Making a non-claimant application

Non-claimant applications can allow for Crown land dealings and activities to proceed where there is no future act pathway and a native title claim or determination has not been made under the Commonwealth *Native Title Act 1993*.

Background to native title and non-claimant applications

Native title is the name Australian law gives to the traditional ownership of land and waters that have always belonged to Aboriginal people according to their traditions, laws and customs. The Commonwealth *Native Title Act 1993* (the Native Title Act) sets out how native title rights are to be recognised and protected.

The Department of Planning and Environment – Crown Lands (the department) is committed to managing Crown land consistently with the Native Title Act.

For background on native title non-claimant applications please refer to the Fact Sheet.

Making a non-claimant application

The NSW Government or Council or Category 1 Crown land managers should only make non-claimant applications where necessary. They are lodged in unique situations to do future acts under the Native Title Act and usually do not progress beyond the protection to the point where a determination is made by the Federal Court that native title has been extinguished or does not exist.

It is important to check the National Native Title Tribunal website for the presence of any native title claims in the area before lodging an application as a non-claimant application may not be eligible to proceed. An application may be made by filling in a native title 'Form 2' available on the Federal Court of Australia forms website and lodging it with the Federal Court. The form can be lodged:

- In person at the New South Wales Registry, Level 17, Law Courts Building, 184 Phillip Street, Queens Square, Sydney;
- Via post to - Locked Bag A6000, Sydney South, NSW 1235;
- Via fax (no more than 20 pages) - (02) 8029 0631;
- Via the Federal Court of Australia's website

The stages of a non-claimant application

Once the application is lodged, the Federal Court will deal with it in two main stages.

Stage 1: receiving protection to do future acts

The first stage may result in protection commencing over the area (referred to in the Native Title Act as 'section 24FA protection'). Protection is triggered if a non-claimant application is made and it is unopposed (i.e. no native title claimant application is made in response). The applicant can rely on this protection to do the future act.

The Federal Court does not confer protection – rather, the following things must happen for commencement of the protection under the Native Title Act:

- the period specified in the notice given has ended; and
- the area in the application has not been amended; and
- at the end of that period, there is no relevant native title claim covering the area or part of the area; and
- the application has not been withdrawn, dismissed or otherwise finalised; and
- there is no entry on the National Native Title Register specifying that native title exists in relation to the area or a part of the area.

For the duration of the protection, any future act by any person over the area is valid in relation to native title e.g. constructing public works on the Crown land. Any future acts done in the area remain valid even if it is later found that native title existed in the area at the time. If it is later found that native title existed, native title holders are entitled to compensation from the future acts that were done at the time the protection was in place.

Many non-claimant applications are withdrawn or dismissed after the applicant has completed the future acts they sought the protection for e.g. to issue a lease. This means the applications do not continue to the second stage. When this happens, protection ceases, and a new non-claimant application needs to be lodged if an applicant seeks to do any new future acts over the area.

Discontinuance of a non-claimant application at the end of stage one allows the Federal Court to make a future determination over the area, for example when a native title claim is made.

Stage 2: a final native title determination

If the Federal Court makes orders to progress the matter to hearing, it will make a final determination in relation to native title. Evidence will need to be put forward for consideration by the Federal Court that native title has been extinguished or does not exist and submissions made by the parties.

A native title determination gives more certainty about how the land can be dealt with in the future. If the determination is that that native title has been extinguished or does not exist over the area later acts do not need to comply with the future acts regime.

If native title is determined to exist, dealings on the land may still be available through an Indigenous Land Use Agreement (ILUA) with the native title holders or a relevant future act provision in the Native Title Act.

The process for parties to be notified of a non-claimant application

Notification of parties

Once a non-claimant application is lodged with the Federal Court, the proceedings are initiated and the Court will notify the Native Title Registrar (the Registrar). The Registrar notifies any persons who may hold native title or other interests in the relevant area that an application has been filed. In NSW, this notification is provided to:

- the relevant State and Commonwealth Ministers;
- any registered native title claimant in relation to any of the area covered by the application;
- any registered native title body corporate;
- any representative Aboriginal/Torres Strait Islander body for any of the area covered by the application (in NSW, NTSCORP Limited);
- any person who, when the notice is given, holds a proprietary interest in relation to any of the area covered by the application, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth or the State;
- the local government body for the area covered by the application.

A notice is also required to be given to the public. The notice advises that the area may become subject to protection under the Native Title Act (under s24FA) unless the area is covered by a relevant native title claim at the end of the 3-month notice period.

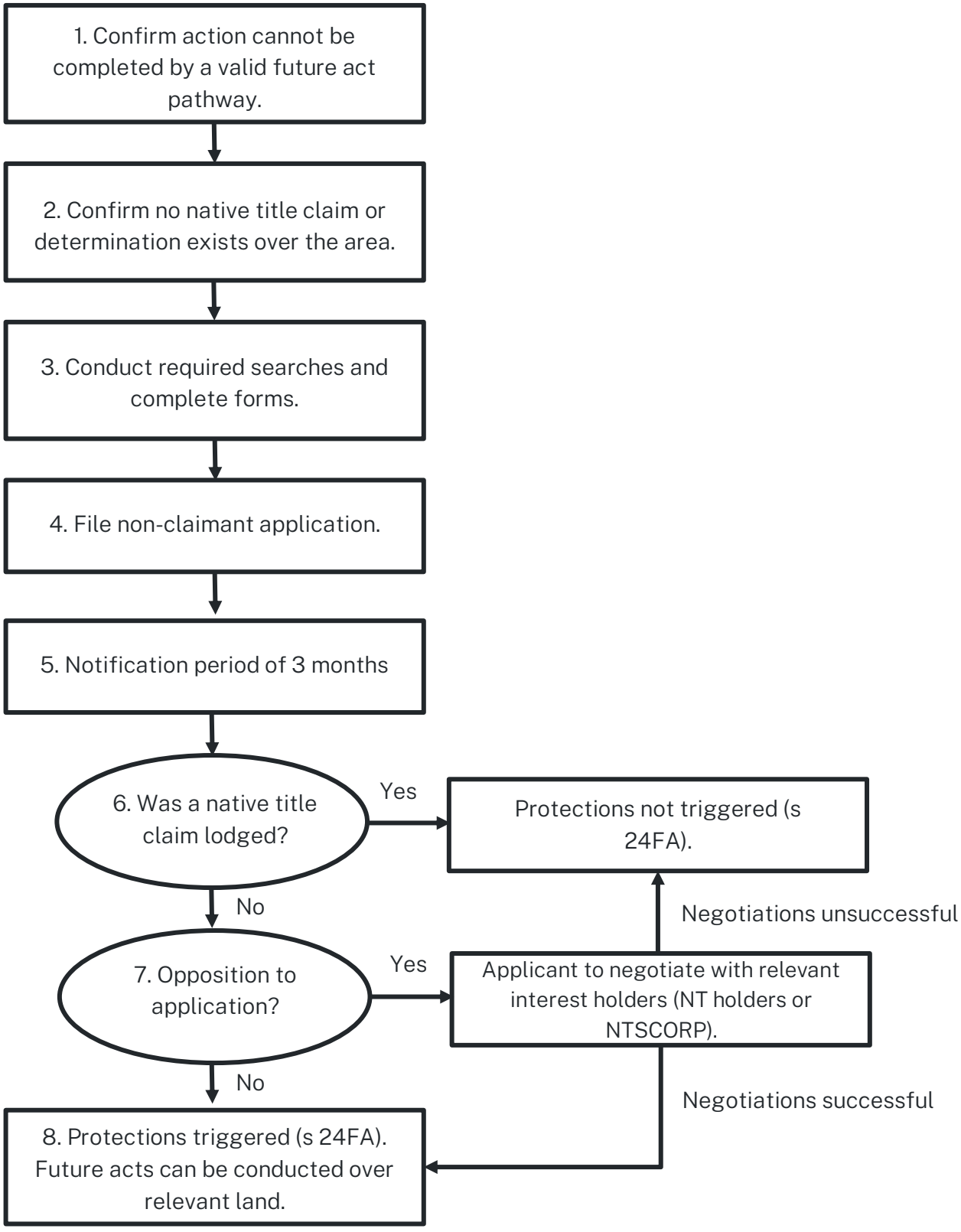
Parties to the application during the notice period

Where non-claimant applications are lodged over Crown land, the NSW Government is always a party to proceedings. If a person wants to be a party to proceedings, they can file a notice with the Federal Court during the notice period outlining their interest in the land. It is common for NTSCORP to become a party to any non-claimant applications. Sometimes there may also be Aboriginal respondents or others that have an interest in the land, like a tenure holder.

The NSW Government and other parties to the application will be served with documents that are filed with the Federal Court, notice of Court listings and other developments in the proceedings.

Applications that are made to engage future act protection are usually mainly procedural in nature. Where an application progresses to a determination of the Court that native title does or does not exist, it is expected that other parties to the application would take a much more active role in proceedings.

The non-claimant application process



Contact

For more information, please contact the Council Crown Land Manager team at:

Ph: 1300 886 235

Email: council.clm@crownland.nsw.gov.au

Legislation

- *Native Title Act 1993* (Commonwealth)
- *Crown Land Management Act 2016* (NSW)

Resources

- National Native Title Tribunal website
- Federal Court of Australia forms website
- Crown Land Manager website