Department of Industry
Lands

COMPREHENSIVE REVIEW OF NSW CROWN LANDS MANAGEMENT

Effectively managing Crown land with native title rights and interests

APRIL 2017

To deliver modern, streamlined and transparent management of the state's vast Crown land, the NSW Parliament passed the Crown Land Management Act 2016 *(CLM Act). It is anticipated the majority of the CLM Act will commence in early 2018, implementing reforms identified in the white paper and comprehensive review of Crown land management. This fact sheet describes some of the issues found and how the CLM Act addresses them.*

Crown Land Management Act 2016 and native title

Native title is the rights and interests in relation to land and waters held continuously by Aboriginal people under their traditional laws and customs, recognised by Australian law in accordance with the Australian Government's *Native Title Act 1993*.

Members of native title claim groups can seek a native title determination from the Federal Court of Australia, so their rights and interests are recognised under Australian law. Approximately half of NSW is currently covered by registered native title applications for determinations.

Native title is different from, and in addition to, land rights that Aboriginal Land Councils have under the state's *Aboriginal Land Rights Act 1983*. A successful native title claim provides recognition and allows exercise of native title rights and interests, while a successful land claim results in a freehold grant of land.

Figure 1. Image from Barkandji country. The Barkandji native title determination was made on 16 June 2015.

Native title is particularly relevant for Crown land managers, as Crown land is less likely to have been subject to dealings that extinguished native title.

The review recognised that the commonwealth native title legislation needed to be considered in implementing the review recommendations, including the recommendation for new, consolidated Crown land legislation. Submissions to the white paper echoed this sentiment, and emphasised the need to ensure that the new legislation refers to and complies with the state's obligations under the native title legislation.

How the CLM Act deals with this issue

- For the first time, Crown land legislation includes specific provisions to facilitate compliance with the *Native Title Act 1993*.
- The new legislation also acknowledges the spiritual, social, cultural and economic importance of land to the Aboriginal people of NSW.
- It includes specific provisions contemplating management of Crown land by Indigenous bodies constituted under both the commonwealth *Native Title Act 1993* and the state *Aboriginal Land Rights Act 1983*.
- The CLM Act does not amend or affect the *Native Title Act 1993*.

Giving Crown land managers responsibility in complying with native title legislation

Unless native title has been extinguished, any proposed activity or development that will affect native title is a 'future act' and must comply with the future acts regime under the native title legislation. This means that where native title has not been extinguished, proposed dealings on Crown land, for example a lease, licence or sale need to follow the future acts regime.

The future act regime specifies the circumstances in which dealings and activities can occur. It also provides for procedural requirements, which may require notification, consultation or negotiation with relevant registered native title claimants or holders. Compensation may also be payable.

Crown land managers are able to deal with the reserves they manage, including by leasing and licencing. The Reserve Trust Handbook requires Crown land managers to ensure that their dealings are valid under native title legislation, and comply with all procedural requirements of that legislation.

Despite this, many Crown land managers rely on the Department of Industry—Lands to ensure compliance with the native title legislation. They do this by relying on the fact that the department, under delegation from the Minister, must approve almost all dealings by Crown land managers.

Under the CLM Act, local councils and certain professional Crown land managers will be able to deal with their reserves without departmental oversight. Accordingly, it is important that those local councils and Crown land managers understand and comply with their obligations under the native title legislation.

How the CLM Act deals with this issue

- Under the CLM Act, local councils and professional Crown land managers will be required to have a person identified as a native title manager to oversee and approve dealings and actions that may affect native title.
- Native title managers must undertake training as required by the Minister for Lands. To assist in this, the Department of Industry—Lands will provide training for staff from each local council and each professional Crown land manager to become eligible as a native title manager.
- Local councils and professional Crown land managers will need to confirm with the Minister for Lands on an annual basis that they have a native title manager overseeing dealings.
- Where native title has been extinguished, the oversight of the native title manager will not be required. This will include where there is a Federal Court determination that native title does not exist, but will also include where the state certifies that it has evidence to support extinguishment.
- To give local councils maximum flexibility in their management of the land in accordance with the federal legislation, local councils will be able to utilise provisions in the native title legislation that will, for example, allow the:
    - negotiation of Indigenous Land Use Agreements with native title holders or claimants under which the native title holders agree to surrender native title rights
    - protection of dealings on land where certain circumstances apply under a Federal Court process.
- Land managed by local councils will retain its reservation, but the local council will also be able to do those things permitted by the local council's plan of management for the reserve. The native title legislation permits acts in good faith to be done in accordance with a reservation in some circumstances.

Addressing liability for compensation for acts done by professional reserve managers or local councils

Under the native title legislation, the state is liable to pay compensation for certain acts that affect native title rights and interests. This could be the case even where the state is not the body who undertakes the act.

One example of this is acts that are done on a reserve in accordance with the reserve purpose. Even though such acts are permitted by the law, where native title is affected, compensation is payable by the state.

It is appropriate that local councils and professional Crown land managers who do things that affect native title are liable to pay any compensation that result from those activities. At the same time, they should not be liable for any acts done by the state or with the state's express authority.

How the CLM Act deals with this issue

- Under the CLM Act, local councils and professional Crown land managers will be liable to pay compensation under the native title legislation for any acts they do that affect native title. If the commonwealth legislation provides that the state is liable for certain acts and council or the Crown land manager undertakes such acts, the council or Crown land manager will be required to pay the state so that it can meet its commonwealth liability to native title holders.
- Councils will not be liable for any acts that preceded their management or ownership of land affected by native title. This liability will remain with the state.

Simplifying the transfer of locally significant land to local councils

Under current legislation, land cannot be transferred to local councils unless native title is extinguished, which significantly reduces the scope of the Crown estate that could be transferred to local councils to manage locally without affecting native title rights and interests.

The review recommended that Crown land of local significance be vested in local councils, so that it could be autonomously managed at a local level. Local council ownership of this land has numerous benefits, including better decision making and cutting red tape.

The recommendation was supported by the Local Land Pilot that the Department of Industry—Lands ran with four local councils—Tweed, Tamworth, Warringah and Corowa—in 2015.

Based on the review and the pilot, the NSW Government has developed a land negotiation framework for three way negotiations between the state, local councils and local Aboriginal land councils which aims to:

- ensure Crown land of state significance is retained by the state
- transfer Crown land of local significance to local councils
- transfer Crown land to local Aboriginal land councils where the transfer will provide social, cultural and economic benefits for Aboriginal people.

All land transfers that stem from these negotiations will be entirely voluntary, and there will be no forced transfers of land.

Native title holders or registered claimants can be invited to participate in negotiations by the agreement of the parties. Where native title parties are included in negotiations, native title outcomes will be explored. This may require use of an Indigenous Land Use Agreement in accordance with the *Native Title Act 1993* to give effect to any agreed native title outcomes.

Where this is not possible, land transferred to local Aboriginal land councils will be in accordance with the requirements of the *Native Title Act 1993*, and continue to be subject to native title as is the case now.

How the CLM Act deals with this issue

- The CLM Act allows land to be vested in local councils subject to native title so that native title is not extinguished or affected on the transfer.
- If a local council agrees to accept land subject to native title, the local council will need to comply with the native title legislation. This will work in a manner similar to where local councils manage Crown land where native title has not been extinguished. This means that native title will not be affected by a transfer to a local council and the local council will need to comply with the native title legislation.

Clarifying what can happen on land where native title has not been extinguished

The *Native Title Act 1993* is a comprehensive, detailed legislative regime supplemented by case law (judicial authority).

Legislation governing the management of NSW Crown lands needs to be clear about what parties can and cannot do, so that it is as straight-forward as possible for local councils and professional Crown land managers to comply with native title legislation.

There also needs to be clarity for third parties about where native title exists or may exist in relation to land owned by local councils, in order to inform the community about the special native title legislative provisions that apply.

Crown land is managed as if native title exists in relation to the land, unless native title is determined to be extinguished by the Federal Court or where the state holds adequate evidence of extinguishment.

How the CLM Act deals with this issue

- The CLM Act contains risk-based provisions that limit dealings with land where native title exists or may exist. Local councils will be prohibited from selling or disposing of land where native title rights and interests exist or may exist, even where the land has been vested in the local council. There will be limited exceptions to this prohibition, where the local council complies with the native title legislation provisions that permit disposal.
- Where land is vested in a local council subject to native title, the Registrar General will be required to record that on a title. This will inform the community—and in particular any prospective purchasers—that the land cannot be sold or dealt with in the ordinary manner.
- As part of the government's commitment to greater transparency, notations on title will also be able to be used where land is transferred to another government agency subject to native title.

More information

For more information contact the Department of Industry—Lands on 1300 886 235 or legislation@crownland.nsw.gov.au

DOC17/080838