

Crown Land Management Act 2016

Native Title FAQs

April 2018

These responses have been prepared for the NSW Local Government Property Professionals group in response to the collated questions provided to the Department of Industry – Crown Lands.

Several of these responses were prepared to complement, and should be read with the Native Title Manager Handbook.

Q. Is there a difference in processes when commencing work over Crown Land depending if doing it as a "reserve improvement" or using a DA for major work? Is Native Title still assessed in the same way?

There is no difference in assessing whether different acts "affect" native title. Basically, when thinking about whether an act is a future act, your focus should mostly be on deciding if it validly 'affects' native title.

Even an act that does not require a development application to be lodged with council can still be one that 'affects' native title within the meaning of the *Native Title Act 1993 (NTA)*. This could include a 'reserve improvement'.

Under the NTA, "affect" is basically defined in reference to 'inconsistency' of different sets of rights. Although, as the Native Title Manager Workbook (Workbook) explains, the Court has held that the concept of "affect" is broader and could extend to simply doing something that may have an impact or impairment on the exercise of any native title rights or interests on the land.

Q. If an ALC is refused and then an appeal is lodged, does this make any difference to how Council should progress with works over the Crown Land? Where does Native Title fit into this?

Aboriginal Land Claims (ALC) are granted and Native Title rights and interests are recognised under two separate legislative regimes. ALC's are made under NSW State legislation (the *Aboriginal Land Rights Act 1984*) whilst native title is provided for under Federal legislation (the *Native Title Act 1993*).

If an ALC refusal is appealed it cannot be considered to be finalised until the courts have made a decision on whether the land is claimable. Where an ALC has been made over Crown land any works that would physically alter the condition of the land should not be carried until the claim is resolved. Any other interest or authority in the land should only progress with due consideration to the existence of the ALC and consider outcomes of the land being found to be claimable.

The attached fact sheet *Aboriginal Land Claims Information for Crown land tenants* provides further general information about Aboriginal Land Claims that may be useful for councils as Crown land managers.

Native Title claimants and Aboriginal Land Councils are two distinct stakeholder groups. Where a council is required to follow procedural requirements of the NTA as a Crown land manager such as notification or consultation with the native title holders, claimants or representative bodies this must be undertaken regardless of whether an ALC has been made over the land.

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Q. If the Crown Land is determined to be dedicated or transferred to Council, is LPI (now LRS) or Crown Lands going to be responsible for the cost of a proper survey, to replace the many 'Departmental' plans currently registered at LPI as there is no detail on these departmental plans? It should not be a burden for Council's to arrange survey.

As is currently standard practice, land will generally be vested with limited title. In cases where surveys are required due to third party rights etc., councils will generally be liable for survey costs for any land they want to take. There may be some exceptions to this rule, and this will be a matter for negotiations between councils and the State as part of the Land Negotiation Program.

Q. Is Crown going to provide a comprehensive list of all Crown Land to each Council which will include details regarding current Native Title issues and ALC's?

To assist councils in their role as Crown land managers the Department of Industry - Crown Lands and Water will provide a schedule of reserves managed by each council that will include details regarding:

- reservation purposes (important for subdivision J)
- dates of reservation (important for subdivision J)
- Lot and DP information

Information on Native Title 'issues' i.e. where a current claim is in place, where a determination exists, where an ILUA has been registered over the land etc. is held by the National Native Title Tribunal (NNTT). The Native Title Manager Workbook sets out how native title managers can access this information from the NNTT register in Section 4.1 (pages 34-41).

Councils should hold their own records on ALC claims within their LGA. Where a new ALC has been made over Crown land the NSW Department will notify council. Councils may also contact the Departments Aboriginal Land Claims Unit for information regarding land claims over Crown land they manage. The Aboriginal Land Claims Unit may be contacted on P: [02 6883 3396](tel:0268833396) or E: ALC@crowland.nsw.gov.au

Q. Where a reserve purpose has been added after 1 January 1994, can that new reserve purpose be applied for the purposes of the application of subdivision "J"?

Note: For clarity this answer it has been drafted as though the question asked about reserve purposes added after 23 December 1996.

Whether subdivision J applies will depend on the identification of an 'earlier act', being an act that occurred prior to 23 December 1996 that conferred or made a reservation for a particular purpose. Particular purpose is not defined in the act, but is central to Subdivision J and likely requires that the purpose be specific and not general. This is the first step in considering whether Subdivision J can be relied upon to validate a future act. Once this is established, the later act must be done in good faith and be done under or in accordance with the reservation or have no greater impact than any act that could have been done under or in accordance with the reservation would have had.

The first issue to consider in any assessment of the proposed later act is whether it actually affects native title. If it does not, then it will not be a future act. When thinking about the 'affect' of any proposed act, your assessment must be fair and balanced. You should consider what native title rights might exist in the area and whether the act you are contemplating is in any way inconsistent with or will otherwise affect those rights.

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The adding of a reserve purpose, of itself, may not affect native title if it does not confer any additional rights that are otherwise inconsistent with the exercise of native title rights that are not already extinguished by an earlier act. For instance, if the earlier act extinguished the native title right to exclusive possession (i.e. the right to exclude and control access), the addition of a reserve purpose that does no more than that would not affect native title and therefore would not require validation under the NTA.

If, however, the later act (being the adding of a reserve purpose) brings about further restrictions or impairment on the native title rights that may exist, then it likely affects native title and it is possible that Subdivision J could be relied upon to validate the later act.

The requirements for a future act to be validated under subdivision J were discussed at the Introductory Native Title Manager training and are further discussed from page 75 to 78 of the Native Title Manager workbook.

Q. Where an original lease was granted prior to 1 January 1994 and there have been a series of renewals or re-grants, can the original lease be relied upon in the application of subdivision “I”?

Subdivision I is discussed in the Native Title Manager Workbook from pages 66-71. Whether this subdivision correctly applies to successive renewals etc. is unclear and it is recommended that you seek legal advice where it is clear that an original lease has previously been relied upon.

Permissible future acts that may be validated under subdivision I involving the renewal, re-grant, re-making or extension of the term of a valid lease, licence, permit or authority are discussed from page 67.

The requirements for a future act to be validated under subdivision I (section 241C) are set out in the checklist on page 69.

Q. Do structures such as public seating, picnic tables, shade structures, public BBQ's, camp kitchens etc. count as “fixtures” under the public definition provided in relation to section J (see page 77 of the workbook)? If so where?

Public works are defined by the NTA to include a building or other structure that is a fixture. Whilst the degree of attachment to the land will be a factor in the consideration of whether a building or other structure is a fixture, the affixer's intention as to permanence, and in particular if the main intention is the better use or enjoyment of the land, is more important.

In general, free standing items that don't have any degree of attachment would not be considered fixtures. However, once the structure has a degree of attachment to the land, then it becomes a question of the intention, including whether it is for the better use and enjoyment of the land. If so, it will likely be a fixture and a public work under Subdivision J.

For those people who are familiar with, and like reading case law, decisions of the Court that have considered whether particular items are fixtures within the meaning of 'public works' in the NTA include: *Alyawarr, Kaytetye, Waramungu, Wakay Native Title Claim Groups v Northern Territory* [2004] FCA 472 and, more recently, *Margarula v Northern Territory* [2016] FCA 1018.]

As a Native Title Manager you will need to be comfortable in your consideration of whether a structure would qualify as a fixture when providing your advice should you look to validate a future act under subdivision J.

If a native title manager holds any concerns regarding legislative interpretation it is always recommended that further advice be sought.

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Q. Can the Crown confirm/ establish that all reserves they hand to Council for management are valid and “done by the Crown” from the point of view of subdivision J?

In general and to our knowledge, Crown reserves are valid and “done by the Crown”. You should seek legal advice if you are uncertain about the validity of the reserve.

Q. If a Plan of Management (POM) satisfies the future act provisions of native title legislation then do acts flowing from the POM need to be revisited. For example the POM may allow for the establishment of a food outlet on land reserved for public recreation and the granting of a lease for same. Do these two acts then need to be separately validated?

Some of the acts that may be undertaken by a council under a plan of management will be future acts. For example, the plan of management may contemplate the grant of leases or licences over community land. The grant of such interests will affect native title and would need to be validated under the future act provisions of the NTA.

Section 8.7 of the CLM Act and the Native Title Manager Workbook clearly set out when native title manager advice is required. **Note: for relevant land as defined by Part 8.**

This provides that native title manager advice is needed for:

- grant of leases, licences, permits, forestry rights, easements or rights of way over the land,
- mortgage the land or allow it to be mortgaged,
- impose, require or agree to covenants, conditions or other restrictions on use (or remove or release, or agree to remove or release, covenants, conditions, or other restrictions on use) in connection with dealings involving the land,
- approve (or submit 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 plan of management that allows a dealings in (a)-(c) and the execution of any lease, licence, permit etc. that may be authorised under that plan.

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.

Q. Is the vesting of non-excluded land in a local Council a ‘Future Act’ under the *Native Title Act 1993 (Cth)*? If so, what effect does it have on the application of Subdivision J of the Act? If not, why not?

The vesting of non-excluded local land in a council is an act attributable to the State and will occur under the land negotiation program. It is not a 'future act' as the vesting itself is subject to any native title rights and interests in the land and therefore does not affect native title (think back to our definition of what a future act is at the training and as set out in the workbook).

Land is vested in fee simple subject to any native title rights and interests existing in relation to the land immediately before the vesting, hence native title manager advice is required for certain functions for that land under Part 8 should it not be ‘excluded land’.

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Section 4.9 (3) of the CLM Act provides that if the land is not excluded land when it is vested, that until it becomes excluded land the dedication or reservation remains. The continuation of the reservation or dedication for the land in effect preserves the ability to rely on subdivision J to validate certain future acts that meet all of the relevant criteria for that subdivision.

Q. Does a plan of management for non-excluded land under the *Local Government Act 1993* that authorises new public works need to be referred to the relevant native title holders for comment prior to its adoption by Council?

The adoption of a plan of management itself should be distinguished from the acts undertaken in accordance with it. Essentially, the adoption of the plan of management depending on its overall terms may be a future act. Additionally, activities undertaken by Councils in accordance with the plan may also be future acts if they affect native title. The authorisation of new public works would affect native title and would need to be validated even were the plan of management itself validated under the NTA.

The Department encourages councils as Crown land managers to foster healthy and collaborative relationships with Native Title groups and NTSCORP and provision of POMs for consideration by native title claimants or holders might be appropriate and helpful in this context.

Q. Council holds references to Native Title extinguishment for some Reserve Trust land. Can you confirm that these determinations are final and don't require re-assessment?

If there has been a determination by the Federal Court regarding the existence of native title, this is final and can be relied upon. In all other cases, native title should be assumed to exist unless and until the land becomes "excluded land" under the CLMA.

Like any other person or body a council Crown Land Manager must comply with the requirements of the NTA in so far as they are applicable to any activities undertaken on the land they manage.

Q. How should land (i.e. Lot/DP) added to a reserve after 23/12/1996 be treated for purposes of Subdivision J. i.e. the reserve was created before 23/12/1996, but a particular parcel of land that Council wishes to embellish was added to the reserve after the 23/12/1996 date stamp.

Any land added to a reserve after 23/12/1996, even if the initial reserve was in place before then, cannot be considered to have been subject to the earlier act (the reservation) prior to 23/12/1996 and as such cannot be considered to satisfy the requirement for validation under subdivision J.

Q. Are Crown Roads on offer for Councils to accept ownership of in the Land Negotiation Process?

Crown roads are not Crown land and are not the main focus of the land negotiation program; however Crown roads may be considered in exceptional circumstances.

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Q. Will currently only devolved to Council for management will with the commencement of the Crown Land Management Act be able to be managed by Council under the LG Act? If so, will they come across as Community or Operational Land? If not, will they be ‘on the table’ for negotiation for transfer to Council under the Land Negotiation Programme

The new legislation does not change the management of devolved land and any devolved cemeteries will continue to be managed by local councils in accordance with section 48 of the *Local Government Act 1993*. As with all other land, if it fits within the "local land criteria" it is "on the table" for negotiations as part of the Land Negotiation Program. Should Council wish to manage the currently devolved land under Crown land legislation they should contact their local Lands office to discuss options of appointment as a reserve trust manager or (Crown land manager post commencement of the CLM Act).

Q. Will the system be “tested” initially with eventual conversion to an on line system being the goal for the future? When Wentworth Shire had the Native Title claim determined we became aware of an on line system that Victoria use for cultural heritage – much the same as we saw in training – cascading until you reach the right answer. It would be much more efficient for a system that anyone can access both from the point of view of ease of access and use and also provision of statistics.

Can this question please be further clarified and resubmit to legislation@crowmland.nsw.gov.au for response.

Further Information

Resources

As was covered in the Introductory Native Title Manager training and Native Title Manager Workbook, there are several very useful information sources that may be helpful to native title managers.

Information that may guide further investigation or legal advice requests may be sourced from the Australian Institute of Aboriginal and Torres Strait Islander Studies who publish a bi-monthly native title newsletter every which summarises native title cases decided in the prior two months.

AIATSIS newsletters can be found at www.aiatsis.gov.au/news-and-events/newsletters

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The Department of Industry – Crown Lands will continue to provide information stakeholders information on the Crown Land Management Act 2016 as we progress towards its commencement.

Disclaimer: These answers provide general information only and do not constitute legal advice. The information provided is based on knowledge and understanding at the time of writing (April 2018) and may not be accurate, current or complete.

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