so reserved, proclaimed, dedicated or conferred? If so, the opportunity to comment may apply.</p>
<p><b>Facilities for services to the public (s. 24KA)</b></p>	<p>The Native Title Act 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 apply as pastoral lessees.</p>
<p><b>Low impact future acts (s. 24LA)</b></p>	<p>There are no procedural rights.</p> <p><b>Note:</b> 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 (see discussion on page 19.)</p>

**Table 1 – Future act hierarchy in the Native Title Act (continued)**

Future act category	Outcome or procedural rights
<p><b>Acts that pass the freehold test (s. 24MD)</b></p>	<p>Freehold test – if the 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:</p> <ul style="list-style-type: none"> <li>• the right to negotiate may apply</li> <li>• the right to be object may apply or</li> <li>• ordinary title rights apply (for example in relation to compulsory acquisition of native title).</li> </ul> <p><b>Note:</b> The Native Title Act specifies a number of circumstances where the freehold test applies.</p>
<p><b>Acts affecting offshore places (S24NA)</b></p>	<p>Procedural rights for native title holders are the same as if they hold non-native title rights.</p> <p><b>Note:</b> Councils generally do not carry out or authorise these kinds of activities.</p>

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 or under other future act provisions. The native title holders may agree to the carrying out of those acts or as the occupiers they may be legally obliged to undertake specific works themselves, such as noxious weed management, depending on the relevant state or territory legislation.

The difficulty arises, in part, because the Native Title Act does not define what constitutes a low impact act. The Native Title Act only identifies what it must not involve, namely:

- granting tenure such as freehold, leases or conferral of an exclusive right to possession
- excavation or clearing land or water unless:
  - this is necessary for the protection of public health or public safety or
  - it involves tree lopping, clearing of noxious or introduced animal or plant species, foreshore reclamation, regeneration or environmental assessment or protection activities
- mining (other than fossicking by using hand-held implements)
- construction of any building or structure (other than fencing

or a gate) that is a fixture or disposal or storing of garbage or any poisonous, toxic or hazardous substance.

It is important to have a clear understanding of what constitutes a low impact act. Council may therefore need to seek legal advice on whether what they propose to do is a low impact future act. If the advice is that the proposed act is not a low impact future act, then council needs to ascertain what other procedural rights may apply and what council's options are. Council may also wish to discuss these matters with native title claimants or holders to reach agreement on what kinds of council activities constitute low impact acts and what does not.



*Councils need to seek independent legal advice on whether what they propose to do is a low impact future act.*

# Working with native title

## Glossary of terms

<b>Affect</b>	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.
<b>Coexistence</b>	To exist together or at the same time. In some areas native title and other rights and interests exist together. 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.
<b>Compensation</b>	Native title holders have the same rights to compensation ‘on just terms’ as all Australian property holders where what is proposed to be done amounts to acquisition of property. For other future acts, the similar compensable interest test applies and compensation is determined under the relevant state or territory laws in relation to the doing of the act in relation to ordinary title. Under the Native Title Act, 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.
<b>Extinguish</b>	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.
<b>Invalid</b>	Some acts or activities or proposals in land or waters may be considered invalid to the extent they affect native title because they did not take native title into account 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 (but not extinguish) their native title rights and interests. Some invalid acts that took place in the past may have been validated under the Native Title Act or under complementary state or territory legislation.
<b>Non-extinguishment principle</b>	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.
<b>Validate</b>	An act or activity that is validated under the Native Title Act 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 or complementary state or territory legislation and cannot be overturned because of native title.