fact sheet

NEW SOUTH WALES ABORIGINAL LAND COUNCIL

Interaction between native title and land rights

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This document has been prepared by the New South Wales Aboriginal Land Council (**NSWALC**) for Local Aboriginal Land Councils (**LALCs**) and Aboriginal communities across NSW.

Please Note: While all care has been taken in the preparation of this document, the advice it contains should not be seen as a substitute for independent consideration of the issues and/or legal advice on this subject. This document is current as of March 2014.

Native title and land rights both relate to Aboriginal Peoples' rights in land, however they have different purposes and starting points. The interaction between native title and land rights is a complex area, but with community cooperation there is scope for the two systems to work together to deliver the best of both.

Recognition of native title compared to granting of land rights

To understand the interaction between native title and land rights, it is essential to understand that native title is about **recognition** of rights and interests in land whereas land rights is about **granting** interests in land.

When the Federal Court of Australia makes a native title determination, Australia's legal system recognises rights and interests that are, and always have been, held by Aboriginal people in accordance with traditional law and custom.

In contrast, when the Minister for Crown Lands grants land under the *Aboriginal Land Rights Act 1983* (**ALRA**), the Government is granting land to Aboriginal Land Councils as compensation to Aboriginal people for past dispossession of land.

For more information comparing native title and land rights, refer to *Native Title Fact Sheet 1*.

Using land rights and native title together

Land rights and native title are very different systems and each has its own aims and benefits that they can offer Aboriginal Peoples.

Native title offers recognition of rights and interests held under traditional laws and customs. If the native title claim is a registered claim, it also offers significant procedural rights while a claim is underway, including the right to negotiate in relation to certain acts including the grant of mining rights[1]. In most cases a native title determination in NSW is likely to recognise non-exclusive rights, such as the right to hunt and gather.

A land claim, if granted, will generally result in the Local Aboriginal Land Council having a fee simple interest in the land which is the strongest interest a landholder can have. Importantly, the fee simple granted under the ALRA includes ownership of certain minerals which no other landholder in NSW has.

With cooperation, LALCs and native title claim groups can work together to make the most of the two systems.

Can native title exist on land rights land?

Native title can exist on land rights land in certain cases. Because native title is about recognising rights and interests that already exist, native title can exist over land even if there hasn't yet been a determination of native title.

[1] Subdivision P of the NTA

For native title to be determined to exist, there must be a connection to the land by the native title claimants and there must not have been any 'act' that has extinguished native title.

Generally speaking, native title law provides that the grant of a freehold title extinguishes native title absolutely[2] and this extinguishment of native title is permanent and cannot be revived[3]. However, these two principles of native title law do not apply in the usual manner to land held by Aboriginal people under the ALRA.

Whether or not native title exists over land granted under the ALRA will depend on a number of factors including how the LALC came to own the land (ie as a result of a successful land claim or by some other means) and, if the land was claimed, the date upon which the land claim was lodged.

Land claims lodged after 28 November 1994

Following the commencement of the *Native Title Act 1993* (**NTA**) in 1993, the ALRA was amended on 28 November 1994 to take into account the new Commonwealth native title regime. As a result of these amendments, the ALRA now provides that, if the land was granted as a result of a land claim made **after** 28 November 1994, any native title rights and interests existing in relation to the lands granted immediately before the transfer continue to exist (sections 36(9) and 36(9A), ALRA).

This means that native title continues to exist on land rights land granted as a result of a land claim lodged after the amendments (ie 28 November 1994), assuming there was no act that extinguished native title before the land was granted under the ALRA and that there is a claimant group that continues to exercise rights and interests over that land or waters in accordance with traditional laws and customs.

This means that, should a native title claim group obtain a native title determination, the members of that group would be recognised by the Federal Court to hold rights and interests in the LALC's land. The rights and interests will vary but are likely to include the right to access land and to hunt or fish on land.

[2] *Mabo v Queensland (1992) 175 CLR 1*
[3] *Fejo v Northern Territory (1998) 195 CLR 96* at paragraph 112

Other land that is owned by a LALC – extinguishment of native title may be disregarded

For other types of land that are owned by a LALC, native title may have been extinguished (this includes Aboriginal Lands Trust lands and land granted under the ALRA as a result of a land claim lodged prior to 28 November 1994), however this would need to be considered based on the circumstances in each case. As noted above, for land claimed after 28 November 1994 native title may have also been extinguished if there has been an act that extinguished native title before the land was granted to the LALC.

However, even where native title has been extinguished, this may be disregarded in some circumstances.[4]

Section 47A of the *Native Title Act*, where it applies, enables the Federal Court to disregard any previous extinguishment over land owned by Aboriginal Land Councils when making a determination[5]. Section 47A may apply where the land held by the LALC is held for the benefit of Aboriginal people and members of the claim group occupy the area. Occupation in this context does not necessarily require people to live on the land. The land might be occupied even if people are only occasionally visiting the land.[6] Whether an area is "occupied" will depend on the context of each individual claim.[7]

Should section 47A of the NTA apply to the land, any extinguishment of native title caused by the grant of the land to the LALC or any prior act will be disregarded.[8] However, the native title rights and interests will be subject to the non-extinguishment principle[9] which means that the rights and interests have no effect in relation to the freehold interest granted to the Land Council under the ALRA.[10] Native title which is subject to the non-extinguishment principle is often described as native title that is 'suppressed' by the freehold interest.

[4] *Native Title Act (Cth),* Sections 47, 47A and 47B
[5] Section 47A NTA
[6] *Moses v Western Australia and Others* (2007) 241 ALR 268 at 315-318
[7] *Moses v Western Australia and Others* (2007) 241 ALR 268 at [210]
[8] Section 47A(2) NTA
[9] Section 47A(3) NTA
[10] Section 238 NTSA

Can a native title claim be lodged over land owned by an Aboriginal Land Council?

In some circumstances a native title claim may be able to be lodged over land owned by an Aboriginal Land Council. This will depend on the type of land, the prior uses of the land, and how the land came to be vested in the Aboriginal Land Council.

As noted above, if the Aboriginal Land Council owns the land as a result of a claim made after 28 November 1994, it is subject to any native title rights and interests that existed immediately before the transfer. While the history of the ownership of that land prior to it being granted under the ALRA (such as the grant of a special lease or previous freehold ownership) may have extinguished native title, if certain conditions are met this extinguishment may be disregarded as a result of s 47A as explained above.

Can a native title claim be lodged over land that has an existing undetermined Aboriginal land claim?

A native title claim may be lodged over land that has an existing undetermined Aboriginal land claim. If a native title claim is lodged over land that has an existing undetermined Aboriginal land claim, the land claim is to be determined as per the conditions on the land at the date the land claim was lodged.

This means where a native title application is lodged ***after*** the Aboriginal Land Claim, this should not influence the Minister's decision on the Aboriginal Land Claim.

Can an Aboriginal land claim be granted over land covered by a native title claim?

An Aboriginal land claim lodged over land that is the subject of a registered native title claim or determination must be refused by the Crown Lands Minister. However, it is important to be aware that many native title claims are made over very large areas of land, but exclude specific parcels within that area from the claim depending on the tenure history of that land. Accordingly, before accepting the Minister's refusal as correct it is important to ensure that the Aboriginal land claim was not over a parcel of land that is excluded from the native title claim. The NSWALC Legal Services Unit, which reviews the correctness of all of the Minister's refusals, makes sure of this.

Interested stakeholders can apply to become a party to native title claims

Local Aboriginal Land Councils should consider whether to apply to become party to native title claims.

Becoming a party gives people a say in mediation and, if necessary, in court. To become a party to a native title claim you need to apply to the Federal Court within the three month notification period.

Parties will often have legal representation and will need to provide a reason why they should be party to a claim.

More information and forms are available on the Federal Court of Australia website:

http://www.fedcourt.gov.au/forms-and-fees/forms/native-title-regulations/form-5-guide

How does native title affect land dealings on LALC land?

There are some restrictions on Aboriginal Land Councils dealing with land that may be subject to native title.[11] Section 42 of the ALRA provides, with certain limited exceptions, that an Aboriginal Land Council must not deal with such lands '*unless the land is subject to an approved determination of native title (within the meaning of the Commonwealth Native Title Act).*'

This means that, if an Aboriginal Land Council wants to deal with land where native title has not been extinguished or has not been the subject of a determination of native title by the Federal Court, the Aboriginal Land Council will need to seek a determination of whether or not native title exists on this land from the Federal Court.

Again, the way in which the LALC came to own the land is relevant. If the claim that resulted in the land being granted was made before 28 November 1994, or if the LALC purchased or otherwise came to own the land, the Aboriginal Land Council will be able to deal with its land in accordance with the ALRA without requiring a federal court determination that native title does not exist on that land.

However, if the claim that resulted in the land being granted was made after 28 November 1994 and there has not been any extinguishment of

[11] Section 42, ALRA

native title, the LALC must comply with section 42 of the ALRA and obtain a native title determination from the Federal Court of Australia before dealing with its land.

If the LALC owns land where native title has been determined to exist it will need to comply with the future act provisions of the NTA which set out the manner in which dealings that may affect native title may be done.

Can Aboriginal Land Councils have a say over proposed developments in areas where native title has been claimed?

Aboriginal Land Councils can still **have a say** in proposed projects or activities over areas where there are native title claims. Where activities propose to damage or destroy Aboriginal culture and heritage, Aboriginal Land Councils generally must be notified, unless native title has specifically been determined to exist over that area.[12]

Making the most of both systems

As noted above, land rights and native title both have different advantages.

It is important to recognise that native title rights and interests can co-exist over LALC land. This may be preferable to other options, such as Government ownership of land where the native title rights and interests exist (such as national parks).

If the local community is keen to use land rights and native title together, the order in which the claims are made is very important. As noted above, a land claim cannot be granted over land that is under native title claim. On the other hand, native title can be recognised over land that is claimed or owned by a Land Council in many cases.

NSWALC encourages LALCs and native title claim groups to work together to make the most of the two systems.

More Information

If you would like additional information about this document, please contact the **NSWALC** Policy and Research Unit or NSWALC Legal Services Unit on 02 9689 4444 or policy@alc.org.au.

If you would like information about native title processes and claims in NSW please contact **NTSCORP** (formerly NSW Native Title Services Ltd). NTSCORP also has a research section that may be able to assist in providing information on your personal genealogy.

Phone: 02 9310 3188
Freecall: 1800 111 844
Email: ntscorp@ntscorp.com.au
Website: www.ntscorp.com.au

More information on native title including videos, maps, and a range of fact sheets, guides and publications can also be accessed by contacting the **National Native Title Tribunal**:

Telephone: (02) 9227 4000
Freecall: 1800 640 501
Email: nswenquiries@nntt.gov.au
Website: www.nntt.gov.au

[12] *National Parks and Wildlife Regulation 2009,* Clause 80C