

December 2021

Overview

The *Crown Land Management Act 2016* (CLM Act) requires councils to undertake some functions that were previously managed by Crown Lands. These functions include native title compliance for dedicated or reserved Crown land managed by a council Crown land manager (CLM) and land vested in a local council under Division 4.2 of the CLM Act.

Under Part 8 of the CLM Act, council CLMs must comply with all requirements of the Commonwealth *Native Title Act 1993* (NT Act) and engage or employ at least one native title manager to fulfill these obligations. These guidelines have been developed to assist council General Managers and Executives in understanding native title requirements under the legislation.

What are the requirements of councils under the *Crown Land Management Act 2016* and the *Native Title Act 1993*?

Councils are responsible for ensuring that all their activities on Crown land are carried out consistently with the CLM Act and the NT Act.

Under the CLM Act, councils are required to:

- Comply with all requirements of native title legislation in relation to land for which it is the Crown land manager (s8.10)
- Engage or employ at least one native title manager to ensure compliance with native title legislation (s.8.6(1))
- Obtain the written advice from their native title manager that the council complies with native title legislation when undertaking certain activities (s.8.7)
- Advise the Minister annually of the name/s of the council's native title manager/s (s.8.8)
- Pay compensation or indemnify the State against compensation liabilities for acts undertaken by councils that affect native title (s.8.12, 8.13)

What is the *Native Title Act 1993*?

Native title is how Australian law recognises the rights and interests that Aboriginal people and Torres Strait Islanders hold in land and waters under their traditional laws and customs. Native title is recognised and protected by the NT Act, which also establishes the ways in which future dealings affecting native title may proceed. Whilst the NT Act does not create any native title rights or interests, it protects and regulates common law rights and interests that already exist.

Who are native title holders?

Native title holders are the group of Aboriginal people who hold native title rights for an area according to their traditional laws and customs. They are the 'traditional owners' for that land and waters and may be formally recognised by the Federal Court through a native title determination. Native title holders however, still possess their native title rights and interests, even if a claim has not been lodged or determined by the Court. The nature and extent of native title rights can vary and may include exclusive possession, use and occupation of traditional country or non-exclusive native title rights, such as the right to access and camp or to hunt and fish on traditional country. The State must assume that native title exists if it does not hold evidence of extinguishment.

Who is responsible for compliance with the *Native Title Act 1993*?

Council is responsible for ensuring compliance with the NT Act. To support this, a council's native title manager must provide a written report to the relevant decision makers in the council that an act complies with native title legislation prior to council undertaking activity on Crown land. The report should include compliance actions necessary to meet the requirements of the NT Act, including notification procedures. The Department of Planning, Industry and Environment (Crown Lands) provides training to accredit council staff as native title managers.

When do I need to seek native title manager advice?

Before a council carries out an activity on Crown land it must first determine whether there is a valid native title pathway. This is done by obtaining a report from your council's native title manager. The native title manager must establish whether the activity is permitted under the 'future act regime' in the NT Act (unless it is 'excluded' land). Council General Managers, Executive teams and various Business Units should consider native title requirements at the commencement of project planning so that any native considerations can be addressed in the site selection and project planning phase.

Why seek native title manager advice early?

While the NT Act allows councils to undertake many land management activities, some acts may only be undertaken by agreement with native title holders or by making a non-claimant application. Early identification in native title manager advice will allow a council to:

1. Make necessary changes at the planning stage that could avoid delays later; and
2. Ensure adequate time for necessary procedural and notification requirements. Native title holders, for example, should be given a suitable notification period (e.g. 30 days) for certain council activity on Crown land. Council cannot commence activity on relevant Crown land until procedural requirements are met.

Types of activities that may require native title manager advice include (but not limited to):

- Public works
- Granting leases, licences, permits, forestry rights, easements
- Construction
- Maintenance
- Planning works
- Developing Plans of Management
- Mortgaging land or allowing it to be mortgaged
- Imposing or agreeing to covenants, conditions or other restrictions on use of the land

How do I know who the native title holders are in my local government area?

Once native title rights are formally recognised by the Federal Court, councils know with certainty who the native title holders are in an area. A native title determination lists the native title rights that have been recognised. Where native title has not been determined by the Court, council should still deal with native title holders through [NTSCorp Limited](#).

- Information on native title applications and determinations including native title holders and rights and interests recognised by the Federal Court can be accessed by searching the [National Native Title Tribunal](#)

- Native title holders formally recognised by the Federal Court form a Registered Native Title Bodies Corporate (RNTBC) to hold their native title rights in trust. Councils can find out details of the Directors of particular RNTBCs by searching the [Office of the Registrar of Indigenous Corporations](#)
- All RNTBCs in NSW are currently represented by [NTSCorp](#), the Native Title Service Provider for Aboriginal Traditional Owners in New South Wales and the Australian Capital Territory. Before a native title claim has been finalised, or if there has not been a native title claim, councils can formally contact NTSCorp by calling (02) 9310 3188 or 1800 111 844 or emailing information@ntscorp.com.au

What is the difference between Aboriginal land rights and native title?

Native title holders are separate stakeholders to Aboriginal Land Councils who make claims for land under the NSW *Aboriginal Land Rights Act 1983*.

<i>Native Title Act 1993 (Cwth)</i>	<i>Aboriginal Land Rights Act 1983 (NSW)</i>
Recognition of rights over land and waters	Grant of land rights (in freehold)
Claim made by native title holders - must establish customary connection to land.	Claim made by Aboriginal Land Councils/NSW Aboriginal Land Council - current day geographic connection.
Land held by Prescribed Body Corporates.	Land held by Local Aboriginal Land Councils or the NSW Aboriginal Land Council.
Claims over Crown land where native title rights have not been extinguished and where connection to the land can be established.	Claims over Crown land not lawfully used or occupied, or required for an essential public purpose, or for residential land.
Non-exclusive rights (typically).	Exclusive rights (typically).
Claim determined by Federal Court.	Claim determined by Minister.

What is an Indigenous Land Use Agreement?

There may be activities that a council will want to undertake on Crown reserves that can only be undertaken by agreement with the native title holders. An Indigenous Land Use Agreement (ILUA) is a voluntary agreement between native title parties and other people or bodies about the use and management of areas of land and/or waters. While registered, ILUAs bind all native title holders to the terms of the agreement and operate as a contract between the parties.

What is s. 24FA protection?

By making a [non-claimant application](#) under s. 24FA, persons can deal with land where native title may exist, even if the act would affect native title. Once the non-claimant application is registered and no native title application is accepted after the notification period expires, the area is subject to 's. 24FA protection' until the non-claimant application is withdrawn. The protection means that any future act may be validly done during that time.

A non-claimant application can be made to the Federal Court to seek a determination that native title does not exist in the area covered by the application or it may be withdrawn after the future act is done, without the Court making a determination about native title. Any person can make a non-

claimant application if they hold a non-native title interest in relation to the whole of the area covered by the application.

A non-claimant application can be made by corporations, Commonwealth, State and Territory Ministers, statutory authorities and other government bodies. Where s. 24FA protection is enlivened, any future acts in the area remain valid even if it is later found that native title exists or existed in relation to the area at the time and compensation may be payable for any extinguishment of those native title rights and interests.

How can I support Aboriginal rights and interest on Crown land?

The first ever State Strategic Plan for Crown land, *Crown Land 2031* outlines the NSW Government's commitment to Aboriginal people and sets priorities to accelerate the realisation of Aboriginal land rights and native title in partnership with Aboriginal people and protect cultural heritage on Crown land. Council and Category 1 CLMs manage highly valuable public land for local and regional communities and are expected to support Crown Lands' priorities through their management of Crown land.

The NT Act provides pathways for government, Council and Category 1 CLMs to achieve public use and amenity of Crown land lawfully, and in the majority of circumstances if the activity is in-line with the gazetted reserve purpose, it can be validly undertaken under the NT Act.

CLMs are encouraged to form positive relationships with the native title claimants or holders in their local area as early as possible, regardless of whether there has been a native title determination.

Where native title rights will be affected, traditional owners have legal rights that could lead to stop work orders and compensation. Plans of Management for council-managed Crown reserves provide a tool for validating use of Crown land and Crown Lands supports Category 1 CLMs and Council CLMs with advisory services for the management of Crown land via dedicated teams.

What native title notifications are required for council activity on Crown land?

The NT Act sets out notification and procedural requirements for activities on Crown land that councils will need adhere to before and after a native title determination.

Where no native title claim exists, NTSCorp should be notified and where a native title claim exists, NTSCorp should be notified and will notify the claimants unless another legal firm represents the claimants. Notifications must be sent to NTSCorp, as well as to the RNTBC after a native title determination.

Procedures required depend on the type of activity that council will be undertaking, and the relevant future act category that the act will be validated under. Your council's native title manager should manage this process. Councils are encouraged to build positive relationships with native title holders and consult with them proactively regarding any proposed changes on Crown land.

Notification procedures generally required for council activity under the *Native Title Act 1993*

Future act category	Notification	Opportunity to comment	Other procedures	Is compensation payable?
B-E - ILUAs	Yes	Yes	Yes Extensive legal negotiations Multi-party consents	Yes
F - FA protection			Yes Court application	Yes
G - Primary production	Yes	Yes		Yes
H - Water, living aquatic resources and airspace	Yes	Yes		Yes
I - Pre-existing acts or renewals	Yes Required for extinguishing acts being grants of freehold (i.e. a disposal) and exclusive possession tenures but not for other dealings.	Yes Required for extinguishing acts being grants of freehold (i.e. a disposal) and exclusive possession tenures but not for other dealings.		Yes
J - Reservations	Yes If it is a public work	Yes If it is a public work		Yes
K - Facilities for services to the public	Yes If required under the State legislation under which the act is permitted.	Yes If required under the State legislation under which the act is permitted.		Yes
L - Low-impact activities				No
M - Acts that pass the freehold test	Yes	Yes		Yes

How do I know what Crown land my council manages?

You can view details of the Crown land your council manages by visiting the Crown land [Reserve Manager Portal](#).

Where can I find more information?

- [Crown Reserve Manager website](#)
- [Native Title Manager Workbook](#)
- [Native Title Act 1993](#)
- [Crown Land Management Act 2016](#)
- [National Native Title Tribunal](#)
- [Office of the Registrar of Indigenous Corporations](#)
- [NTSCorp](#)
- [Developing *Indigenous Land Use Agreements* – a Guide for Local Government](#)

Contact information

Council Crown land managers

Phone: 1300 886 235

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Category 1 Crown land managers

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