

Native Title Assessment Procedure

EHTM Attachment 2B

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Government of South Australia
Department for Infrastructure
and Transport

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Abbreviations / Glossary

Term/ Acronym	Definition
CSO	The Crown Solicitor's Office – the Government of South Australia's legal service providing advice to Cabinet, ministers and government agencies. All contact with CSO is to be by the Department.
DIT or the Department	Department for Infrastructure and Transport
EHIA	Environment and Heritage Impact Assessment
EHIA Report	Environment and Heritage Impact Assessment Report
Procedure	This procedure document being the Department's Native Title Assessment Procedure
Group(s)	Aboriginal people(s) associated with a particular place
	Indigenous Land Use Agreement
	An ILUA is a voluntary agreement between a native title group and others about the use of land and waters. These agreements allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances.
	An ILUA can:
ILUA	<ul style="list-style-type: none"> • exist over areas where Native Title has, or has not yet, been determined; • be entered into regardless of whether there is a Native Title claim over the area or not; and • be part of a Native Title determination or settled separately from a Native Title claim. <p>ILUAs do not apply where Native Title has been extinguished or has been determined to not exist.</p>
Native Title	Native Title is the name Australian law gives to the traditional ownership of land and waters that have always belonged to Aboriginal people according to their traditions, laws and customs.
NT Act	<i>Native Title (South Australia) Act 1994</i>
NT Act Cwth	<i>Native Title (Commonwealth) Act 1993</i>
NTV	Native Title Vision
Project Area	Area in which a project can have an effect on environmental and heritage aspects. Includes both the construction and operational footprints
RNTBC	Registered Native Title Body Corporate(s)

1 Introduction

The purpose of the Native Title Assessment Procedure (the Procedure) is to outline the process to determine the presence, or otherwise, of Native Title within a Project Area. This information identifies the need to develop alternative engineering options and/or whether there are formal notification requirements under the *Native Title (Commonwealth) Act 1993* (NT Act Cwth). An assessment of Native Title should be undertaken as part of the Environment and Heritage Impact Assessment for construction and maintenance works.

This Procedure applies to all Department for Infrastructure and Transport (the Department) programs and project types including road, rail, marine and other infrastructure types as required.

This Procedure forms Attachment 2B of the Environment and Heritage Technical Manual (EHTM). This Procedure should be read in conjunction with Master Specification PC-H1 – Aboriginal Heritage and Native Title.

1.1 Performance Outcomes

To meet the performance requirements under this section, unless specified otherwise in the Contract documentation, the following shall be achieved:

- identify if a Native title claim, determination or Indigenous Land Use Agreement (ILUA) operates over the Project Area;
- identify the relevant parties to the claim, determination or ILUA;
- determine if the Project Area includes any parcels of land where Native Title is considered to exist or co-exist (exclusively or non-exclusively) as soon as possible during the project planning phase to inform project design and timelines;
- identify the requirement to submit a notification in accordance with the NT Act Cwth in a timely manner to ensure there are no delays to project construction works; and
- if required, provide the relevant mapping, parcel information and project specific details in a technical note to inform and enable an enquiry of the Crown Solicitor's Officer (CSO).

1.2 Legislative Context

Users of this Guideline are responsible for complying with relevant legislation and obtaining relevant approvals, permits or authorisations (where required by the Contract Documentation).

The following legislation may apply to departmental construction, demolition, operation and maintenance activities associated with transport and building (including property) related infrastructure:

- *Native Title Act (Commonwealth) Act 1993*

The NT Act Cwth is a law passed by the Australian Parliament that recognises the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs. This Act governs the process to establish Native Title rights and interacts with land for which Native Title exists. This Act also makes provision for the establishment of Indigenous Land Use Agreements (ILUAs).

Under the NT Act Cwth, assessments must be undertaken to determine Native Title status and values of the Project Area as well as the presence, or otherwise of an ILUA.

- *Native Title (South Australia) Act 1994*

Compliance with the Commonwealth legislation addresses requirements under the *Native Title (South Australia) Act 1994*.

2 Assessment Process

The assessment process for Native Title should begin during the initial project phases (i.e. during the Proving and Pre-Delivery phases before the development of the 30% project design) and forms an essential part of Environment and Heritage Impact Assessment (EHIA) reporting. Figure 1 summarises the general process to be adopted to ensure that Native Title and ILUA implications are identified and appropriately managed throughout the delivery of a project/ program. Where the Project Area includes land for where Native Title exists and/or is subject to an ILUA that cannot be avoided, notification and negotiation may be required (pending the nature of the scope of works, the Native Title claim, ILUA clauses and advice from the CSO advice). Negotiation and the notification processes vary in complexity and create time implications for a project, Project Managers should allow between three to nine months for the completion of the Native Title processes. Further details on each of these assessment steps are provided in the following sub-sections.

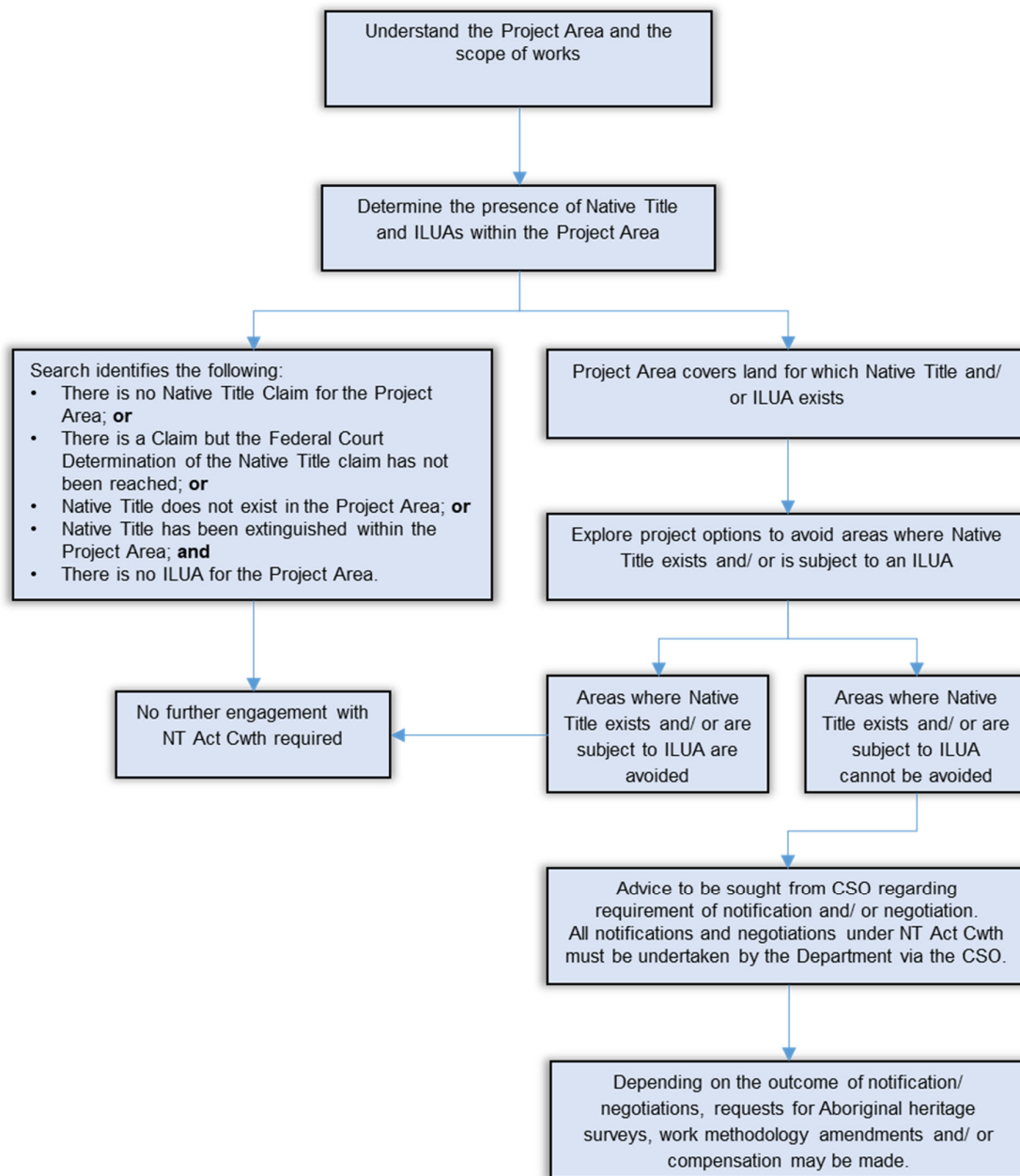


Figure 1 Native Title Assessment Process

2.1 Understanding the Project Area

For the purpose of this Procedure, the Project Area includes the construction and operational footprint of the project including the project alignment and areas of underground service installation, borrow pits, quarries and stacking sites. The Project Area also includes the footprint of land that may need to be acquired (partially or wholly) and land that may only be temporarily required during construction (such as laydown areas, site compound locations and site access tracks). In understanding the Project Area, the scope and nature of works must also be understood. This includes locations of earthmoving activities, changes to landforms, interactions with waterways etc.

2.2 Determining the Presence of Native Title and ILUAs

When determining if a Native Title Claim/ Federal Court Determination of an ILUA exists within the Project Area, the following must be addressed, as a minimum:

- Is the land subject to a Native Title Claim?
- Is the land subject to a Federal Court Native Title Determination and if so, what is the determined outcome for the Project Area?
- Is the land subject to an ILUA and (if known) are there any parameters within the ILUA that may apply to the project?
- Where the above exists, identify the relevant Registered Native Title Body Corporate(s) (RNTBC) or legal representatives, or parties to the relevant ILUA.
- Is there evidence to indicate that Native Title has been extinguished over the Project Area (or parts of the Project Area)?
- Provide mapping which indicates Native Title outcomes (exists, co-exists, extinguished or otherwise) and ILUA status of the Project Area. Where the project area does overlap with Native Title/ ILUA boundaries, mapping must also include clear property boundaries and parcel identifiers.

Further detail regarding reporting requirements is presented in Section 3.

To inform the above, the Native Title Tribunal's Native Title Vision (NTV) database must be consulted to determine the presence, or otherwise, of Native Title within the Project Area.

Note:

Use and Interpretation of Native Title Vision

NTV is a free online visualisation, mapping and query tool. NTV brings together:

- a geospatial view of the Native Title Registers and databases; and
- overlays of administrative regions, non-freehold land parcels and resources tenure.

The NTV database can be navigated online or data can be downloaded directly for projecting in graphical system software. Access to the NTV online tool is available via <http://www.nntt.gov.au/assistance/Geospatial/Pages/NTV.aspx>

When utilising NTV in the context of this Procedure, navigate to the Project Area and activate the layers relevant to your purposes:

- Applications – shows the area for which a Native Title Application has been made to the Federal Court under the NT Act Cwth;
- Determinations – shows the area for which a decision by an Australian court (or other recognised body) that native title does or does not exist. A determination is made either when parties have reached an agreement after mediation (consent determination) or following a trial process (litigated determination);
- Determined Outcomes – shows the areas for which Native Title exists or does not exist as the outcomes of a Determination;

- Indigenous Land Use Agreements – shows the area subject to an ILUA. Note that an ILUA is a voluntary, legally binding agreement about the use and management of land or waters, made between one or more native title groups and others (such as miners, pastoralists or governments).

Note:

Other Conditions Relevant to the Assessment of Native Title/ILUAs

Native Title is generally considered extinguished for works that meet the following criteria:

- works to be completed on freehold (privately owned) land/water, registered as a Certificate of Title; or
- works to be undertaken within a road reserve (as identified utilising the South Australian Property and Planning Atlas) upon which a road was constructed prior to 1 January 1994.

ILUAs (generally) do not apply on existing roads, or within the existing road corridor if created before 1993.

2.3 Explore Project Options to Avoid Impacts

The Department strongly encourages solutions that avoid and minimise impacts to Native Title values and that limit the further extinguishment of Native Title on land/ water out of respect for Traditional Owners and their connection to Country. If the Project Area is identified to include land for which Native Title exists or which is subject to an ILUA, options should be explored to avoid works on or impacts to such areas. The realignment of the Project Area and construction footprint to avoid areas where Native Title exists or is subject to an ILUA will often be the lower risk option for the project as there are lengthy timeframes associated with the NT Act Cwth process and procedures.

2.4 Seeking Advice, Notification and Negotiation

After following the assessment process as detailed in this Procedure, if there is uncertainty regarding the status of Native Title within the Project Area, advice is to be sought by the Department from the CSO.

Where the Project Area overlaps with land for which Native Title exists (or may exist) and/ or is subject to an ILUA, notification in accordance with the NT Act Cwth and subsequent negotiations are to be undertaken by the Department via the CSO. Depending on the outcome of notification/ negotiations, requests for Aboriginal heritage surveys, work methodology amendments and/ or compensation may be made by the Group(s). This will be managed by the Department unless advised otherwise.

The need to seek advice or notify must be identified and managed as soon as possible during project planning works. Three to nine months should be allowed for this process to be finalised.

3 Reporting

Unless specified as otherwise in the Contract Documentation, the following reporting applies and shall be provided to the Department's Technical Services Environment Unit for review and acceptance.

The assessment of Native Title/ ILUAs is to occur during the Proving and Pre-Delivery project/ program phases (or at any phase if not undertaken previously). As the project/ program progresses, if the Project Area changes, the assessment is to be revisited to ensure that the outcomes are still accurate and that previous recommendations are still being considered.

Assessment of Native Title/ ILUAs

The assessment outcomes are to be captured in the Environment and Heritage Impact Assessment reporting and summarised in the planning and/ or design reports to inform the cost estimation and timing schedule as well as risk management for the project/ program.

Reporting must:

- State the presence, or otherwise, of Native Title and/ or ILUAs within the Project Area by providing clear responses to the queries in Section 2.2.
- Provide recommendations to avoid the areas for which Native Title exists and/ or is subject to ILUA, or if recommendations have already been adopted, details of the efforts made to mitigate impacts (refer to Section 2.3).
- If applicable, include a road map (including time frames) for approval pathways, relevant to anticipated wider project milestones. The road map should acknowledge that any activities relating to Native Title or ILUA negotiations are to be driven by the Department following CSO advice.
- Include figures or maps that indicate Native Title outcomes (i.e. exists, co-exists, extinguished or otherwise) and ILUA status of the Project Area. Where the Project Area does overlap with Native Title/ ILUA boundaries, mapping must also include property boundaries and parcel identifiers.

Where the need to seek advice or submit notification/ negotiation has been identified, the following additional information must also be provided:

- a succinct description of works to be undertaken including the extent of ground disturbing activities and any proposed changes to landform, including access to areas for which Native Title exists; and
- details of any pre-existing infrastructure within the Project Area (i.e. roads, borrow pits or other works).