



Developing plans of management for community land Crown reserves

GUIDELINES FOR COUNCIL CROWN LAND MANAGERS

NSW Department of Industry
NSW Office of Local Government

GUIDELINES

Developing plans of management for community land Crown reserves

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More information

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Overview

This guideline is designed to assist NSW councils to understand the requirements of the *Crown Lands Management Act 2016* and *Local Government Act 1993* with regard to the development and adoption of plans of management for Crown reserves classified as community land. The guideline also describes the processes which councils should follow in developing and adopting such plans.

The guideline and attachments are not intended to be an exhaustive or complete guide to plan of management development.

Note: This document is not issued under the *Local Government Act 1993* and is not a guideline under that legislation. While it provides general guidance for councils relating to the development of plans of management for Community Land, the information contained in this document only relates to those Crown reserves managed by councils as Crown Land Managers under the *Crown Land Management Act 2016*.

Councils should continue to refer to *Practice Note No 1—Public land management* for broader guidance on plans of management for general community land under the *Local Government Act 1993*.

Assistance

Note: Council Crown land managers should read these guidelines before seeking assistance.

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1. Why plans of management are required

The *Crown Land Management Act 2016* (the CLM Act) authorises local councils appointed to manage dedicated or reserved Crown land (council managers) to manage that land as if it were public land under the *Local Government Act 1993* (LG Act). Generally council managers will manage land as if it were community land.

Under the LG Act, a plan of management (POM) must be adopted by council for all community land.

1.1. Benefits of having a plan of management

A POM is a useful tool to provide strategic planning and governance for the management and use of land. POMs set out objectives and performance targets for community land and promote active land management and use, including issuing tenures over the land.

The LG Act requires undertaking community engagement activities when preparing POMs, including publicly exhibiting the plan and providing opportunities for the community to comment. This allows the community to be involved and represented in the contents of a plan.

Letting councils manage Crown land as if it were council-owned public land under the LG Act, and to implement POMs, allows councils to manage their entire land portfolios under one streamlined regime, reducing duplication, red tape, administrative complexity and confusion.

In the context of the CLM Act, POMs are also a critical tool to ensure that any authorisation or restriction on the use of a Crown reserve is consistent with the *Commonwealth Native Title Act 1993*. We discuss the important review role of native title managers in the POM adoption process in section 4 of this guideline.

1.2. Deadline for plans of management under new legislation

Council managers must ensure there is a compliant POM for all Crown land that they manage as community land within three years of the commencement of Part 3 of the CLM Act (that is, by 30 June 2021). This is to ensure that Crown land is lawfully used and occupied, which is an essential part of councils' role as the manager of Crown land.

1.3. Assigning multiple categories to Crown reserves

Under the CLM Act, council managers must assign to all Crown land under their management one or more initial categories of community land referred to in section 36 of the LG Act. The initial category must be assigned as soon as practicable after a council's appointment as a Crown land manager.

It is important that the initial category aligns closely with the original reserve purpose, and should be the overarching consideration of a council manager when notifying the initial category. This issue is discussed in further detail in section 5 of this guideline.

NSW Department of Industry has also issued *Guideline - Initial categorisation of Crown land managed by local council Crown land managers*. This document includes in its Annexure B guidance on which categories under section 36 of the LG Act might be considered to most closely relate to purposes for which Crown land is reserved or dedicated.

The document and its annexures can be downloaded from available from olg.nsw.gov.au/content/council-crown-land-managers-resources

It is ultimately a matter for each council to nominate the initial category for each reserve. However, in accepting the guidance categories in *Guideline - Initial categorisation – Annexure B*

– *Categories guidance for reserve purpose(s)*, councils can ensure a more straightforward transition to the new framework.

The notification of additional categories should occur during the process of preparing a POM for the reserve. This will enable the minister responsible for the CLM Act to approve new categories as if another purpose had been applied, and enable planning and management through the POM, including public consultation and exhibition, that considers both categories and purposes.

Further information about the importance of initial categorisation to the POM process is contained in section 5 of this guideline.

1.4. Terminology

Unless otherwise specified, any reference in this guideline to the ‘the minister’ should be taken to mean the minister responsible for the CLM Act. At the time of writing the responsible minister is the Minister for Lands and Forestry.

1.5. Differences in requirements for initial and further/subsequent plans of management

The CLM Act contains specific requirements for **initial** POMs for Crown reserves, and some different requirements for further/subsequent POMs. This guideline highlights the differing requirements, where appropriate.

2. CLM Act requirements

2.1. Overview

Section 3.23(6) of the CLM Act requires council managers to adopt a POM for any Crown reserve for which it is the appointed Crown land manager, and that is classified as ‘community land’ under the LG Act.

These POMs must be prepared and adopted in accordance with the provisions of Division 2 of Part 2 of Chapter 6 of the LG Act (further information about LG Act requirements for POMs is contained in section 3 of this guideline).

2.2. The ‘initial period’

Section 3.23(7) of the CLM Act specifies an ‘initial period’ of three years from the commencement of Part 3 of the CLM Act (ending 30 June 2021), during which a council manager must ensure that the first POM applicable to the land is adopted as soon as practicable before 30 June 2021.

2.3. Amending an existing plan of management

Section 3.23(7) also states that council managers may amend existing POMs so that they apply to Crown reserves, and where appropriate, to the reserve’s use. All applicable provisions of the CLM Act and the LG Act must be addressed for amended POMs (including the requirement to obtain written advice from a Native Title Manager).

2.4. Public hearings

While all POMs must be developed in accordance with the public exhibition requirements of the LG Act (see section 3.8 of this guideline), section 3.23(7)(c) states that, if the draft **first** POM does not add, change or alter the initial assigned categories, the council manager will not be required to hold public hearings under section 40A of the LG Act, but must give public notice of it as required by section 38 of that Act.

Further details about the public exhibition and public hearing requirements of the LG Act are set out in sections 3.8 and 3.9 of this guideline.

2.5. Ministerial consent

Section 3.23(7)(d) of the CLM Act states that, if the draft **first** POM alters the categories assigned as provided by this section, the council manager must:

- (i) obtain the written consent of the minister to adopt the plan if the re-categorisation would require an addition to the purposes for which the land is dedicated or reserved
- (ii) hold public hearings under section 40A of the LG Act.

In practice this means that, after notifying the Minister for Lands and Forestry of the proposed initial categorisation of the land, a council manager must obtain the minister’s consent for council adoption of any POM that would alter the categorisation of the land only if it would require an additional purpose.

The minister can require a council manager to alter the initial category assigned under section 3.23(3) and cannot give consent to a subsequent alteration of the categorisation of land through a POM under section 3.23(7)(d) if it is considered that the alteration is likely to materially harm the use of the land for its reserve purpose.

Note: Section 3.23(9) of the CLM Act states that ministerial consent is required for any further/subsequent POM that changes (or adds) a category **in any way**.

The Ministerial consent process is described in section 6.1 of this guideline.

What constitutes material harm?

Material harm considerations are set out in section 2.19(3) of the CLM Act, and include:

- (a) the proportion of the area of the land that may be affected by [any proposed lease, licence or other estate allowance provision]
- (b) if the activities to be conducted under [any proposed lease, licence or other estate allowance] will be intermittent, the frequency and duration of the impacts of those activities
- (c) the degree of permanence of likely harm and in particular whether that harm is irreversible
- (d) the current condition of the land
- (e) the geographical, environmental and social context of the land
- (f) any other considerations that may be prescribed by the regulations.

The CLM Act goes on to specify that, to avoid doubt:

- (a) the purposes for which a [lease, licence or other estate] can be granted are not limited to public purposes or purposes that are ancillary or incidental to a purpose for which the land is dedicated or reserved
- (b) a [lease, licence or other estate] does not materially harm the use of the land for the purposes for which it is dedicated or reserved just because:
 - (i) the use of the land under the interest may be inconsistent or incompatible with a purpose for which it is dedicated or reserved, or
 - (ii) the land may be used for grazing under the interest.

2.6. Existing use of a Crown reserve continues pending adoption of a plan of management

Section 3.23(7)(f) of the CLM Act states that section 44 of the LG Act applies, meaning the nature and use of the land must not be changed while the adoption of a POM for community land is pending.

However, this subsection does not apply to any further POM (or amendments to POMs) made during the initial period.

2.7. Crown reserve plans of management made after the initial period

Any POM adopted for a Crown reserve after 30 June 2021 must meet all of the requirements of the LG Act, as described in section 3 of this guideline.

Transitional arrangements

Schedule 7 (Cl. 5) of the CLM Act provides that any existing tenure for council-managed Crown land continues in force for the term of its original grant.

Additionally, the [Crown Land Management Regulation 2018](#) provides certain exemptions to the operation of the CLM Act and LG Act during the 'initial period' (from 1 July 2018 to 30 June 2021).

The regulation introduces transitional arrangements that will enable councils to continue current authorised uses and short-term uses of Crown land while developing plans of management.

During the initial period, and until council adopts a first POM for council-managed Crown land, the regulation allows councils to:

- issue short-term licences over council-managed Crown land for a range prescribed purposes, such as holding sports and recreational activities, camping and events
- renew existing leases (for a term not exceeding 21 years, including any option for the grant of a further term) over council-managed Crown land if the renewal does not authorise any additional use for the land
- grant new leases over council-managed Crown land (for a term not exceeding 21 years, including any option for the grant of a further term), if there was a pre-existing lease immediately prior to the repeal of the *Crown Lands Act 1989* (which happened on 1 July 2018) and the new lease does not authorise any additional use of the land.

NSW Department of Industry has issued a Transition Guide and Lease and Licence fact sheet, available from olg.nsw.gov.au/content/council-crown-land-managers-resources. Council managers should take these, and the abovementioned transitional information into consideration when developing POMs for Crown reserves in the initial period.

When exercising powers provided by these transitional arrangements, council managers must also obtain written advice from a qualified native title manager that any leases or licences comply with native title legislation.

3. LG Act requirements

Note: All references to legislation in this section relates to the LG Act unless otherwise specified.

3.1. Overview

Under section 36(1) of the LG Act, POMs must be prepared for all community land. They are not only required under the LG Act, but are an essential management tool for councils.

Plans of management:

- are written by council in consultation with the community
- identify the important features of the land (e.g. natural significance, sportsground)
- clarify how council will manage the land
- indicate how the land may be used or developed, such as leasing.

Table 1 Sections of the LG Act that set the framework for POMs

Requirement	Act section
Use and nature of community land must not change prior to the preparation of a plan of management	44
Prepare plans of management for all community land	35, 36(1)
Process for community land not owned by council	37, 39
What a plan of management for council owned land must include	36(3), (4)
A draft must be exhibited prior to adoption and may be re-exhibited if amended prior to adoption	38, 39, 40

3.2. Minimum requirements

The minimum requirements for a POM are set out under section 36(3) of the LG Act. A POM must identify the:

- category of the land
- objectives and performance targets of the plan with respect to the land
- means by which the council proposes to achieve the plan's objectives and performance targets
- manner in which the council proposes to assess its performance with respect to the plan's objectives and performance targets, and may require the prior approval of the council to the carrying out of any specified activity on the land.

For plans that are specific to one area of land, section 36(3A) specifies that the plan must also:

- describe the condition of the land as at the adoption of the plan
- describe the buildings on the land as at adoption
- describe the use of the buildings and the land as at adoption
- state the purposes for which the land will be allowed to be used, and the scale and intensity of that use.

3.2.1. Assigning categories at the draft stage

Clause 101(2) of the Local Government (General) Regulation 2005 requires councils to have regard to the guidelines for the categorisation of community land set out in clauses 102 to 111 of that regulation, when preparing a draft plan of management.

For Crown Reserves, it is imperative that councils consider this guidance in the context of the reserve purpose, as well as any existing or proposed future use of the reserve, especially with regard to any express authorisations that may be included in the POM (see section 3.3 of this guideline).

Councils should note that the Minister for Lands and Forestry may direct the council to assign another category (under section 3.23(5)) at any point (including at the draft POM stage) if it is considered that a category assigned to the land is not consistent with the reserve purpose. This is separate to the ministerial consent process set out in sections 3.23(7) and 3.23(9) of the CLM Act discussed in section 2.5 of this guideline.

3.2.2. Mapping

Clear and accurate mapping is a key component of a POM, as it allows readers and users to understand where particular categories (and therefore any relevant express authorisations proposed in accordance with the category) apply on the land in question.

Councils must take care to ensure that any map included in a POM includes a sufficient level of detail to allow the easy identification of category boundaries, important natural features, and any existing or proposed infrastructure, such as buildings, roads and parking areas.

Additionally, Clause 113 of the Local Government (General) Regulation 2005 requires that a draft plan of management that categorises an area of community land, or parts of an area of community land, in more than one category must clearly identify the land or parts of the land and the separate categories (by a map or otherwise).

3.3. Additional matters that may be included in a plan of management

The LG Act specifies that other matters may be included in a POM, depending on council's intentions for the land, such as:

- an 'express authorisation' for leases, licences or other estates that may be granted over the land. Leases, etc. may not be granted unless there is an express authorisation in a plan (section 46). Council may also specify any other conditions to apply to leases, etc.
- leases, licences or other estates that will only be granted following a tender process (section 46A)
- activities that require the prior approval of the council before being carried out on the land (section 36(3)). These activities are listed in Part D, section 68. Council may have also dealt with these approvals more particularly under a local approvals policy. If so, council should refer in the POM to any local approvals policy in place, or include the relevant material in the POM.

Note: The provisions of sections 46, 46A, 47, 47A, 47AA, 47B, 47C, 47D, 47E and 47F of the LG Act must be closely considered when addressing express authorisation for leases and licenses in a POM.

For example: a council must ensure that leases or licenses exceeding 21 years that require ministerial consent under section 47(8AA) of the LG Act are expressly authorised in the POM.

See 'Practice Note No.1 – Public land management' available from olg.nsw.gov.au/content/practice-note-no1-public-land-management for further details about leasing, licensing and approvals under LG Act POMs.

For further information about leases and licenses on Crown Reserves in the CLM Act transition period see the 'Leasing and Licence fact sheet' available from olg.nsw.gov.au/content/council-crown-land-managers-resources

3.4. Additional matters where land is not owned by council

The LG Act requires that, where the council controls but does not own land (as is the case with all council managed Crown reserves), a POM must:

- a) identify the owner of the land
- b) state whether the land is subject to any trust, estate, interest, dedication, condition, restriction or covenant
- c) state whether the use or management of the land is subject to any condition or restriction imposed by the owner
- d) not contain any provisions inconsistent with anything required to be stated by paragraph (a), (b) or (c).

Note: Under section 3.23(7)(e) of the CLM Act, points b) to d) above are waived in the case of the **first POM during the initial period** for Crown reserves classified as community land.

3.5. Specific and generic plans of management

Council has the discretion in most cases to prepare a specific POM for the area or a generic plan that applies to more than one piece of land. However, generic POMs **cannot** be made for land declared:

- as critical habitat or directly affected by a threat abatement plan or a recovery plan under threatened species laws (sections 36A(2) and 36B(3))
- by council to contain significant natural features (section 36C(2))
- by council to be of cultural significance (section 36D(2)).

Generic plans will be entirely appropriate in many cases, for example in dealing with children's playgrounds or other pieces of land that contain similar facilities with similar management issues. Natural areas may not be so appropriate for generic plans, given that there may be issues unique to each piece of land, based on the character of the land, surrounding development, community expectations and so on. This does not prevent council from including common clauses or paragraphs in specific POMs.

Alternatively, council could make a specific plan that incorporated another document that contained common provisions used in other specific plans. For example, council could make a brief site specific plan for each piece of land categorised as natural area.

This plan must contain all the requirements of a POM, but these could be covered by reference to other documents such as 'Management objectives—natural areas', 'Rehabilitation strategies—natural areas', and so on.

Council must make sure that all the requirements of the LG Act are covered and that it is clear what documents apply, and whether there is any qualification to these in the individual POM.

Note: The *Threatened Species Conservation Act 1995* has been repealed and superseded by the *Biodiversity Conservation Act 2016*. However, references to the former legislation remain in the LG Act and are therefore retained in this guideline.

Councils should carefully cross reference the requirements of the sections 36A(3) and 36B(4) of the LG Act with the savings and transitional provisions of the *Biodiversity Conservation Act 2016* and its regulations. For example, clause 8 of the *Biodiversity Conservation (Savings and Transitional) Regulation 2017* states that ‘Any area that was, immediately before the commencement of the new Act, declared to be critical habitat under Part 3 of the *Threatened Species Conservation Act 1995* is taken to have been declared under Part 3 of the new Act as an area of outstanding biodiversity value’.

3.6. Requirements for specific land types

3.6.1. Community land comprising the habitat of endangered species

If the POM deals with land that, all or in part, is the habit of endangered species, then the following additional requirements apply (section 36A(3)). The POM must:

- subject to any decision of the Chief Executive of the Office of Environment and Heritage under section 146 of the *Threatened Species Conservation Act 1995* or any decision of the Secretary of the Department of Industry, Skills and Regional Development under section 220Y of the *Fisheries Management Act 1994*, state that the land, or the relevant part, is critical habitat
- categorise the land, or the relevant part, as a natural area
- identify objectives, performance targets and other matters that:
 - take account of the existence of the critical habitat
 - are consistent with the objects of the *Threatened Species Conservation Act 1995* or the *Fisheries Management Act 1994*, as the case requires
 - incorporate the core objectives prescribed under section 36 in respect of community land categorised as a natural area.

Note: See also additional public exhibition requirements set out in section 3.8 of this guideline

3.6.2. Community land comprising the habitat of threatened species

If the POM deals an area of community land, all or part of which is directly affected by a recovery plan or threat abatement plan, then the following additional requirements apply (section 36B(4)). The POM must:

- state that the land, or the relevant part, is so affected
- categorise the land, or the relevant part, as a natural area
- identify objectives, performance targets and other matters that:
 - take account of the council’s obligations under the recovery plan or threat abatement plan in relation to the land
 - are otherwise consistent with the objects of the *Threatened Species Conservation Act 1995* or the *Fisheries Management Act 1994*, as the case requires
 - incorporate the core objectives prescribed under section 36 in respect of community land categorised as a natural area.

Note: See also additional public exhibition requirements set out in section 3.8 of this guideline

3.6.3. Community land containing significant natural features

If the POM deals with land which council has declared to contain significant natural features under section 36C, then additional requirements apply:

- Section 36C(3)—the plan must state why the land is declared to contain significant natural features
- Section 36C(3)—the land must be categorised as a natural area
- Section 36C(3)—objectives and performance targets for the management of the land must be designed to protect the area and its features.

3.6.4. Culturally significant land

If the POM deals with land that council has declared to be of cultural significance under section 36D, then additional requirements apply:

- Section 36D(3)—the plan must state that the land is declared to be of cultural significance.
- Section 36D(3)—the land must be categorised as an area of cultural significance.
- Section 36D(3)—the plan must incorporate any requirements of the Director General of National Parks and Wildlife.

Note: Clause 112(5) of the Local Government (General) Regulation 2005 states that ‘A council must not prepare a draft plan of management that categorises community land as an area of cultural significance on the ground that the land is an area of Aboriginal significance...unless the council has called for and considered any submissions made under this clause by Aboriginal people traditionally associated with the area in which the community land is situated’.

Clause 112 of the regulation contains additional consultation requirements concerning categorisation of land as an area of cultural significance, which should also be considered by councils.

Additionally, section 36DA of the LG Act allows that a council may resolve (at the request of any Aboriginal person traditionally associated with the land concerned or on the council’s own initiative) to keep confidential such parts of a draft or adopted POM to which this section applies as would disclose the nature and location of a place or an item of Aboriginal significance.

3.7. Landowner notification requirements

Section 39 of the LG Act requires that any draft POM for a Crown reserve, including the first plan of management prepared, is required to be referred to NSW Department of Industry as the owner of the land, in draft form prior to council placing the POM on public exhibition.

This enables the land owner to ensure any matters properly required are included in the draft POM.

Under the initial POM adoption processes described in section 6 of this guideline, **all POMs** must be referred to NSW Department of Industry, and the attached forms (annexures A and B) accommodate the notification process.

However, in some instances additional ministerial consent is required for a POM (see section 6.1 of this guideline). Form B requires council to provide the necessary additional information to make a ministerial consent application, should it be deemed necessary by the department. The POM adoption process is described in further detail in section 6 of this guideline.

Note: For further subsequent POMs, the requirements of section 37 of the LG Act must be adhere to in full.

Councils are reminded that the requirements of section 37 of the LG Act are limited by the CLM Act. In the initial POM, councils must only identify the owner of the land, and are not required to state if the land is trust, estate, interest, dedication, condition, restriction or covenant, or whether the use or management of the land is subject to any condition or restriction imposed by the owner.

3.8. Public exhibition requirements

The LG Act requires councils undertake community engagement activities in the preparation of POMs, including public exhibition of the plan and opportunities for the community to comment. This allows the community to be involved and represented in the POM contents.

Specifically, section 38 sets out that:

- a council must give public notice of a draft POM for a period of not less than 28 days
- the public notice must also specify a period of not less than 42 days after the date on which the draft plan is placed on public exhibition during which submissions may be made to the council
- the council must, in accordance with its notice, publicly exhibit the draft plan together with any other matter that it considers appropriate or necessary to better enable the draft plan and its implications to be understood. All documents referred to in a POM should be displayed at the same time as the draft POM.

Additionally, in the case of community land comprising the habitat of endangered species, or which is affected by a threatened species recovery plan or threat abatement plan, the following requirements also apply:

- when public notice is given of the draft plan under section 38, the draft POM must be sent (or a copy must be sent) by the council to the relevant director
- the POM must incorporate any matter specified by the relevant director in relation to the land, or the relevant part.

Note: For the purpose of the abovementioned provisions, relevant director means:

- in relation to the *Threatened Species Conservation Act 1995*, the Chief Executive of the Office of Environment and Heritage (noting the transitional arrangements regarding the *Biodiversity Conservation Act 2016* referred to in section 3.5 of this guideline)
- in the *Fisheries Management Act 1994*, the Secretary of the Department of Industry.

3.9. Public hearing requirements

In addition to the usual community engagement activities prescribed by the LG Act in preparation of a POM, section 40A of the act requires that a council must hold a public hearing in respect of a proposed POM (including for one that amends another POM) if the proposed plan would have the effect of categorising, or altering the categorisation of, community land under section 36(4).

A council must hold a further public hearing in respect of the proposed POM if:

- the council decides to amend the proposed plan after a public hearing has been held in accordance with this section
- the amendment of the plan would have the effect of altering the categorisation of community land under section 36(4) from the categorisation of that land in the proposed plan that was considered at the previous public hearing.

Note: A public hearing is **not** required if the draft POM would merely have the effect of altering the categorisation of the land under section 36(5) (i.e.: the further categorisation of land categorised as natural area as bushland, wetland, escarpment, watercourse or foreshore).

A council must also adhere to the requirements of section 47G of the LG Act when conducting public hearings. Specifically:

- the person presiding at a public hearing must not be:
 - a councillor or employee of the council holding the public hearing
 - a person who has been a councillor or employee of that council at any time during the five years before the date of his or her appointment
- not later than four days after it has received a report from the person presiding at the public hearing as to the result of the hearing, the council must make a copy of the report available for inspection by the public at a location within the area of the council.

Note: There is no prescribed notice period in the LG Act or regulation for public hearings. However, the NSW Department of Planning and Environment's practice note on Classification and reclassification of public land through a local environmental plan (search planning.nsw.gov.au for 'PN 16–001 Classification and reclassification of public land through a local environmental plan'), which relates to similar land management issues, states that, 'After the exhibition period has ended, at least 21 days public notice is to be given before the hearing. This allows the person chairing the hearing sufficient time to consider written submissions and all issues raised'.

Councils are also reminded that, in accordance with section 3.23(7)(c) of the CLM Act, no public hearing is required for the first POM for Crown land (unless the initial assigned category changes or multiple categories are assigned during the POM process).

4. Plans of management and native title

It is imperative that POMs for Crown reserves be compliant with the statutory requirements prescribed by the both CLM Act and LG Act. This includes a requirement for council crown land managers to obtain written advice from a qualified native title manager that any POM covers Crown land that is not 'excluded land'.

Excluded land is defined in the CLM Act to include:

- a) land subject to an approved determination of native title (as defined in the *Native Title Act 1993* of the Commonwealth) that has determined that:
 - i. all native title rights and interests in relation to the land have been extinguished, or
 - ii. there are no native title rights and interests in relation to the land,
- b) land where all native title rights and interests in relation to the land have been surrendered under an indigenous land use agreement (as defined in the *Native Title Act 1993* of the Commonwealth) registered under that Act,
- c) an area of land to which section 24FA protection (as defined in the *Native Title Act 1993* of the Commonwealth) applies,
- d) land where all native title rights and interests in relation to the land have been compulsorily acquired,
- e) land for which a native title certificate is in effect.

Section 8.7 of the CLM Act and the Native Title Manager Workbook (available from industry.nsw.gov.au/lands/what-we-do/our-work/native-title) clearly set out that written native title manager advice is required before a council Crown land manager does any of the following:

- a) grants leases, licences, permits, forestry rights, easements or rights of way over the land
- b) mortgages the land or allows it to be mortgaged
- c) imposes, requires or agrees to covenants, conditions or other restrictions on use (or removes or releases, or agrees to remove or release, covenants, conditions, or other restrictions on use) in connection with dealings involving the land
- d) approves (or submits for approval) a plan of management for the land that authorises or permits any of the kinds of dealings referred to in paragraph (a), (b) or (c). Accordingly, native title manager advice must be obtained prior to the approval (or submittal for approval) of a POM that allows a dealings in (a)–(c) and the execution of any lease, licence, permit, etc. that may be authorised under that plan.

Note: In cases where a POM does not allow dealings under section 8.7(a)–(c) of the CLM Act, written confirmation of this be provided by a native title manager. This confirmation should accompany any notice made to NSW Department of Industry (using forms A or B).

Crown reserve POM native title requirements—summary

Assume native title exists and do not seek to determine extinguishment of native title

A council Crown land manager cannot approve (adopt) a POM until they have obtained written advice from a native title manager that the approval (or submission for approval) of the POM complies with any applicable provision of Commonwealth native title legislation.

As NSW Department of Industry's Native Title Manager Workbook makes clear, unless the council managed Crown land in question is 'excluded land' (as defined by the CLM Act), council must assume that native title exists.

Even if there are no native title claims for the land it does not mean that native title does not exist. A council will still need native title manager advice to comply with the CLM Act.

Approved determinations about whether native title has been extinguished are complex and can only be made by the Federal Court, High Court or a recognised state body.

Early native title manager advice built into the POM approval process

Native title manager engagement and native title consideration should start from the beginning of drafting, even though the written advice is not formally required until the POM is ready for adoption.

The adoption processes put in place for initial POMs (see section 6 of this guideline) brings forward the requirement to obtain native title manager advice to the draft POM referral stage to ensure council's seek the advice early.

NSW Department of Industry will not process a draft POM received from a council unless the council attests that it has considered native title manager advice.

A council generally does not need to provide the advice itself to NSW Department of Industry. However, the department may request the advice in certain circumstances.

In practice the native title manager advice generated for the POM could be used as a basis for developing the advice regarding the lease, licence or permit, and any notification procedure could refer to the previous notification or consultation.

5. Initial categorisation as the gateway to plan development

5.1. Why initial categorisation is required

Under the LG Act, it is at the POM stage where a council is required to categorise ‘community’ land. However, under section 3.23(2) of the CLM Act, council Crown land managers must assign to all Crown land under their management one or more initial categories of community land referred to in section 36 of the LG Act. The initial category must be assigned as soon as practicable after a council’s appointment as a Crown land manager—including appointment due to the commencement of the CLM Act.

Council managers must assign a categorisation they consider to be most closely related to the purposes for which the land is dedicated or reserved. Multiple categories may be assigned to Crown land where Crown land is subject to multiple reservation or dedication purposes.

The degree to which an assigned categorisation relates to the reserve or dedicated purpose is important, as council managers must obtain native title manager advice under Part 8 of the CLM Act prior to dealing with Crown land that they manage, specifically in regards to subdivision J of the *Native Title Act 1993* (Cwlth).

The *Guideline - Initial categorisation of Crown land managed by local council Crown land managers* (available from olg.nsw.gov.au/content/council-crown-land-managers-resources) discusses the initial categorisation process in detail and provide the proper form for assignment notifications by councils.

Note: where a categorisation has been assigned that is **not** the most closely related to the reserve or dedication purpose, the council’s ability to validly manage the land in accordance with that category might be limited by the extent to which those actions affect native title.

Therefore council managers must select a category that closely matches the **original** reservation or dedication purpose, or their land management activities may infringe upon native title rights and council may lose the legal right to continue those activities.

5.2. Initial categorisation in practice

Councils must only notify of one LG Act category that most closely aligns to the original reserve purpose. However, multiple categories may be assigned to Crown reserves when these reserves are subject to multiple reservation or dedication purposes—if there is no alteration of purpose and there is sufficient justification provided by the councils.

Generally speaking, however, the notification of additional categories should occur during the process of preparing a POM for the reserve.

In assigning categories at both the initial categorisation and POM stages, council managers should refer to LG Act provisions that govern the management and use of each community land category and consider how these would preserve and facilitate use of the land for the purpose for which the land was originally set aside by its dedication or reservation.

The use and management of community land can be considered by council managers through the core objectives for each category prescribed by the LG Act and guidelines for categorisation of community land prescribed by the Local Government Regulation 2005.

Additional guidance as to CLM Act reserve purposes that may be most closely related to LG Act categories is also provided in the *Guideline - Initial categorisation of Crown land managed by local council Crown land managers* (available from olg.nsw.gov.au/content/council-crown-land-managers-resources). This information is provided as general guidance only and council

managers must make their own enquiries and rely on their own advice when making a decision regarding categorisation of Crown land they manage.

5.3. Implications of initial categorisation

The categorisation decisions made by council at the initial categorisation stage will have direct implications with respect to which POM adoption approach a council takes for its initial POM (see section 6 of this guideline).

In some cases a council may determine that no additional category (or categories) need to be assigned to a reserve during the POM process to enable the continued use of the reserve. In this case, POM adoption Approach 1 is triggered (see Figure 1). This is the most straightforward approach a council can take to initial POM adoption.

However, the addition of a further category (or categories) to a reserve at the POM stage may require the council to seek ministerial consent under section 3.23(7)(d) or section 3.23(9) of the CLM Act. This is discussed in further detail in section 6.1 of this guideline.

6. Adopting a plan of management for Crown reserves

6.1. Overview of the adoption process

Note: Councils are reminded that:

- section 3.23(7)(d) of the CLM Act states that, if the draft **first** POM alters the initial categories assigned, the council must obtain the minister's consent if the re-categorisation would require an addition to the purposes for which the land is dedicated or reserved
- section 3.23(9) of the CLM Act states that ministerial consent is required for any further/subsequent POM that changes (or adds) a category **in any way**
- the minister cannot give consent under section 3.23(7)(d) or section 3.23(9) if it is considered that the alteration is likely to materially harm the use of the land for its reserve purpose.

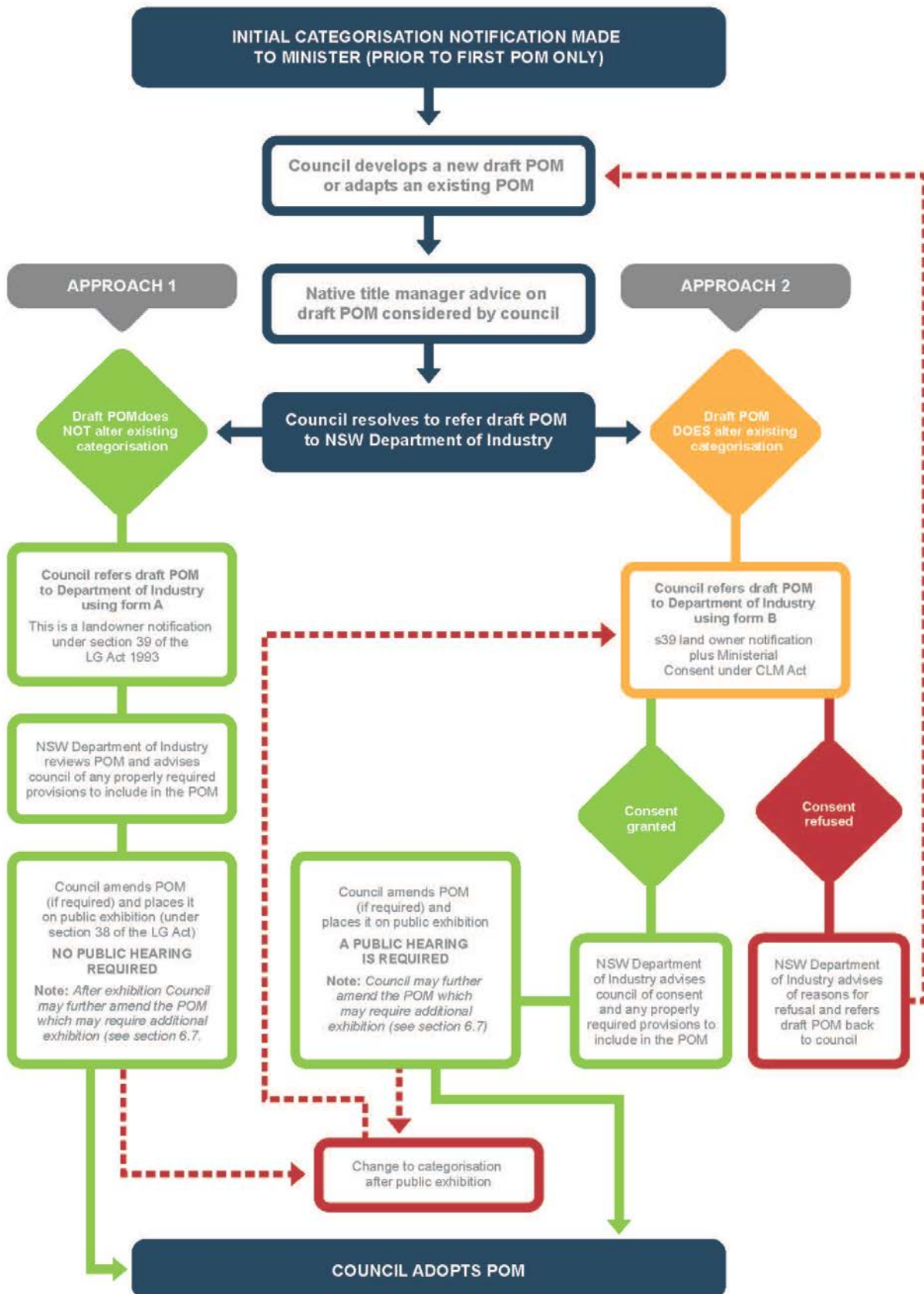
There are two specific approaches that a council can take when adopting a POM for a Crown reserve:

- **Approach 1:** the draft POM **will not** alter categorisation (initial or otherwise) of the reserve
- **Approach 2:** the draft POM **will** alter the initial assigned category or adds a category (or categories) to the reserve.

In both approaches, the council is required to submit the draft POM to NSW Department of Industry (using the appropriate form), as representative of the owner of the land under section 39 of the LG Act. However:

- **under Approach 1**, no additional ministerial consent is required as there is no change to categorisation and therefore no additional purpose needs to be added to the reserve (see section 6.4)
- **under Approach 2**, ministerial consent for an additional purpose is required. NSW Department of Industry will assess the draft POM to determine whether ministerial consent to add an additional purpose to the reserve is given (see section 6.5).

Figure 1 Overview of the POM adoption process



6.2. Preparing a draft

Annexure C to this guideline provides two sample outlines for generic and specific POMs, which councils may wish to consider in preparing a draft POMs for Crown reserves.

Councils should refer to section 3 of this guideline with regard to LG Act requirements for POMs. Further relevant information about the preparation of draft POMs for community land under the LG Act can be found in Practice Note No 1—Public Land Management (available from olg.nsw.gov.au).

6.3. Native title manager advice

As noted in section 4 of this guideline, councils must obtain written advice from a qualified native title manager that any POM for Crown land adopted, or submitted for approval, complies with any applicable provision of Commonwealth native title legislation. This must be obtained prior to referring the draft POM to NSW Department of Industry.

6.4. Adopting a plan of management that does not alter categorisation (Approach 1)

Process

Council must complete *Form A—Notice of plan of management for Crown reserve—no alteration of initial categorisation or additional purpose* (see Annexure A) and send the form to NSW Department of Industry as owner of the land in accordance with the requirements of section 39 of the LG Act, providing the following information:

- a description of the land (reserve number, purpose, lot/DP(s), initial category, etc.)
- a statement of attestation that the initial assigned category has not been altered under the POM
- notice of confirmation that the council has received and considered written advice from a native title manager.

Outcome

NSW Department of Industry will assess the form, and notify council that it may proceed to adopting the POM, or if there are any matters that are properly required by the land owner to be included in the POM.

Note: In Approach 1, the council must publicly exhibit the POM before adopting it. However, the public hearing requirement of the LG Act is waived as the POM is not altering the initial categorisation or requiring an additional purpose for the reserve.

6.5. Adopting a plan of management that alters the categorisation or adds a category (Approach 2)

Process

Council must complete *Form B—Notification of Plan of Management—alteration of categorisation or additional/new categorisation* (see Annexure B) to NSW Department of Industry as the land owner, providing the following information:

- a description of the land (reserve number, gazetted purpose, lot/DP(s), assigned category, proposed category(s), etc.)
- a statement indicating that the initial category **has** been altered under the POM, and details of any new/additional category
- notice of confirmation that the council has received and considered written advice from a native title manager.

As referred to in section 6.1 of this guideline, the department will then assess the draft POM to determine whether ministerial consent to add an additional purpose to the reserve should be granted.

Therefore, Form B also acts as a ministerial consent application form, requiring councils to agree to the use of the form for that purpose.

To support the ministerial consent application, Form B also requires the council to provide additional information about why the draft POM will not materially harm the use of the land (see section 2.5 of this guideline for further information regarding material harm considerations). NSW Department of Industry will use the information in the form as part of a review process to assess whether it is likely or not that the use of the land under the proposed category would cause material harm to the use of the land for any of its reserve purposes.

Council should provide as much information as possible in the application to assist NSW Department of Industry to assess the likelihood of material harm. This may be beyond what is required in the approved form if this is considered to be necessary.

Note: Ministerial consent is required for an **initial** draft POM that alters the initial categorisation and requires an additional purpose to be added to the reserve.

There may be situations where adding/altering a category at the draft initial POM stage will **not** require an additional purpose to be added, and therefore ministerial consent is not required. However, these are expected to be in rare circumstances and will be determined by NSW Department of Industry on a case-by-case basis.

Councils are also reminded that section 3.23(9) of the CLM Act requires that a council must obtain ministerial consent for **any further/subsequent** draft POM that alters the categorisation of the land in **any way**.

There are two possible outcomes of a request for ministerial consent application.

1. **Minister's consent is granted**—Where it is identified that the proposed additional category or categories does not materially harm the land for which it was reserved or dedicated, council will be given notice by the department that they may proceed to adopting the POM (and of any necessary changes to be made to the draft POM).

Council may go on to adopt the POM (after making any necessary changes to the draft POM).

Note: A public hearing must also be undertaken by council with respect to the POM, as the POM is altering the initial categorisation for the reserve.

2. **Minister’s consent is refused**—Where a proposed additional category(s) does materially harm the land for which it was reserved or dedicated, the POM will be referred back to the council. NSW Department of Industry will provide council with information about why consent has been refused. It is then a matter for council to determine whether it pursues the consent or chooses to take another approach to the POM.

6.6. Public exhibition

The public exhibition (and if necessary, public hearing) requirements of the section 38 of the LG Act, described in sections 3.8 and 3.9 of these guidelines, are required to be undertaken by council after the draft POM has been submitted to NSW Department of Industry, but prior to adoption.

If the council is required to make any changes to the draft POM under direction of the department, these changes must be reflected in the version of the draft POM on which public consultation is undertaken.

If the public exhibition (and if necessary, public hearing) process results in substantive changes to the draft POM, it will need to be resubmitted to the department, prior to final adoption.

Note: Generally, a draft POM does not need to be referred back to NSW Department of Industry **after** the public exhibition process. However, if the public exhibition process results in the alteration or addition of a category in the draft POM, the council must again refer it to the department using the process outlined under section 6.5 of this guideline.

6.7. Plan of management adoption

Section 3.23(6) of the CLM Act requires that POMs for council-managed Crown reserves be prepared and adopted in accordance with the provisions of Division 2 of Part 2 of Chapter 6 of the LG Act.

In that division of the LG Act, section 40 requires that:

- (1) After considering all submissions received by it concerning the draft plan of management, the council may decide to amend the draft plan or to adopt it without amendment as the plan of management for the community land concerned.
- (2) If the council decides to amend the draft plan it must either:
 - (a) publicly exhibit the amended draft plan in accordance with the provisions of this Division relating to the public exhibition of draft plans, or
 - (b) if it is of the opinion that the amendments are not substantial, adopt the amended draft plan without public exhibition as the plan of management for the community land concerned.
- (2A) If a council adopts an amended plan without public exhibition of the amended draft plan, it must give public notice of that adoption, and of the terms of the amended plan of management, as soon as practicable after the adoption.
- (3) The council may not, however, proceed to adopt the plan until any public hearing required under section 40A has been held in accordance with section 40A.

The council resolution should therefore note that the POM is adopted pursuant to section 40 of the LG Act in accordance with 3.23(6) of the CLM Act.

Additionally, clause 114 of the LG (General) Regulation 2005 must also be adhered to in cases where a council receives any submission concerning the draft POM that makes any objection to a categorisation of land under the draft POM, and the council adopts the POM **without** amending the categorisation that gave rise to the objection.

In this case, the resolution by which the council adopts the POM must state the council's reasons for categorising the relevant land in the manner that gave rise to the objection.

Note: The resolution should also be carefully worded so as to authorise an appropriate council officer to make the application, using the relevant form, on behalf of the council.

7. Related documents

- [Local Government Act 1993](#)
- [Local Government \(General\) Regulation 2005](#)
- [Crown Land Management Act 2016](#)
- [Crown Land Management Regulation 2018](#)

8. Annexures

Number	Title
A	Notice of plan of management for Crown reserve—No alteration of initial categorisation or additional purpose (form A)
B	Notice of plan of management for Crown reserve—Alteration of categorisation or additional/new categorisation (form B)
C	Crown reserve plans of management—Sample outlines