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# Compulsory acquisitions: Things you need to know about Aboriginal land claims and native title

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## Compulsory Acquisitions

Where land is affected by an Aboriginal Land Claim, or is subject to native title, the Crown's ability to compulsorily acquire that land under the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW)* ("*Just Terms Compensation Act*") may be affected. It is important that these interests are identified at an early stage so that the relevant procedures can be complied with or, if necessary, alternate options for acquiring the land can be explored.

This paper discusses the legislative limitations on the acquisition of lands subject to an Aboriginal land claim under the *Aboriginal Land Rights Act 1983 (NSW)* ("*ALR Act*") and the legal framework for acquisitions of native title. It explores the practical steps that should be taken to ensure relevant interests are identified and provides some alternative options to compulsory acquisition where land held by an Aboriginal Land Council and/or which may be subject to native title is required by an agency.

## Land affected by an Aboriginal Land Claim

### The legislative framework

The *ALR Act* establishes the procedure by which an Aboriginal Land Council<sup>1</sup> can make a claim for Crown land to be transferred to it in freehold.<sup>2</sup> For land to be successfully claimed under the regime which is contained in Pt 2 of Div. 2 of the Act, it must be "claimable Crown land". Section 36(1) defines "claimable Crown lands" as lands that vest in Her Majesty at the date a claim is lodged at the Office of the Registrar, *Aboriginal Land Rights Act 1983 (NSW)*, and which:

- "(a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901*;
- (b) are not lawfully used or occupied;
- (b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands;
- (c) are not needed, nor likely to be needed, for an essential public purpose;

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<sup>1</sup> Such claims may be made by the New South Wales Aboriginal Land Council on its own behalf or on behalf of one or more Local Aboriginal Land Councils, or by one or more Local Aboriginal Land Councils for land within its or their area or, with the approval of the Registrar, outside its or their area: ss. 36(2) and (3) *ALR Act*.

<sup>2</sup> Such a freehold interest is granted subject to native title: s. 36(9) *ALR Act*. In the case of land to which the [Western Lands Act 1901](#) applies but which is not within an area determined by the Minister administering that Act as being the urban area of a city, town or village, the transfer shall be effected by granting a lease in perpetuity under that Act: s. 36(9A) *ALR Act*.

- (d) do not comprise lands that are the subject of an application for a determination of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the Commonwealth Native Title Act; and
- (e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act) (other than an approved determination that no native title exists in the lands)."

After a claim is made by an Aboriginal Land Council, the Registrar assesses whether to refer that claim to the Crown Lands Minister (currently the Minister administering the *Crown Land Management Act 2016*).

The Crown Lands Minister may grant or refuse the claim, or grant part of the claim and refuse part of the claim, depending upon the status of the land claimed and how it is assessed against each criterion of s. 36 of the *ALR Act*.

Where the claim is refused, the Aboriginal Land Council may appeal to the Land and Environment Court. Neither the Minister, nor the Court on appeal, has a discretion to refuse to grant a claim over land that is determined to be "claimable Crown land" at the date of claim. Thus, where the Crown Lands Minister is satisfied that claimed land (or part thereof) comes within the definition of "claimable Crown lands" prescribed by s. 36(1), the Minister must grant the claim (or the valid part thereof) by transferring the land to the relevant Aboriginal Land Council.<sup>3</sup>

The *ALR Act* is an example of beneficial legislation, the purpose of which includes enabling appropriate Crown land to be vested in representative Aboriginal Land Councils in New South Wales. Significantly for those contemplating compulsorily acquiring land, the *ALR Act* contains s. 42B which provides that:

"Despite anything in any Act, land vested in an Aboriginal Land Council must not be appropriated or resumed except by an Act of Parliament."

In *Darkinjung Local Aboriginal Land Council v Wyong Coal Pty Ltd (No 2)* [2014] NSWLEC 71 at [74], Craig J stated that:

"Section 42B inserted by the ALR Amendment Act, places land vested in an Aboriginal Land Council in a privileged position. By operation of that section land that is vested in such a Council cannot be appropriated or resumed except by an Act of Parliament. It is a provision that is expressed to apply "[d]espite anything in any Act". Thus, it overrides the operation of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)".

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<sup>3</sup> *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and The Western Lands Act (1988)* 14 NSWLR 685 at 691 ("*Winbar Claim [No. 3]*").

Section 42B will, however, only prevail over the operation of the *Just Terms Compensation Act* and other Acts to the extent that land vested in an Aboriginal Land Council would be appropriated or resumed pursuant to those Acts.

Section 40(2) of the *ALR Act* provides that land is “vested in an Aboriginal Land Council” if:

- “(a) the Council has a legal interest in the land, or
  - (a1) the land is the whole or part of land that is, pursuant to an Aboriginal Land Agreement under section 36AA, to be transferred to the Council, or
  - (b) the land is the whole or part of land the subject of a claim under section 36 and:
    - (i) the Crown Lands Minister is satisfied that the land is claimable Crown land under section 36, or
    - (ii) the Court has ordered under section 36 (7) that the land be transferred to the Council,

and the land has not been transferred to the Council.”

This definition suggests that land “vested in an Aboriginal Land Council” is not limited to land the subject of a successful land claim, but includes land acquired by an Aboriginal Land Council by other means as well as land the subject of a successful land claim which has not yet been transferred. As it also includes land that the Court has ordered to be transferred to a Land Council, it follows that land the subject of an unsuccessful land claim which has been appealed to the court or which is still within the relevant timeframe in which it may be appealed to the Court, may be found to be land which is “vested in an Aboriginal Land Council”.

Further, s. 36AA of the *ALR Act* sets out a regime for the negotiation of agreements in writing between the Crown Lands Minister and one or more Aboriginal Land Councils known as “Aboriginal Land Agreements”. Such agreements may make provision for, amongst other things, a land transfer to an Aboriginal land council.

Consequently, before any compulsory acquisition takes place, the acquiring agency should be confident that the land is not vested in an Aboriginal Land Council, and that there is no possibility of it being found at a later stage, to have been so vested at the date a claim was made under s. 36 of the *ALR Act*.

### Relevant Searches

To confirm whether or not land is, or may be, “vested in an Aboriginal Land Council”, a number of searches should be undertaken prior to issuing a Proposed Acquisition Notice in compliance with the *Just Terms Compensation Act*. These include:

- Search of the current title to establish the registered proprietor of the land.
- Search by the Office of the Registrar of the *Aboriginal Land Rights Act*.
  - The Office of the Registrar can undertake a search of the Register of Aboriginal Land Claims database to determine whether a parcel appears on the Register as being affected by an Aboriginal Land Claim.

- The search applies to Crown land as a claim under s. 36 of the *ALR Act* may only be made over land that vests in the Crown.
- Enquiry with the Crown Lands Division of the Department of Industry about the status of investigation and determination of an Aboriginal Land Claim and, in the case of an appeal to the Land and Environment Court by the Aboriginal Land Council of a decision of the Minister to refuse the claim, whether the four month appeal period has expired.
  - The Aboriginal Land Claim Investigation Unit within the Crown Lands Division undertakes the investigation of claims.
  - The Crown Lands Division will also be aware of the status of any current appeal.
  - Such information would tend to be raised during consultation with an acquiring authority and Crown Lands regarding the possibility of an acquisition.
- The *ALR Act* requires that the Registrar keep and maintain a register in relation to Aboriginal Land Agreements made under s. 36AA.<sup>4</sup> While no Aboriginal Land Agreements are currently entered on the register, it is likely that such agreements will be in the future.

Once the nature of any Aboriginal Land Council's interests are known, then appropriate options for acquiring the land can be identified.

### **Options to acquire land in which an Aboriginal Land Council has an interest**

#### *Where no Aboriginal Land Council interests are identified:*

Where no Aboriginal Land Council interests are identified, and assuming no native title interests are identified (see further, below), the usual compulsory acquisition procedures can be followed.

#### *Where an Aboriginal Land Council holds an interest in the land:*

If the land is vested in an Aboriginal Land Council within the meaning of s. 40(2) of the *ALR Act*, regardless of whether the land has been transferred to a Land Council or not, s. 42B will prevent the land from being compulsorily acquired. The only way land held by an Aboriginal Land Council could be so "appropriated or resumed" is by an Act of Parliament.

Alternatively, negotiation to purchase land from the Aboriginal Land Council by agreement might be considered. Importantly, any dealing in land by the Aboriginal Land Council must comply with Division 4 of Pt. 2 of the *ALR Act* which prescribes the land dealings by Aboriginal Land Council. Depending upon the terms of any agreement, the Minister may also consider asking the Aboriginal Land Council to withdraw the relevant claim.

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<sup>4</sup> Section 36AA(12).

## Land affected by Native Title

Any authority of the State in NSW that is authorised by law to acquire land by compulsory acquisition may also acquire the native title rights and interests in the same way (s. 7A, *Just Terms Compensation Act 1991*). However, any act which affects native title (such as the acquisition of it) can only be *validly* done if it is done in accordance with the future act regime in the *Native Title Act 1993* (Cth) ("the *NT Act*").

Alternatively, native title may be surrendered or suppressed by agreement with the native title holders, through the mechanisms set out below.

### What is native title?

"Native title" is a term generally used to refer to recognition under the Common Law that Aboriginal people had rights and interests in the lands and waters of Australia before sovereignty over those lands and waters was claimed by the Crown. Those rights were first recognised in the High Court's judgment *Mabo and others v Queensland (no. 2)* [1992] HCA 23; (1992) 175 CLR 1 and since then both common law and legislation (in the form of the *NT Act* and the *Native Title (New South Wales) Act 1993* (NSW) ("the *NT(NSW) Act*") has developed to provide mechanisms for recognising and managing those rights and interests.

### Where does native title exist?

Native title exists over any land and waters where:

- The descendants of the people who held those rights and interests over those lands and waters have maintained a connection to them, and continue to acknowledge and observe the traditional laws and customs from which those rights and interests were derived (acknowledging the impact of settlement) (this is known as "connection" and "continuity"); and
- There has been no valid act by the Crown that is wholly inconsistent with the continued existence of those native title rights and interests (this is known as "extinguishment"); and
- The native title holders have not voluntarily surrendered their native title through an indigenous land use agreement.

Native title was extinguished by acts such as creating freehold over the land, public works and some types of leases. It can also be partially extinguished by acts which are partially inconsistent with native title – for example, some types of pastoral leases gave rights for the lessee to run sheep or cattle on the land, but did not prevent Aboriginal people from also using the land at the same time. Such a lease would have extinguished any native title right to prevent the lessee and their invitees from the land (that is, it extinguished any right to "exclusive possession") but did not extinguish any native title rights to enter and use the land themselves.

For the purposes of compulsory acquisition, however, the distinction between native title which has been partially extinguished and native title which has not been extinguished at all is perhaps only in the amount of compensation that may be due to the native title holders.

### *Native title determinations, connection and continuity*

The *NT Act* sets out a process for obtaining a determination of native title from the Federal Court. It is a common misconception that this determination creates or restores native title rights. However, where native title exists it exists whether or not it has been determined by the Court. That means that it is important that native title is fully considered whether or not it has been claimed or determined.

There are two main aspects to a native title determination – working out whether the connection and continuity elements are made out, and working out where native title has or has not been extinguished.

Where the Federal Court has made a determination of native title, you may rely on that determination to work out whether native title does or does not exist on a particular portion of land.

Where the Federal Court has not made a determination as to whether native title exists in an area, we recommend that you operate on the assumption that connection and continuity are capable of being established (even where no native title claim is currently on foot) and, subject to extinguishment, native title exists.

### **Searching the registers**

The Native Title Registrar (“the Registrar”) maintains three registers: the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements (ILUAs). Each of these is accessible for searching from the website of the National Native Title Tribunal (“the NNTT”) at <http://www.nntt.gov.au>.

The NNTT website also contains databases of future act notices and processes and unregistered native title applications.

In addition to text based searching (which requires some foreknowledge), the NNTT provides a geospatial mapping tool called “Native Title Vision” which allows you to view the contents of the three registers and the other schedules overlaid on the land and waters to which they apply.

The NNTT will conduct searches of the registers on request and provide you with a table of results. They have a toll free number you can call if you have questions: 1800 640 501 or a search can be requested by filling out a request form published by the NNTT (linked below) and sending it to [geospatialsearch@nntt.gov.au](mailto:geospatialsearch@nntt.gov.au):

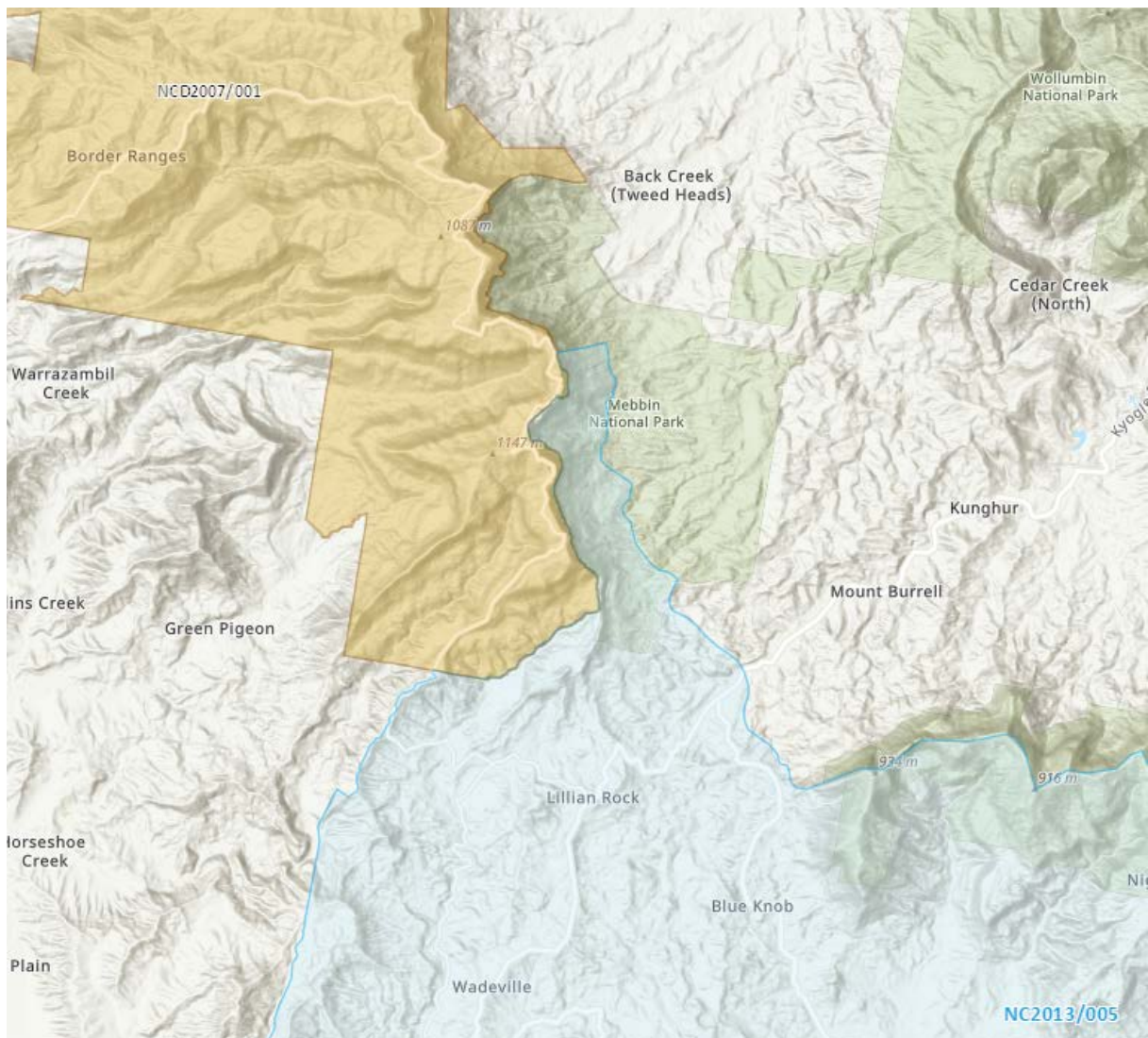
[http://www.nntt.gov.au/Forms/Search%20Form\\_Request%20for%20Search%20of%20Tribunal%20Registers%202018.docx](http://www.nntt.gov.au/Forms/Search%20Form_Request%20for%20Search%20of%20Tribunal%20Registers%202018.docx)

### *Registered claims, determinations and determination outcomes*

While a good general indicator, the depictions of determined outcomes on Native Title Vision should always be confirmed by reviewing the determination judgment. Clicking on the area will bring up an information box which, among other things, will contain a link to the full text of the determination on AustLII.

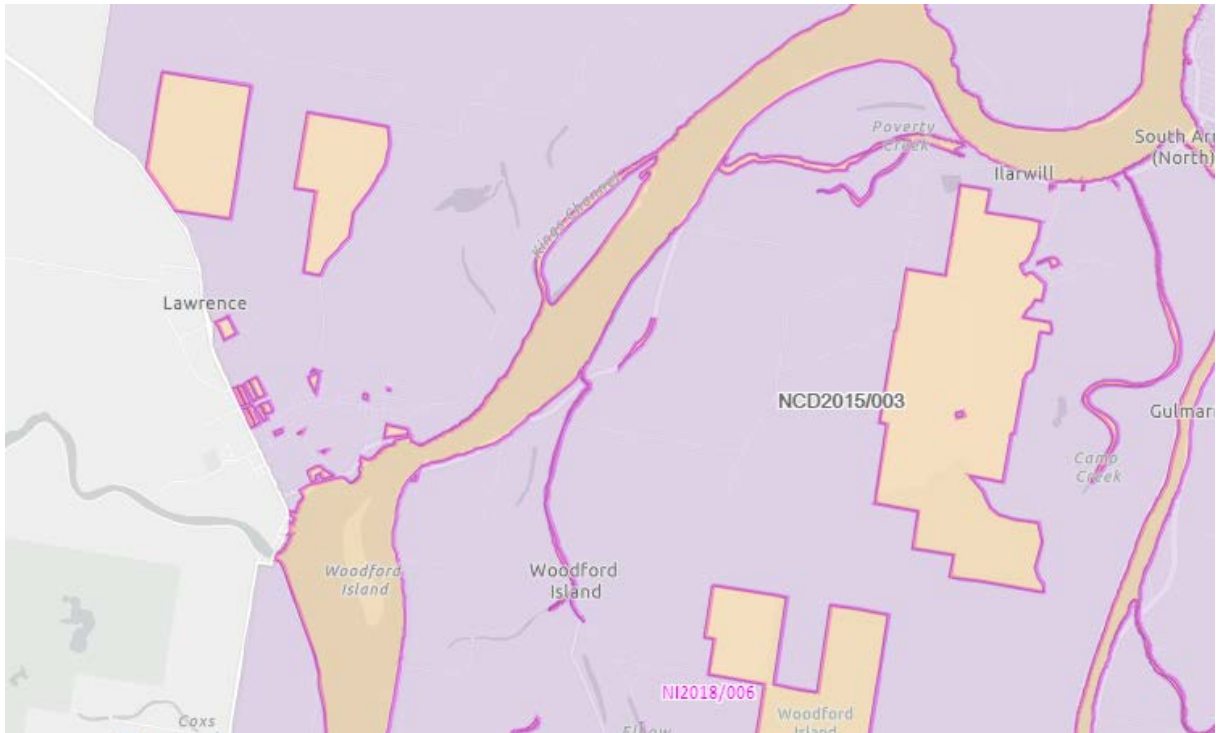
If there has been no determination of native title then, whether or not there is a registered native title claim, the safest course of action is to assume that native title exists in some form.

Indigenous land use agreements registered under the *NT Act* may include clauses in which the native title holders surrendered native title. However, that is not always the case. Where there is an indigenous land use agreement it is important to review the Register extract for that agreement. The extract will inform you whether native title was surrendered in the agreement.



**Figure 1 - Native Title Vision showing part registered native title claim NC2913/005 (blue) and part of determination NCD2007/001 (orange) in NSW**





**Figure 2 Native Title Vision showing part of the outcome of determination NCD2015/003 (purple for extinguished native title, orange for non-exclusive native title) and part of the lands and waters covered by registered indigenous land use agreement NI2018/006 (pink outline)**

*Tenure searching and extinguishment analysis*

A review of the tenure history of the land you wish to compulsorily acquire may be sufficient to determine that any native title that did exist has been wholly extinguished. For example, if you have evidence that the land was converted to privately held freehold before 1 January 1994, then native title was extinguished.

There are many other acts which extinguish native title to one degree or another. However, there are many disputes in New South Wales as to whether certain types of tenure did or did not do so. While certain acts (such as freehold grants and those leases listed in Part 1 of Schedule 1 of the *NT Act*) did extinguish native title (provided that they were validly done), in many cases there is room for doubt and to date there is only a small amount of case law on the extinguishing effects of historic NSW tenures.

You may need to obtain legal advice as to whether native title is or is not wholly extinguished on the land you wish to acquire and, where the outcome is uncertain, about the level of risk involved.

*Aboriginal held or unallocated land where there is a native title claim*

Sections 47, 47A and 47B of the *NT Act* allow for prior extinguishment of native title to be disregarded if certain conditions were met at the time the native title claim was filed.

In particular, s. 47 applies to pastoral leases held by or on behalf of members of the claim group, s. 47A applies to other land held by or on behalf of Aboriginal people or Torres Strait Islanders and is occupied by members of the claimant group and s. 47B applies to “unallocated” Crown land that is occupied by members of the claimant group.

This means that native title may be “revived” where it had been previously extinguished.

Where there is a native title claim already filed but not yet determined, it is worth examining whether the claimants may have a valid argument that one of ss. 47, 47A or 47B applies as it could result in difficulty if native title previously thought to be extinguished is found to be revived *after* you have acquired the land.

### Options to acquire land subject to native title

As noted above, the valid creation of private freehold extinguishes native title at common law. This means that ensuring that the private freehold is *validly* created (for the purposes of the *NT Act*) is an important step.

The only way that an act on land where there is native title can be done *validly* is if it is done in accordance with Part 2 Division 3 of the *NT Act*. This is known as the “future acts regime”.

Broadly speaking, there are three or four ways (depending on the reasons) of acquiring land subject (or possibly subject) to native title. Each has its pros, cons and minimum timeframes.

#### *Option 1 – Negotiating an Indigenous Land Use Agreement*

An indigenous land use agreement is an agreement in which, *inter alia*, native title holders can voluntarily agree to surrender, suppress<sup>5</sup> or limit the exercise of their own native title rights and interests.

The *NT Act* sets out a number of requirements for indigenous land use agreements, including:

- They must be authorised by the persons who hold or may hold the native title rights in the land and waters concerned (“common law holders”) (s. 251A);
- They must be executed by either the registered native title body corporate that holds or manages those native title rights and interests (if there is a determination over all or part of the land and waters – s. 24BD(1), s. 24CD(2)(b)), or by people expressly authorised to do so by the common law holders (if there is a registered native title claim - s. 24CD(2)(a)) or, if there is no registered claim, by people who claim to hold native title and/or the representative Aboriginal/Torres Strait Islander body (which, in NSW, is NTSCORP Ltd);

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<sup>5</sup> Where no extinguishing effect is had and native title might later revive if the act is removed or ceases to operate.

- They must undergo a process of registration under the *NT Act*, which includes a notification period after the agreement is made by the parties (one month for agreements where there is a registered determination of native title over the whole agreement area – s. 24BI(2), three months otherwise – s. 24CH(2)(d) and s. 24DI(2)(d)) during which certain other parties may object to the making of the agreement or file a native title determination application in response.

Once an indigenous land use agreement is entered into the Register, it is binding on all of the common law holders and any surrenders of native title that are included in it come into effect.

The cooperative, consent based approach of negotiating an indigenous land use agreement allows the parties to take a flexible approach to issues such as compensation and whether native title should be suppressed or extinguished.

Where there is a registered determination, this is also the fastest pathway to a resolution as the only unavoidable delay is the one month notification period.

However, the authorisation requirements in s. 251A are generally interpreted as requiring an “authorisation meeting” at which the native title holders vote (or make a consensus based decision) on the agreement. Particularly in regional areas these meetings can be very costly exercises.

As with all negotiation processes, there is always the possibility that agreement will not be reached.

An indigenous land use agreement does require some certainty as to who you need to negotiate with. Where there is no registered native title claim or determination, the native title holders (if any) may not have the cohesion or resources to be able to be negotiated with effectively or fairly.

### *Option 2 – Seeking protection under s. 24FA of the NT Act*

Section 24FA of the *NT Act* establishes the concept of “s. 24FA protection”. Where this applies to an action such as acquiring land, that action is valid for the purposes of the *NT Act* and has whatever extinguishment consequences it would normally have at common law (in the case of the creation of registered Torrens freehold, it would wholly extinguish native title).

As with indigenous land use agreements, s. 24FA protection is capable of covering acts which may affect native title – it is very flexible. For this reason, it is the best option where you are unable to identify a cohesive native title holding group capable of negotiating an ILUA.

Section 24FA protection is obtained by making a “non-claimant” application for a determination of native title under s. 61 of the *NT Act*. Non-claimant applications can be made by the State Minister (in NSW, that is the Attorney General) or by any person who holds a non-native title interest (such as a lease or licence or management of a reserve) in the land and waters.

Once accepted, a non-claimant application will enter into a three month notification period (s. 66A(10)(a)).

During the notification period, a native title holding group may make a claimant application for a determination of native title. If one is made that satisfies the requirements of s. 24FE, s. 24FA protection will not apply unless and until that other claim is formally withdrawn or dismissed (s. 24FC(e)).

Section 24FA protection will apply to any act on the land that is done after the end of that notification period until the non-claimant application is discontinued. Although it is technically an application for a determination of native title, the usual procedure is to discontinue the proceedings as soon as the act needing s. 24FA protection has been done.

Generally speaking the Court is reluctant to make determinations that native title does not exist in non-claimant applications even when they are unopposed, particularly when there is any evidence to suggest that native title may exist (see, eg, *Pate v State of Queensland* [2019] FCA 25).

While Section 24FA protection means that the acquisition can go ahead, it does leave open the possibility that a native title claim could be made in the future and, if that happens, the State will be liable to compensate those native title holders for the acquisition. As such, consideration should be given to setting aside funds to satisfy any future compensation claim.

### *Option 3 – Infrastructure projects and subdivision K*

If the acquisition is for an infrastructure project for the use of the general public such as a road, water pipeline, sewerage facility or similar (see s. 24KA(2) for a full list), and it is not viewed as necessary to acquire or extinguish the native title rights and interests then it may be possible to validate the project under subdivision K of the future acts regime.

This would be available where, once the project is constructed, it would not prevent native title holders from accessing the land or waters other than for health and safety reasons. For example, generally there is no reason why native title holders would need to be restricted from accessing the area around and underneath a bridge once it is constructed.

If subdivision K is used, native title rights are not extinguished by the project (s. 24KA(4)) but the native title holders will need to be given the same procedural rights as a lessee (if the land is currently held under a non-exclusive pastoral or agricultural lease) or as an ordinary title holder (otherwise) (s. 24KA(7)). This means you need not compulsorily acquire the land to extinguish any native title that may exist in the land.

### *Option 4 – Compulsory acquisition and subdivision M*

Any authority of the State in NSW that is authorised by law to acquire land by compulsory acquisition may also acquire the native title rights and interests in the same way (s. 7A, *Just Terms Compensation Act 1991*).

Compulsory acquisition can be validated under subdivision M of the *NT Act*. Where the land will be vested in the acquiring authority or where the land is being acquired for a public infrastructure project, the “right to negotiate” process set out in Subdivision P of the *NT Act* does not apply (s. 26(1)(c)(iii)) but the native title holders have a right to just terms compensation. The consequences set out in s. 24MD(6B)(c) will also apply and those include notification and a right to object which may then be referred to the NNTT for determination.