

Policy

Wet Tropics Management Authority

Native Title

Policies provide a framework for consistent application and interpretation of legislation and for the management of non-legislative matters by the Wet Tropics Management Authority. Policies are not intended to be applied inflexibly in all circumstances. Individual circumstances may require a modified application of policy.

Background

This policy outlines the Wet Tropics Management Authority's developing response to the *Native Title Act 1993* and the likely existence of native title rights and interests in the Wet Tropics World Heritage Area.

At least 80% of the land mass of the Wet Tropics World Heritage Area is potentially claimable under the *Native Title Act 1993*.

The Wet Tropics Management Authority has a legal responsibility to protect World Heritage values as well as comply with the requirements of the *Native Title Act 1993*. In some cases the exercise of the particular rights of native title holders may be inconsistent with the Wet Tropics Management Authority's obligations under the World Heritage Convention. In other cases the exercise of native title rights may have the potential to enhance the conservation of World Heritage values. It is also apparent in the intent of the *Wet Tropics World Heritage Area Protection and Management Act 1993* that the Wet Tropics Management Authority has a 'special' responsibility to recognise management goals and traditional aspirations of Aboriginal people particularly concerned with the land¹. For example in the preamble to the *Wet Tropics World Heritage Area Protection and Management Act 1993* at paragraph 8, it states that: "It is also the intention of the Parliament to acknowledge the significant contribution that Aboriginal people can make to the future management of cultural and natural heritage within the area, particularly through joint management agreements".

Division 5 of Part 3 of the *Wet Tropics Management Plan 1998* requires the Wet Tropics Management Authority to negotiate with an Aboriginal person or group of people who hold native title or assert a particular native title right under common law when the exercise of that right could adversely affect World Heritage values. The requirement on the Wet Tropics Management Authority to negotiate applies to a situation where negotiation is first sought by an Aboriginal person/s who has or claims these rights. The Wet Tropics Management Authority is not obliged to actively seek such negotiations. However, negotiations may also be precipitated by the Future Act Notice and/or Cooperative Management agreement process (refer later sections of policy). These negotiations would be undertaken with the aim of entering into mutually beneficial management agreements consistent with achieving the primary goal and fulfilling statutory obligations. As outlined below there are a number of mechanisms which facilitate this process.

¹ Section 5 of the Act states that:

"For the purposes of this Act, Aboriginal people are particularly concerned with land if

- (a) they are members of a group that has a particular connection with the land under Aboriginal tradition; or
- (b) they live on or use the land or neighbouring land".

In order to validly regulate native title rights, the *Wet Tropics Management Plan 1998* and any activities undertaken in relation to the *Wet Tropics Management Plan 1998* (including permit assessment) must comply with the *Native Title Act 1993*. The *Wet Tropics Management Plan 1998*, as it is written, ensures that native title holders cannot be more disadvantaged at law than ordinary title holders.

Unlike the rights of private land holders, the exact nature, extent and location of the rights of native title holders is largely unknown from a western legal perspective, as there has not as yet been any formal determination of native title in the region². Therefore a mechanism is required to ensure that native title holders are not unfairly disadvantaged in comparison to freehold title holders before the determination process is completed.

The present Queensland Government strongly believes that a litigious approach to native title issues is not the way forward. The preferred Queensland approach is through the development of statutory management agreements or Indigenous Land Use Agreements negotiated in good will and in good faith, by all interested parties.

Prior to authorising a proposed action regulated by the *Wet Tropics Management Plan 1998* (eg. issuing a licence, authority, or permit, or entering into a management agreement) Wet Tropics Management Authority is required to follow the native title future act notification procedures developed jointly by the Queensland Departments of Premier and Cabinet and the Environmental Protection Agency (in compliance with the *Native Title Act 1993*). These formal notification procedures are outlined in a separate document entitled "Native Title Notification Procedures".

Note that the *Native Title Act 1993* is not the only statutory regime that relates to Aboriginal issues. Other relevant legislation includes, but is not restricted to, the *Wet Tropics Management Plan 1998*, the *Wet Tropics World Heritage Area Protection and Management Act 1993*, the Cultural Record Act and the Commonwealth Racial Discrimination and Cultural Heritage Protection Acts. Thus the Wet Tropics Management Authority is obligated to comply with legislative obligations to Aboriginal people particularly concerned with the land in more than just a native title context. There are also other policy implications inherent in a number of international conventions and agreements to which Australia is a signatory.

Arguably the purpose of s10(5) and the preamble to the *Wet Tropics World Heritage Protection and Management Act 1993* was to ensure that the Wet Tropics Management Authority adopted a proactive approach, rather than a minimalist approach to Aboriginal issues. As such the Wet Tropics Management Authority can be said to have a responsibility to provide leadership and direction amongst Wet Tropics World Heritage Area management agencies in relation to Aboriginal issues and Wet Tropics World Heritage Area management.

Consistent with s.32.(3) (b) of the *Wet Tropics Management Plan 1998* and s56 (2) of the *Wet Tropics World Heritage Area Protection and Management Act 1993*, the Wet Tropics Management Authority recognises that s.211 of the *Native Title Act 1993* effectively lifts statutory prohibitions that might otherwise exist in relation to the exercise of certain classes of native title rights and interests. Consequently the Wet Tropics Management Authority acknowledges that where native title exists there is the potential for the *Wet Tropics Management Plan 1998* and the underlying management regimes (eg. the *Nature Conservation Act 1992* and the *Forestry Act 1959*) to fall short of achieving the envisaged levels of protection for World Heritage values. The High Court's pending decision on the 'Yanner' case will help to inform and hopefully clarify this situation.

² Note that a number of recent Federal and High Court decisions and national Native Title Tribunal deliberations have provided some generic directions with respect to understanding native title rights and interests.

From a western perspective, the nature of native title rights and interests can be elusive. Certainly, the recognition of native title by the common law, and the formal references to common law rights and interests to be found in legislation and the literature, don't assist much in defining the nature of native title for the practical purpose of working out how environmental and other interests might co-exist with native title rights and interests. The State of Queensland has a cautious approach to formally recognising the exact nature of the native title rights and interests that remain in an area until after a formal determination of native title by the court or tribunal system. However, the State does recognise the possibility that native title still exists under common law over significant portions of the Wet Tropics World Heritage Area where there are no inconsistent tenures. However, for formal recognition of the existence of common law native title, the Department of Premier and Cabinet requires review of appropriate anthropological or historical material specific to the Wet Tropics World Heritage Area.

Nevertheless, for the Wet Tropics Management Authority to wait for a formal determination of native title before developing management agreements with traditional owners is arguably poor risk management. (Note that this is recognised in sections of the *Wet Tropics Management Plan 1998* and the *Native Title Act 1993* which enable agreements prior to determination). A better working relationship now with claimant groups will only serve to facilitate the resolution of competing interests that may arise upon a formal determination of native title.

Policy statement

The Wet Tropics Management Authority views negotiated management agreements with native title interests as the preferred method of resolving competing land and resource use issues. A litigious approach, although not discounted, is seen as a last resort option.

The Wet Tropics Management Authority will seek, as far as is possible (with the necessary support and endorsement of native title representative bodies, the relevant land management agency, and the Department of Premier and Cabinet) to negotiate in good faith with groups who assert a right or interest under the common law and/or under the *Native Title Act 1993*. This is consistent with the provision of s.40-42 of the *Wet Tropics Management Plan 1998*.

Where the Wet Tropics Management Authority is approached by a group of Rainforest Aboriginal people asserting native title rights and interests over an area prior to a formal claim registration or determination of native title the Wet Tropics Management Authority will seek guidance from firstly the Department of Premier and Cabinet, and secondly, from the relevant Native Title Representative Body and Bama Wabu in relation to the possibility of an agreement under the *Wet Tropics Management Plan 1998* or an Indigenous Land Use Agreement under the *Native Title Act 1993*.

The Wet Tropics Management Authority will continue to explore the potential of Indigenous Land Use Agreements as a Wet Tropics World Heritage Area management tool with relevant Native Title Representative Bodies and the Department of Premier and Cabinet.

In the case of negotiating an agreement prior to a formal determination of native title priority will be given to working with claimant groups that have met the new registration requirements arising from the amendments to the *Native Title Act 1993* or where no dispute with other groups appears to exist³. Where overlapping claims exist the Wet Tropics Management Authority will only proceed towards a negotiated endpoint where all parties agree to the content and nature of the final agreement. It is not the responsibility of the Wet Tropics

³ This is consistent with section 24CD of the *Native Title Act 1993*.

Management Authority to mediate in disputes between claimant groups. Thus, consistent with the duty to 'negotiate in good faith' the Wet Tropics Management Authority will attempt to find a common solution to specific management issues but will not proceed to mediate in disputes where arguments over traditional ownership take priority over the mutually acceptable resolution of competing land use interests.

Consistent with s.35 and s.63 of the Plan⁴, the Wet Tropics Management Authority will issue a permit to native title holders (as formally determined through the Court or Tribunal system) for domestic activities such as building a residence, access, house garden or orchard, and extracting water for domestic use on their native title land. This applies where those domestic activities have been specifically determined as part of the group's particular native title entitlement. Where no formal determination of native title exists the Wet Tropics Management Authority will refer the matter to Native Title Services (*Native Title Act 1993*), the Department of Premier and Cabinet, for additional advice. Note that specific conditions may be attached to any permit granted⁵.

With the support of Aboriginal groups the Wet Tropics Management Authority will continue to seek endorsement from the Queensland Department of Premier and Cabinet to be directly involved in native title mediation processes that involve land management issues and concerns relevant to the World Heritage Area. This will enable the Wet Tropics Management Authority to more effectively be involved in the development of strategies aimed at protecting the interests of the State and Commonwealth under the World Heritage Convention while maintaining its obligations to Aboriginal groups. At the very least the Wet Tropics Management Authority will develop a closer working relationship with those representing the State Government and Aboriginal interests in the formal mediation process.

In conjunction with *Native Title Act 1993*, the Wet Tropics Management Authority will address the issue of compensation, particularly as it relates to the potential injurious affection of the rights and interests of native title holders as per section 54 and 57 of the *Wet Tropics World Heritage Area Protection and Management Act 1993*.

The Wet Tropics Management Authority will also continue to modify and review its policy position to reflect ongoing changes in the State and Commonwealth's understanding and interpretation of Native Title law.

Interpretation

The effect of this policy is to provide the basic framework for the ongoing development of a management approach that balances the Wet Tropics Management Authority's obligation under the World Heritage Convention with the requirement to take into account the rights and interests of registered native title claimants and holders under the *Native Title Act 1993*.

⁴ Section 35(2) of the *Wet Tropics Management Plan 1998* states that a permit may be issued to a native title holder for a domestic activity. Section 63(2) takes this issue one step further and provides that the Wet Tropic Management Authority must issue the permit, albeit potentially subject to certain conditions.

⁵ Note that the *Wet Tropics Management Plan 1998* also has the potential to allow native title holders and other Aboriginal people particularly concerned with the land to undertake activities (such as these domestic activities) which might otherwise be illegal under the Plan through the use of Section 41 or 42 cooperative management agreements. The Wet Tropic Management Authority can only enter such an agreement and thus allow a particular activity where that particular agreement would contribute in some way to the Primary Goal (refer to Schedule 1 *Wet Tropics World Heritage Area Protection and Management Act 1993* for a definition of the Primary Goal).

The policy will also provide the basis for the Wet Tropics Management Authority to achieve the Primary Goal without unduly leaving itself open to significant compensation claims for injurious affection of native title rights and interests. Note, however, that although the policy has a strong emphasis on the positive benefits to be gained through improved consultation, negotiation, and the development of agreements, this is not to suggest that there will never be circumstances where native title rights will not be adversely affected and thus possibly subject to compensation. As previously mentioned the issue of compensation for injurious affection to native title rights is to be more fully addressed at a later stage.

By developing a proactive approach to resolving native title issues through an interests based approach to negotiated agreements the Wet Tropics Management Authority will develop a better working relationship and climate for negotiation with claimant groups. An inflexible position based approach will only exacerbate the lack of trust that currently exists between some claimant groups and WHA managers. This may have a negative flow-on effect once a formal determination is made, and the exact nature of native title rights and interests are understood.

This policy, particularly with its emphasis on agreements as a means of resolving competing interests, will have considerable influence across a range of other Wet Tropics Management Authority policy areas⁶. As such there is a need for an integrated approach to policy development.

In all probability most issues will be settled by broad comprehensive agreements. The Wet Tropics Management Authority will avoid 'quick-fix' solutions to deal with political and economic imperatives; endeavouring at all times to establish appropriate processes that also take into account longer term goals.

Implementation

Consistent with the State future act notification procedures every permit application or potential management agreement will conform with the requirements of the *Native Title Act 1993* in relation to future acts. Thus, where required, specific notification(s) will be sent to any relevant native title claimant group(s), registered native title body corporate(s) and native title representative bodies for comment. A minimum of 28 days from the time of receipt of the notification is allowed for comment. Wet Tropics Management Authority will undertake a flexible approach, as far as is practicable, to this 28 day period, making allowances with respect to the cut-off response time for legitimate logistical or socio-cultural concerns. Such concerns would, for example, include problems associated with accessing isolated or flood prone regions, or the need to accommodate specific cultural obligations such as ceremonies and funerals that may disrupt normal communication processes. Wet Tropics Management Authority will facilitate on site inspections as requested or required with the assistance of the Community Liaison Officers and in conjunction (as far as possible) with the relevant Native Title Representative Body.

Apart from the future act notification procedures the Wet Tropics Management Authority will actively seek negotiated management agreements consistent with s.40-42 of the *Wet Tropics World Heritage Area Protection and Management Act 1993*.

Because the Wet Tropics Management Authority is not a land-owner or land-manager the Wet Tropics Management Authority is reliant on the full participation and co-operation of the relevant State management agency in the development of *Wet Tropics Management Plan 1998* management agreements. This has proven

⁶ Examples of other relevant policy areas include infrastructure development and works proposals, walking track and tourism development strategies, roads and access, research, land tenure changes etc.

to be difficult at times as a result of the subtleties and complexities of the other legislative and policy regimes in place. Wherever possible the Wet Tropics Management Authority will resolve difficulties through legislative and policy adjustments in collaboration with the relevant day-to-day management agencies.

Indigenous Land Use Agreements provide for greater certainty in relation to the validity of future acts done by agreement even when no native title determination has been made in the area concerned. Indigenous Land Use Agreements may cover a whole range of matters concerning native title rights and interests, including the doing of future acts or classes of future acts, the relationship between native title rights and interests in the area, the manner of exercise of native title rights in an area, and the compensation for past or future acts (Sections 24BB, 24CB, 24DB *Native Title Act 1993*).

The establishment of any agreement either as a formal instrument under the *Wet Tropics Management Plan 1998* or as an Indigenous Land Use Agreement under the *Native Title Act 1993* requires notification and an opportunity for other parties to object to their establishment. In the case of Indigenous Land Use Agreements, once formally registered with the National Native Title Tribunal, future acts undertaken as part of the agreements remain valid even in the face of later opposition.

Note that provisions under the *Wet Tropics Management Plan 1998* do not preclude the possibility of agreements with Aboriginal people particularly concerned with the land who are not necessarily native title holders or claimants. Although such agreements could not be made against the wishes of the native title holders, where these are identified, there is opportunity for joint agreement. Such agreements would be negotiated in close consultation with the relevant Native Title Representative Body and with Native Title Services (Department of Premier and Cabinet).

At all times the relevant Native Title Representative Body will be contacted to assist in any attempts to establish the identity of native title claimant groups or relevant traditional owners

A complementary policy entitled "Moving Onto Country" will be developed in collaboration with relevant State agencies and Aboriginal groups, including Bama Wabu and Native Title Representative Bodies. The purpose of this document will be to provide a framework for dealing with indigenous groups that assert a native title right to establish living areas back on their traditional estates. It will focus not only on the establishment of living areas but also on the use of natural resources. The "Moving Onto Country" policy will serve to inform the Wet Tropics Management Authority's negotiation of land and resource use agreements.

Any management agreements with claimant groups or registered native title holders under the *Wet Tropics Management Plan 1998* or the *Native Title Act 1993* (whether in a native title context or otherwise) will need to include the relevant State land manager (eg. Department of Natural Resources, Queensland Parks & Wildlife Service, DATSIPAD) as signatories to the agreement. Any agreement would also need the consent of the Board of the Wet Tropics Management Authority. Any Indigenous Land Use Agreement under the *Native Title Act 1993* would need the consent of the Department of Premier and Cabinet.

The Principle Agency Forum will provide a mechanism for coordinating the resolution of native title and land management issues across tenures. The Principle Agency Forum will also serve as a clearing house for ongoing policy development and the resolution of inter-agency concerns.

The proposed Interim Negotiation Forum will also serve as a vehicle for the discussion and possible resolution of native title issues identified in the Review of Aboriginal Involvement in the Management of the Wet Tropics World Heritage Area.

For the purposes of s.40 of the *Wet Tropics Management Plan 1998*, negotiating in good faith is defined as per Attachment A.

Disclaimer

This policy does not necessarily reflect the views of the Australian and Queensland Governments.

Approval

Wet Tropics Board

Meeting 35
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Attachment A

Negotiating “In Good Faith”

“Useful Indicia for determining whether a party has negotiated in good faith”

Based on *Western Australia v Champion* (27 July 1998)

“A party may be in breach of their duty of good faith where they:

Unreasonable delay initiating communications in the first time instance.

Fail to make proposals in the first place.

Fail to communicate with other parties within a reasonable time.

Fail to contact one or more of the other parties.

Fail to follow up a lack of response from other parties.

Fail to respond to reasonable requests for relevant information within a reasonable time.

Stall negotiations due to unexplained delays in responding to correspondence or telephone calls.

Unnecessarily postpone meetings.

Refuse to agree on trivial matters, for example, a refusal to incorporate statutory provisions into an agreement.

Shift their position just as an agreement is near completion.

Adopt a rigid non-negotiation position.

Fail to make counter proposals.

Refuse to sign written agreement in respect of the negotiation process.

Fail to do what a reasonable person would do in the circumstances.”

(cited in *Native Title News* 4 (2) p. 32)