



Byron Shire Council and Indigenous Stakeholders



A Guide to Statutory Relationships

Byron Shire Council : Legal Services

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An Important Note:

The object of this document is to provide an overview of applicable laws and hopefully facilitate cultural understanding for officers within council who have a need to consider Indigenous stakeholders within their processes and projects.

This document is not legal advice and is not an exhaustive indication of legislative requirements and obligations. Much of the information and how it is applied will depend on context, so it provides a general overview only. It also does not take into account traditional beliefs or customary laws of specific Indigenous stakeholders that may apply to individual scenarios or projects. This document is intended for internal use only.

Sections of relevant acts are hyperlinked to their corresponding webpage for ease of access. Simply hold the ctrl key whilst clicking on a hyperlink.

Please always seek advice from both:

- **Legal Services to confirm the statutory requirements that apply to your specific project; and**
- **The Indigenous Project Officer to confirm any cultural or customary requirements that may apply to your project.**

Guide to abbreviations

In this document, the following abbreviations apply:

ALR Act	Aboriginal Land Rights Act
BSC	Byron Shire Council
Cth.	Commonwealth
ILUA	Indigenous Land Use Agreement
LALC	Local Aboriginal Land Council
LEP	Byron Local Environment Plan 2014
LGA	Local Government Area
LG Act	Local Government Act
MoU	Arakwal/BSC Memorandum of Understanding
NNTT	National Native Title Tribunal
NPW Act	National Parks and Wildlife Act
NSWALC	NSW Aboriginal Land Council
NT Act	Native Title Act
NTSCORP	Native Title Service Corporation (NSW and ACT)

Preamble

Several areas of Indigenous engagement are seen to fall within an active responsibility of local government. In particular, land management is a crucial point of intersection. Instruments guiding land use and Indigenous rights (such as the Native Title Act) should be addressed in the strategic, corporate and operational plans of BSC. Through local planning processes and advocacy with state and federal departments, Local Governments are able to proactively work with local Indigenous people to ensure that Indigenous interests are championed from the outset of any decision making process undertaken with respect to land use.

Customs and traditional laws can vary widely from group to group, though there are some common threads, particularly in terms of the importance placed on relationship. It is the complex physical and spiritual relationship between kin, Indigenous peoples and land (Country) that is often misunderstood or discounted by the European based authority structures of post-colonised Australia. For this reason, land management should be sensitively navigated by BSC within the boundaries of legislation to protect and conserve Aboriginal culture, whilst advancing partnerships between local government and Indigenous groups. Understanding and respecting the cultural practices and beliefs of a particular Indigenous stakeholder will be paramount in the successful development and maintenance of the supportive relationships BSC is able to build. Council should consider, at each

opportunity, whether a project/activity or event could provide a community benefit to the local Indigenous people, in particular the opportunity to engage or self determination.

What do I need to consider...?

If you have a project concerning the use or development of any land in the shire, it is recommended that you identify whether there are any Indigenous interests on that land before you begin.

Identifying Indigenous Interests on Land

To identify Native Title interests:

1. Visit <http://www.nntt.gov.au/News-and-Publications/Pages/Forms.aspx>. Under the 'Assistance' tab, select the form 'Search Form Request for Search of Tribunal Registers'
2. Fill out the form and send to enquiries@nntt.gov.au
3. The Tribunal will respond with information as to any interests identified on the land.

You may also need to identify through the Aboriginal Land Council (NSWALC) as to whether there are any Land claims made. It is important to be aware of the difference between Native Title claims and Land Claims. Native Title claims are provided for under Commonwealth legislation, and Land Claims are provided for under State legislation. See "[Relationships Between Indigenous Stakeholders](#)" on page 8.

Another important consideration is whether the project is culturally appropriate for the identified custodians of the land on which is proposed. For example, a cultural event may require the approval of the identified custodian group of that land, to ensure the event does not break any of that groups customary law etc. It is safest in this instance to enquire with BSC's Indigenous Project Officer as to whether this needs to be considered.

Notification

(See [Appendix Two](#) for contact details of stakeholders)

In most instances, whether there is a registered Native Title claim or not, BSC will be required to notify the relevant Indigenous Representative Body (such as NTSCORP) of your intentions with respect to the use of land.

For an act that will extinguish or partially extinguish Native Title on a lot (for example in a compulsory acquisition), often referred to in legislation as a Future Act, the period for comment is open for 60 days, per Section [24MD](#) of the Native Title Act (subsection 6B).

For a non permanent act, for example a lease or licence granted by BSC as the Reserve Trust Manager of Crown land, the Native Title Act provides that bodies must be notified and allowed time to comment. There is no specific time frame in the Act for this type of notification, but generally speaking 30 days is acceptable.

At a minimum, you should notify NTSCORP and NSWALC to request direction on which group, if any, needs to be notified and the process for notification. BSC should develop a 'Notification' template which can be applied. Generally, NTSCORP will be the representative of the relevant Indigenous group which means that Council will correspond through NTSCORP as the authoritative representative body.

PART ONE: A GUIDE TO INDIGENOUS STAKEHOLDER RELATIONSHIPS IN BYRON SHIRE

The Arakwal Corporation

The Arakwal Corporation is incorporated under the *Aboriginal Councils and Associations Act 1976 (Cth)*. It was established in 1996 and primarily works for the betterment of the Bundjalung of Byron Bay Aboriginal (Arakwal) people, lands and waters. Board members of the Corporation represent the Arakwal people on various committees with other agencies such as the Cape Byron Reserve Trust, Cape Byron Marine Park, the NSW Office of Environment and Heritage, and Byron Shire Council.

The Bundjalung of Byron Bay (Arakwal) people

The Bundjalung of Byron Bay (Arakwal Bumberlin people) are recognised as Traditional Owners and custodians of land in the Byron Bay Area under the Native Title Act (Cth). Arakwal Country extends from Seven Mile Beach south of Broken Head, north to the Brunswick River, out to the escarpment west of Byron Bay, and east out into the Tasman Sea.

There is an active Bundjalung (Arakwal) Native Title Claim active in Byron Shire, NSD6020/2001, and along with Arawkal Corporation, the Native Title Claimants are party to three Indigenous Land Use Agreements.

Contact for purposes of notification to the Native Title Claimants should be through NTSCORP.

Local Aboriginal Land Councils (LALC)

LALCs are autonomous bodies, governed by elected Boards. LALCs were established under the *Aboriginal Land Rights Act 1983* as the elected representatives for Aboriginal people in NSW. The functions of a LALC Board are to:

- direct and control the affairs of the Land Council in accordance with the *Aboriginal Land Rights Act* and the council's Community Land and Business Plan;
- facilitate communication between the members and the New South Wales Aboriginal Land Council (NSWALC);
- review the performance of the Land Council in carrying out its functions and achieving its objectives; and
- any other function conferred by the Act.

The Act established the Land Council structure in a way that has sought to achieve a high degree of participation and involvement by every Aboriginal person in the affairs of their local community. Under the *Aboriginal Land Rights Act 1983* (see Part 5, Division 6), LALCs are required to prepare and implement Community Land and Business Plans in consultation with:

- LALC members;
- persons who have a cultural association with land in the land council's area; and
- other stakeholders

The purpose of the Community, Land and Business Plan (CLBPs) is to describe the aims of the Local Aboriginal Land Council and to develop strategies by which these can be achieved.

There are three LALC's with interests that extend within the Byron Shire. They are Tweed/Byron, Jali (Ballina) and Nguligah (Lismore).

NSW Aboriginal Land Council (NSWALC)

NSWALC is the state's peak representative body in Aboriginal Affairs. The aim of the NSWALC, per its website www.alc.org.au, is to protect the interests and further the aspirations of its members and the broader Aboriginal community. Under the Aboriginal Land Rights Act (1983), NSWALC is empowered to do the following:

- administer the NSWALC Account and Mining Royalties Account;
- grant funds for payment of the administrative costs and expenses of LALCs;
- acquire land on its own behalf or on behalf of, or to be vested in, LALCs;
- determine and approve/reject the terms and conditions of agreements proposed by LALCs to allow mining or mineral exploration on Aboriginal land;
- make claims on Crown lands, either on its own behalf or at the request of LALCs;
- manage any of the affairs of a particular LALC, with their agreement;
- conciliate disputes between LALCs, between LALCs and individuals, or between individual members of those LALCs;
- make grants, lend money or invest money on behalf of Aboriginal people;
- hold, dispose of or otherwise deal with land vested in or acquired by NSWALC
- ensure LALCs comply with the Act in respect of the establishment and keeping of accounts and the preparation and submission of budgets and financial reports;
- advise the Minister on matters relating to Aboriginal land rights; and
- exercise such other functions as conferred or imposed on it by or under the *Aboriginal Land Rights Act (1983)* or any other Act.

NSWALC represents 120 LALCs which collectively manage the range of support services delivered at a local level to communities.

NTSCORP

NTSCORP Limited is the Native Title Service Provider for Aboriginal people, Traditional Owners and Indigenous groups in New South Wales and the Australian Capital Territory. NTSCORP offers assistance to Traditional Owners in the following areas:

- Facilitation and assistance of native title claims;
- Dispute resolution;
- Notification of Future Acts activities;
- Agreement making; and
- Research.

BSC will occasionally need to notify NTSCORP of any proposed activities on lands that may be subject to Indigenous interests. Where BSC is unsure how best to engage with the relevant Traditional Owner or Indigenous group, it should contact NTSCORP or NSWALC to seek guidance on the most appropriate approach.

The Widjabul Wia-bal people

The Widjabul Wia-Bul people are a part of the wider Bundjalung nation. They have an active Native Title claim for land within the Shire (NSD174/2013). The claim area encompasses roughly a third of the western part of the Shire and extends into several other local government areas. Contact for purposes of notification to the Native Title Claimants should be through NTS Corp. BSC may consider opportunities to partner with neighbouring local government authorities in working together with the Widjabul Wia-bul people.

Relationships between Indigenous Stakeholders

As well as navigating BSC's relationship with Indigenous Stakeholders, it is important to understand the relationships between the Indigenous Stakeholders themselves. BSC should be aware of any right to negotiate that exists between two stakeholders when it comes to land use / management. The reason for this is that BSC should respect and endorse the right to negotiate between two groups, and where this situation arises, communicate at all times with both groups transparently.

Native Title Claimants and Aboriginal Land Councils (see Appendix Four)

Native Title claims are registered under the Native Title (NT) Act at a Commonwealth level, whilst Land Claims are provided for under the Aboriginal Land Rights (ALR) Act, at a state level. There are key differences to understand between these two Acts. The main difference to be aware of is that in order for a land claim to be granted under the ALR Act, a continuous traditional connection to the land does not need to be established. It is a process more concerned with returning Crown lands to Indigenous people in terms of compensation for the dispossession of Indigenous people collectively. Whilst there are provisions in terms of recognising traditional owners, obviously there may be some friction between those who have a legitimate ancestral connection to the land, and a land council being granted use or ownership of land that the members do not have a specific connection to.

The NT Act, however, is primarily focussed on the recognition of cultural ownership and custodianship over land to which a group has continuous recognisable connection to country. Native Title claims can run for many years, as complex issues of continuous connection to country are required to be 'proven' in terms of a common law judicial system, where the standards of evidence tend to require tangible (e.g. written) records. In this system, it can be difficult for an Indigenous group to prove connection to the land prior to colonisation, because their records dated prior to this time are typically in verbal form, through the generational sharing of stories and customary laws. In establishing a Native Title claim, historians and anthropologists work closely with potential claimants to demonstrate these requirements, as well as delving into the historical record.

Although the relationship between Land Rights and Native Title is legally complex, the following principles generally apply:

- Land rights and native title may co-exist in land;
- The granting of an Aboriginal land claim lodged after 1994 will not affect any native title rights;
- Where native title has been extinguished in land owned by an Aboriginal land council it may be 'revived', but will not restrict the Aboriginal land council's ability to deal with the land;
- Land claims made over land that is the subject of a registered Native Title claim or a positive determination of native title must be refused;
- Aboriginal Land Councils cannot deal with land that has been granted subject to native title unless there is a determination of native title over that land;

- Native Title claimants and holders may be members of Aboriginal Land Councils and vice versa; and
- Aboriginal Land Councils and Native Title claimants/holders may develop agreements about land subject to both native title and land rights.

Key agreements that BSC is party to

Heads of Agreement (1998)

Document # DM564718

Signed in 1998, this document set out a framework for ongoing consultation between BSC and the Arakwal people to ensure that the Arakwal are involved in the management and protection of culturally significant sites which are priorities to the Arakwal. The Heads of Agreement was the first agreement of its kind between a local council and Native Title applicants in New South Wales, and is essentially the pre-cursor to the Memorandum of Understanding (below).

Memorandum of Understanding (Arakwal) (2013)

Document #E2013/42493

In 2011, BSC resolved (11-891) to create an Advisory Committee with terms of reference to oversee the implementation of a new MoU in keeping with BSC's commitment of an ongoing relationship with the Arakwal people. The MoU between BSC and the Arakwal Corporation was entered into on 8 July 2013. The purpose of the document is to recognise and support the status of the Bundjalung of Byron Bay Arakwal people as the Traditional Owners and custodians of land and rights as established through the NT Act. The MoU provides for the establishment of an advisory committee, to be administratively resourced by BSC. The aim is to achieve an ongoing cooperative and successful strategic working relationship between the Arakwal people and BSC. By extension of this relationship, preserve Aboriginal heritage and culture throughout the shire whilst improving social justice and community development issues for indigenous people living within the shire. The MoU's priorities are reflective of many key pieces of legislation as outlined in this document, and so BSC has significant statutory obligations in the delivery and implementation of projects that are identified within the MoU. The MoU is an enforceable strategic document which should be used by Council as a reference point in communicating and working with the Indigenous community to achieve positive outcomes.

PART TWO : A GUIDE TO LEGISLATION

Aboriginal Land Rights Act (NSW) 1983

The aim of the Act is to redress past injustices when Aboriginal people were dispossessed of their land by colonisation. This Act governs the creation of and function of the NSWALC, as well as LALCs.

NSWALC is an independent self-funded non-government organisation with an elected governing council. They have functions to acquire and manage land to protect Aboriginal culture and heritage.

LALCs have similar functions within their boundary areas. LALCs are **key stakeholders** within a local government context, as they are directly involved in negotiation for land use agreements and claims over Crown land within Local Government Area (LGA) boundaries. That land may be required by BSC for an event, public space, acquisition or so forth; and ***so it is vital that the LGA is aware of and involved in potential negotiations, and their obligations to notify the relevant LALC of any proposed activities on that land.***

The relationship with LALCs may become even more important should BSC become involved in any future Aboriginal Land Agreements, potentially commencing from around 2018 (see Aboriginal Land Agreements below).

Aboriginal Land Claims

Through the ALR Act, Crown land not lawfully used or occupied, or required for an essential public purpose, or for residential land, is returned to Aboriginal people. The Department of Industry - Lands investigates and assesses Aboriginal Land Claims across the State.

S36 outlines the definition of 'claimable Crown Lands' and the process by which a LALC or NSWALC can proceed to make a claim:

In this section, (except in so far as the context or subject-matter otherwise indicates or requires):

"claimable Crown lands" means lands vested in Her Majesty that, when a claim is made for the lands under this Division:

- (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;
- (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).

Aboriginal Land Agreements

On 1 July 2015, the Government enacted [section 36AA](#) of the Act, which provides for Aboriginal Land Agreements (ALAs). As per the [Department of Industry- Lands](#) website:

“ALAs allow for the strategic settlement of multiple land claims and for flexibility in providing the social, cultural and economic outcomes intended by the ALRA.

The ALA negotiation framework aims to ensure ALA negotiations are fair and likely to succeed in the shared objectives of:

- Speeding up the processing of land claims;
- Providing more sustainable social, cultural and economic outcomes for LALCs and Aboriginal communities from the return of land; and
- Providing greater certainty to all parties over Crown land.

The framework defines the scope of ALA negotiations, provides principles that will guide how negotiations are conducted, and prescribes procedural elements to ensure negotiations are fair and likely to succeed.”

For the time being, BSC may not be affected by any ALAs, as negotiations began in 2016 and will continue through 2017, though only in the four LGAs which were involved in the Government’s Local Land Pilot in 2015 (Tweed, Tamworth, Corowa and Warringah).

ALA negotiations may then proceed in 2018 and 2019 in additional areas (based on LGA boundaries or LALC boundaries), subject to Government approval.

[S36AA](#) lists the provisions for an Aboriginal Land Agreement and provides the definition as

‘an agreement, in writing, between the Crown Lands Minister and one or more Aboriginal Land Councils (whether or not the agreement also includes other parties) that, in addition to any other matter that may be included in the agreement, makes provision for:

- (a) the exchange, transfer or lease of land to an Aboriginal Land Council; or
- (b) an undertaking by an Aboriginal Land Council not to lodge a claim, or to withdraw a claim, in relation to specified land.’

[S42](#) deals with restrictions on dealing with land subject to Native Title. Specifically:

- (1) An Aboriginal Land Council must not deal with land vested in it subject to native title rights and interests under section 36 (9) or (9A) unless the land is the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act).

(2) This section does not apply to or in respect of:

- (a) the lease of land by the New South Wales Aboriginal Land Council or one or more Local Aboriginal Land Councils to the Minister administering the NPW Act under Part 4A of that Act in accordance with a condition imposed under section 36A (2), or
- (b) a transfer of land to another Aboriginal Land Council, or
- (c) a lease of land referred to in section 37 (3) (b).

Aboriginal Land Councils

[s43-44A](#) Concerns the payment of **rates and exemptions for rates** being charged to land that is vested in an Aboriginal Land Council. This intersects with [s555](#) of the *Local Government Act*.

[S52](#) outlines the functions of LALCs including acquisition of land, management or disposal of land, submission of proposals for culturally significant land (under [sch.14](#) of NPW Act) and negotiate leases in respect of land, whilst maintaining the best interests of the identified Aboriginal owners of the land concerned. LALCs also have functions relating to protection of the heritage and culture of Aboriginal persons within their area, and to promote business

and enterprise. Under [s50](#) of the *Interpretation Act 1987*, a Local Aboriginal Land Council has certain functions as a statutory corporation, including the power to purchase, exchange, take on lease, hold, dispose of and otherwise deal with property.

NB: See intersection with *Crown Lands Management Act 2016* and the vesting of land in local councils on page 14-15.

[s113](#) outlines matters in which the NSWALC may prepare and implement policies for, including those relating to land dealings and the financial management of LALCs.

[Part 10, s176-s215A](#) outlines conduct, disclosure and disciplinary matters applying to Aboriginal Land Councils. Much of this correlates with sections of the Local Government Act. This means that Aboriginal Land Councils are typically required to adhere to similar standards as local government councils in meetings and in how they conduct business.

[Part 13 \(s238-241\)](#) makes provision for mediation, conciliation or arbitration of disputes by NSWALC.

[s248](#) provides that both NSWALC and LALCs are taken to be a public authority for the purposes of the *Ombudsman Act 1974*, the *Independent Commission Against Corruption Act 1988* and the *Government Information (Public Access) Act 2009*. However, a **Local** Aboriginal Land Council is not taken to be an agency for the purposes of [section 6](#) of the *Government Information (Public Access) Act 2009*.

Byron Local Environment Plan (NSW) 2014 (LEP)

The Byron LEP is a regulation enabled under the *Environmental Planning and Assessment Act 1979*. One of the guiding aims of the Byron LEP is a commitment to the protection of Aboriginal culture and heritage through development controls and practices. For example:

[Clause 3.3](#) defines the term 'Environmentally sensitive area for exempt or complying development' as including land identified in this or any other environmental planning instrument as being of high Aboriginal cultural significance or high biodiversity significance.

[Clause 5.5](#) is in relation to development within the coastal zone, with one of its objectives being identified as protection of Aboriginal cultural places, values and customs.

[Clause 5.9](#) provides for the conservation and protection of trees and vegetation that are identified as part a culturally significant Aboriginal place or object.

[Clause 5.10](#) provides for the conservation of Aboriginal heritage sites or objects through the requirement of development consent for development that may impact on (or be within an area of) Aboriginal cultural significance. For example, disturbing or excavating a site, erecting a building on a site, subdividing culturally significant land and so on.

[Schedule 1](#) provides that certain land at Lighthouse Road in Byron Bay may only be developed according to ILUA 1 and that the dominant use is to be 'Aboriginal Cultural Center'.

[Crown Lands Act 1989](#)

The Crown lands Act is still in force, however, the Crown Lands Management Act 2016 (see below) is anticipated to fully repeal the Crown Lands Act 1989 by early 2018 (specifically, the Act is to be repealed on the commencement of Sch 8 (a) to the Crown Land Management Act 2016 No 58).

This Act affects BSC in that it is required to manage reserves and obtain licences for use of Crown reserves. Generally speaking, Native Title claimants and other relevant Indigenous representative bodies will require notification before a lease or licence is granted (see [Notification](#) pg. 4)

[Crown Lands Management Act 2016](#)

The Crown Lands Management Act 2016 was assented to on 14 November 2016 and will eventually repeal the Crown Lands Act 1989. The majority of the provisions are expected to commence in early January 2018, though provisions relating to vesting of land in local councils were in force from the date of assent.

One of the objects of the Act is:

Division 1.1. (1.3)(e) to facilitate the use of Crown land by the Aboriginal people of New South Wales because of the spiritual, social, cultural and economic importance of land to Aboriginal people and, where appropriate, to enable the co-management of dedicated or reserved Crown land.

Vesting of Land

Lindsay Taylor Lawyers provides a helpful summary of this provision and how it relates to Local Government and Native Title interests in their [article](#) of December 2016:

“The CLM Act provides for a process whereby ‘transferable Crown land’ can be vested in local councils by way of a notice in the gazette (Vesting Notice). ‘Transferable Crown land’ is Crown land which has not been dedicated or reserved, nor declared to be a wildlife refuge under the National Parks and Wildlife Act 1974, or which is not land required to be used in a particular way under other legislation. However, nothing in the Local Government Act 1993 (LG Act) can prevent land from being transferable Crown land.

There are a number of pre-requisites to the vesting of land in a council, as follows:

- the council must agree to the vesting;
- the land must be wholly within the local government area of the council in whom it is being vested;
- the vesting must have the consent of local and NSW aboriginal land councils if the land is subject to a claim under the Aboriginal Land Rights Act 1983; and
- the Minister must be satisfied that the land is suitable for ‘local use’.

Any vesting is subject to any native title interests, and there are constraints on dealing with the land unless native title has been satisfactorily dealt with under the Native Title Act 1993 (Cth) in order to avoid any breach of that Act. However councils will be able to adopt and implement plans of management under the LG Act for the land.” *Megan Hawley, December 2016.*

Part 8 Native title rights and interests Introductory note. This Part provides for:

- (a) the issuing of native title certificates by the Minister;
- (b) the obligations of certain Crown land managers for dedicated or reserved Crown land and local councils vested with Crown land in connection with the management of native title issues in relation to the land (including using native title managers to provide advice on certain dealings with the land); and
- (c) compensation responsibilities concerning native title rights and interests for the conduct of these Crown land managers and local councils.

Local Government Act (NSW) 1993

The LGA provides the statutory requirements for local government authorities within NSW. The whole of the Act applies to Indigenous people within the shire, as it outlines Local Government roles and responsibilities for all individuals (for example, the civic process, BSC's social responsibilities, financial management and so on). However, there are some certain sections of the Act that specifically relate to BSC's statutory obligations as a local authority regarding Aboriginal culture, land use, protection of heritage and so on.

The summary below is a general overview of some of the sections of the LG Act which are applicable.

Local Government Land Management

S10A provides that parts of BSC meetings dealing with culturally significant sites identified under s36DA can be closed to the public.

S36D BSC has statutory responsibility to ensure that community land (that is BSC owned land for community use) that is identified as culturally significant must adopt a plan of management for the land. (see also: clauses 2.2, 4 of the **MoU** - that the Arakwal be involved in identification and management of such land).

S36DA provides that the location of places and items of Aboriginal significance may be kept confidential by a resolution of council at the request of any Aboriginal person, and that parts of an adopted or draft plan of management subject to a resolution of confidentiality are not to be disclosed by councillors or BSC employees except with consent of BSC. Councils are to consult with appropriate Aboriginal communities when proposing a draft plan of management that involves disclosure of confidential items or places.

S36H provides the core objectives for the management of community land that is categorised as an area of cultural significance, specifically active conservation methods to be undertaken to preserve the cultural significance of the site.

S47AA Provides additional requirements around the issuing of a lease or licence for filming projects on community land that has been identified as Culturally Significant under s36D, including notifying or advertising the proposal in the manner prescribed by the regulations.

Compulsory Acquisition of Land

[S188](#) deals with the compulsory acquisition of land for re-sale and the requirement for BSC to perform a 'diligent inquiry' to identify the landowner. S188(3) defines the term 'diligent inquiry' as including giving notice of the proposed acquisition to the NSWALC and the relevant LALC, along with any Native Title claimants in the area (see '[Identifying Indigenous Interests](#)' page 3).

Rates and Levies

[S496A](#) Subsection (1) does not permit BSC to make and levy annual charges for stormwater management services on rateable land held under a lease for private purposes granted under the [Aboriginal Housing Act 1998](#).

[S496B](#) Subsection (1) does not authorise or permit a council to make or levy an annual charge for the provision of coastal protection services for rateable land that is held under a lease for private purposes granted under the [Aboriginal Housing Act 1998](#).

[S555](#) outlines lands which are exempt from ALL rates. Land exempt includes (but is not limited to) land that is vested in the New South Wales Aboriginal Land Council or a Local Aboriginal Land Council and is declared exempt from rates under [Division 5, part 2 of the Aboriginal Land Rights Act 1983](#). See also *National Parks and Wildlife Act 1974*.

[S556](#) provides that land that is vested in an Aboriginal Land Council **and** that is reserved under Part 4A of the *National Parks and Wildlife Act 1974* is exempt from rates other than water supply special rates and sewerage special rates.

[S560](#) provides that the Crown is liable to pay the rate for land owned by the Crown which is subject to the [Aboriginal Housing Act 1998](#).

[National Parks and Wildlife Act \(NSW\) 1974](#)

This Act provides for the identification, management, conservation and preservation of Aboriginal cultural sites, items, heritage and lands at a State level. There is a good portion of this Act which deals explicitly with the reservation and management of Aboriginal lands.

Below is a summary of some relevant sections of the NPW Act.

[Part 3](#) provides for the creation and the functions of an Aboriginal Cultural Heritage Advisory Committee. The Committee is to advise the Minister and the Chief Executive on any matter relating to the identification, assessment and management of Aboriginal cultural heritage, including providing strategic advice on the plan of management and the heritage impact permit process, whether or not the matter has been referred to the Committee by the Minister or the Chief Executive.

[Section 30k](#) outlines the purpose of reserving land to protect Aboriginal places of cultural significance, and to provide principles under which that land is to be managed.

[Part 6, Division 1](#) focusses on the protection of Aboriginal cultural sites and objects, as well as outlines the provisions for penalties in relation to the destruction of Aboriginal objects and/or cultural sites; or failure to notify the Chief Executive of the Department about the known location of a culturally significant site or object. [S86](#) provides that harming of Aboriginal objects or sites is prohibited, though [S87A](#) and [S87B](#) provide conditions of exemption from s86 in some culturally related circumstances. (see also **Local Government Act sections 36D,36DA and 36H**).

Whilst BSC currently does not have the authority to enforce offences committed under this Act, it may be applicable to BSC's obligations to Aboriginal stakeholders in that:

- it identifies certain offences and exemptions pertaining to the destruction or damage of culturally significant items and sites, which is important for BSC to consider during planning and development proposals, events, licences for use of land and so on (**also intersects with the Byron LEP 2014 Clause 5.10**);
- sections of this Act that focus on the identification and preservation of such culturally significant sites or objects can be seen to overlap with sections 36D,36DA and 36H of the Local Government Act; and
- BSC, through various compliance or development processes, may become aware of an offence being committed under this Act, and therefore be required to notify the National Parks and Wildlife Authority.

[Native Title Act \(Cth\) 1993](#)

The Native Title Act 1993 (Cth) (NT Act) provides the framework for the legal recognition of the rights and interests of Indigenous people or groups. Activities undertaken by BSC in relation to land or waters may affect native title rights and interests (whether Native Title has been formally recognised in a particular area or not).

A native title assessment should be carried out at the beginning of any work plan or project assessment process.

There are currently two active Native Title Claims that encompass land within Byron Shire:

- Bundjalung of Byron bay (Arakwal) – NSD6020/01; and
- Widjabul Wia-bal People - NSD174/13

Native Title is a complex area of law. Given its complexity, no particular section is outlined in this document, and it is recommended that you obtain specific advice from Legal Services when considering the impact that Native Title rights and interests may have on a proposed activity, event or project.

Where it is unclear, or there is no established process, the most appropriate way to determine existing Native Title interests is to contact the NNTT or NTSCORP.

BSC may intersect with the NT Act in the following ways:

- As a **Crown Land Reserve Trust Manager**, BSC must notify the relevant stakeholders of any **proposed lease or licence** to be granted on that parcel;
- In the case of compulsory **acquisition of land**, BSC is required to notify relevant Indigenous Stakeholders, as acquisition of land will likely extinguish Native Title;
- Future Acts: Where BSC proposes to construct a **public work** on land that has not had Native Title extinguished, BSC is required under the NT Act to notify any relevant stakeholders. The building of a public work may extinguish Native Title on that land (meaning it will no longer be claimable land). There is a Future Act process which Council is required to undertake. Where a Council staff member considers it may have an activity, event or project where a Future Act may be concerned, it should seek advice from Legal Services as a first step in the process.

A 'public work' is defined in [section 253](#) as:

- (a) any of the following that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:
 - (i) a building, or other structure (including a memorial), that is a fixture; or

- (ii) a road, railway or bridge; or
 - (iia) where the expression is used in or for the purposes of Division 2 or 2A of Part 2—a stock-route; or
 - (iii) a well, or bore, for obtaining water; or
 - (iv) any major earthworks; or
- (b) a building that is constructed with the authority of the Crown, other than on a lease.

In addition, section [251D](#) provides that a reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work.

Native Title (Indigenous Land Use Agreements) Regulations 1999

Indigenous Land Use Agreements are enabled under the NT Act.

As per the [Office of Environment and Heritage](#) website:

“An indigenous land use agreement (ILUA) is a voluntary agreement between a native title group and others about the use and management of land and waters. ILUAs can be made separately to the formal determination of a native title claim or they can be a stepping stone towards or part of a formal native title determination by the Federal Court. The NSW Government can negotiate an ILUA with native title claimants regarding the management of public land in their claim area.

If the ILUA is registered on the Register of Indigenous Land Use Agreements it binds all parties and all native title holders to the terms of the agreement. **The native title rights established by an ILUA have the same force under Federal law as if they were part of a native title determination.**” (emphasis added)

There are three ILUAs in force within Byron Shire.

ILUA 1 (doc. # E2013/62799) 28 December 2001.

An agreement between the Minister for Land and Water Conservation; the Director General of National Parks and Wildlife; Cape Byron State Recreation Area Trust; the Arakwal Aboriginal Corporation; Lorna Kelly and Linda Vidler on behalf of the Arakwal people; the Tweed Byron LALC; and the NSW ALC; The main objects of this agreement related to the creation of the Arakwal National Park, a proposal for the land at Taylor’s Lake to be dedicated as a nature reserve and for some identified land parcels to be transferred to the

Arakwal Corporation. The creation of a National Park through an ILUA was the first of its kind.

ILUA 2 (doc. #E2013/62429) 20 December 2006

ILUA 2 is a deed of agreement made between the Minister for Lands, the Minister for the Environment, the Director General of the Department of Environment and Conservation, Native Title Applicants for Bundjalung of Byron Bay Native Title Claims and the Arakwal Corporation. This agreement achieved a partial settlement of Native Title Claim NSD6010/98 (the first application) and a final settlement of native Title Claim NSD6088/98 (the second application). ILUA 2 provides the means for the State to establish and manage the Arakwal National Park in accordance with the Native Title Act (along with certain benefits for the native title claimants such as transfer of some land, lease of a cottage within the national park, employment and training opportunities in the National Park). In exchange for benefits provided by the State, the native title claimants have agreed to withdraw the First Application over certain land, amend the third application (NSD6020/01 discussed below) by removing parcels that fall within the National Park area and surrender Native Title claim over other land claimed in NSW. ILUA 2 represents the full and final settlement of the First Application and provides that no further application for a determination of native title shall be made in respect of the area encompassed by ILUA 2 except in the limited circumstances provided for within the agreement. Under this agreement, Arakwal elders enabled Crown land to be transferred to BSC for the purposes of the Byron Bay Library site. Under the [MoU](#), **clause 3.2.4** stipulates the requirement of this ILUA that an 'Arakwal Room' be perpetually provided at the library for cultural activities.

ILUA 3 (doc. # E2013/62432) 20 December 2006, Ti Tree Lake (Taylors Lake)

A deed of agreement made between the Minister for Lands, the Minister for the Environment, the Director General of the Department of Environment and Conservation, Native Title Applicants for Bundjalung of Byron Bay Native Title Claim NSD6020/2001 (the third application), and the Arakwal Corporation. The premise of the Agreement is the protection and conservation of the sacred and culturally significant site at Ti Tree Lake (aka Taylor's Lake), which is of particular significance to Bundjalung women. Jali LALC lodged a land claim over the area in 1985 in an attempt to protect it. ILUA 3 protects the area covered by the Agreement under the reserve system of the National Parks and Wildlife Act 1974. The agreement stipulates that the Department of Environment and Conservation is to create a special advisory committee made up of female members of the Jali LALC, the Bundjalung people of Byron Bay and other indigenous women with an interest to advise and give input into the protection and management of the agreement area. The Agreement also stipulates that the department should consider declaring the area as an Aboriginal Area

under the National Parks and Wildlife Act 1974. Land in the north of the agreement area and owned in freehold by BSC is to be included in the Reserve. See also clause 1.2.2 of the [MoU](#).

Native Title (New South Wales) Act 1994

This Act applies Native Title to the State. The objects are set out as follows:

Section 3 The main objects of this Act are:

- (a) in accordance with the Commonwealth Native Title Act, to validate any past acts, and intermediate period acts, invalidated because of the existence of native title and to confirm certain rights, and
- (b) to ensure that New South Wales law is consistent with standards set by the Commonwealth Native Title Act for future dealings affecting native title.

This Act validates past and intermediate period acts that were undertaken by the State, and provides that they do not become invalid due to the existence of the Commonwealth Native Title Act. If there are any irregularities between the State Act and the Commonwealth Act, the Commonwealth takes precedence.

The relevance of this Act to staff projects would be determined on a case by case basis.

APPENDIX ONE : KEY DOCUMENTS

Document	Contents	Location / Doc. Number
Case Study: A Local Government / Aboriginal Service Agreement	A case study done by Coorong District Council on their service agreement with Raukkan Community Council Alliance. Features stories, partnership and protocol tips.	E2017/11413
BSC owned/managed land under Native Title/Aboriginal Land Claim	Spreadsheet identifies parcels of BSC land that fall within a native title area or have an Aboriginal Land Claim on them. This document is a guide, for official confirmation as to whether a parcel has any interests over it, contact National Native title Tribunal, Or NSWALC.	E2016/107733
Heads of Agreement (1998)	Framework for ongoing consultation between BSC and the Arakwal people.	DM564718
ILUA 1 (Dec 2001)	Indigenous Land Use Agreement 1 (initial process in creation of Arakwal National Park et al.)	E2013/62799
ILUA 2 (Dec 2006)	Indigenous Land Use Agreement 2 (established mechanism for State to manage Arakwal National Park, settlement of first native Title application)	E2013/62429
ILUA 3 (Dec 2006)	Indigenous Land Use Agreement 3 (conservation of Taylors Lake / Ti Tree Lake)	E2013/62432
Memorandum of Understanding (Arakwal) (2013)	Signed agreement between BSC and Arakwal. Outlines BSC's commitment to ongoing relationship with Arakwal. Key areas of importance to the Arakwal people identified.	E2013/42493
Plan of Management – Arakwal National Park	Document outlines the Plan of Management for the Arakwal National Park, such as prohibited activities, ecology of the area, cultural significance etc.	E2017/11330
Working with Native Title: Linking native Title and Council Processes (3rd edn. 2009)	Document developed by Native Title Tribunal and Local Government Association. Outlines how Local government processes are affected by Native Title.	E2017/11408

F1610 = Bundjalung Native Title Claim (NSD 6020/01)

F1804 = Widjabul-Wiabal Native Title Claim (NSD 1174/13)

APPENDIX TWO : KEY CONTACTS

STAKEHOLDER	EMAIL	PHONE	ADDRESS
Arakwal Corporation		02 6685 8746	
Crown Lands- Aboriginal Land Claims Unit	ALC@crowmland.nsw.gov.au	02 6883 3396	
Crown Lands	enquiries@crowmland.nsw.gov.au	1300 886 235	
LALC: Jali (Ballina)	jalilalc@bigpond.com	02 6686 7055	PO Box 1677, BALLINA NSW 2478
LALC: Nguligah (Lismore)	jean.boussard@ngulingah.org.au	02 6621 5541	PO Box 981, LISMORE NSW 2480
LALC: Tweed / Byron	admin@tblalc.com	07 55361763	PO Box 1410, KINGSCLIFF NSW 2487
Native Title Tribunal	enquiries@nntt.gov.au	02 9227 4000	GPO Box 9973 Sydney NSW 2001
NSWALC	media@alc.org.au	02 9689 4444	PO Box 1125 Parramatta NSW 2124
NTSCORP	information@ntscorp.com.au	02 9310 3188	PO Box 2105, Strawberry Hills NSW 2012

APPENDIX THREE : PROJECT EXAMPLES

PROJECT	STAKEHOLDERS INVOLVED	LEGISLATION/ DOCUMENT	PROCESS
Acquisition of Land	Native Title Claimants; NSWALC, NTSCORP	Native Title Act (Cth) 1993; Native Title (Notices) Determination 2011	Before any land is acquired, BSC is required to check whether there are any Native Title claims on that parcel. If there are registered Native Title claimants, they must be notified as owners, per section 12 of the Land Acquisition (Just Terms Compensation) Act 1991 . If there are no claimants found in this search, then at minimum the NSWALC, and NTSCORP need to be notified with 60 days provided to comment.
Event on BSC Managed Reserve	Arakwal Corporation; Native Title Claimants	Arakwal MoU; Native Title Act (Cth) 1993;	When an event is proposed to take place, it should be part of the assessment of the event application that Indigenous interests are identified prior to any approval. This is very important for events that are cultural or spiritual. This may include: <ul style="list-style-type: none"> • Determining whether the event is cultural. If it is, does it align with the cultural values of the identified custodians of the land it is being held on? • Does the custodian of the land give their permission for the event?
Development		Native Title Act (Cth) 1993; ILUAs; Aboriginal Land Rights Act (NSW) 1983; Byron LEP 2014	Is the land under a claim or land use agreement? Is it culturally significant and possibly protected from some types of development? Planning and Development projects will often need to take into consideration Native Title Act processes, as well as Land Claims under the Aboriginal Land Rights Act. In particular, the Byron LEP 2014 and other legislation determine parameters of development permitted on land of cultural significance.
Report to Council	Arakwal Corporation; Native Title Claimants; National Parks and Wildlife Service	Arakwal MoU; Local Government Act (NSW) 1993;	If a council report contains information about culturally significant sites, staff should be aware that the report may need to be kept confidential. As such, the council meeting would need to move in to a confidential session for discussion. Staff should enquire with the appropriate Indigenous Stakeholder as to whether it is to be kept confidential.
Cultural Heritage Projects in Community Development			
Tourism activities and events			

APPENDIX FOUR : ABORIGINAL LAND RIGHTS ACT and NATIVE TITLE ACT

Excerpt from NSW Aboriginal Land Council document:

LAND RIGHTS AND NATIVE TITLE IN NSW, A GUIDE FOR THE COMMUNITY

	LAND RIGHTS	NATIVE TITLE
What is it?	The return of certain Crown lands to Aboriginal peoples as compensation for dispossession and the resulting ongoing disadvantage suffered by Aboriginal peoples.	The recognition of the traditional and customary rights and interests Aboriginal peoples have in lands.
How long has it been around?	A non-statutory NSW Aboriginal Land Council was established in 1977 as an Aboriginal lobby on land rights. The <i>Aboriginal Land Rights Act (ALRA)</i> ¹ was passed by the NSW Parliament in 1983.	Native title was first recognised by the courts in the 1992 Mabo decision. Legislation then followed with the Commonwealth passing the <i>Native Title Act (NTA)</i> in 1993 and the NSW Parliament passing the <i>Native Title (New South Wales) Act</i> in 1994.
Is traditional connection required?	Traditional connection does <u>not</u> need to be established for a land claim to be granted. The ALRA also contains provisions for culturally significant lands to be returned to people with a connection to the place.	Native title will <u>only</u> be determined to exist where Aboriginal people have established to the Federal Court that they have maintained a continuing connection with an area through an acknowledgement of traditional laws and customs.
Who can make a claim?	Aboriginal Land Councils constituted under the ALRA.	A native title claim group's nominated representatives, known as 'the Applicant'. The word Applicant is used even though this will usually be a group of people, not an individual.
What land can successfully be claimed?	Crown lands that are not lawfully being used or occupied, not needed or likely to be needed for residential or essential public purposes and not the subject of a registered native title claim or determination.	Vacant Crown land, National Parks, State Forests, Crown Reserves, some types of non-exclusive leases, land covered by permissive occupancies and licenses, inland waters and the sea.
Does it mean ownership?	Yes, generally full or freehold title to land is granted, though sometimes land may be held in leasehold.	In some cases it can mean rights akin to full ownership. More often, native title is recognised to co-exist alongside other rights and interests in the same area. This can mean access and usage rights are legally recognised, including for camping, hunting, fishing and other cultural activities.
Who holds the rights?	Aboriginal Land Councils constituted under the ALRA.	Either the native title holders or a Prescribed Body Corporate (PBC) holds the title in trust or as an agent
How many claims in NSW?	Since 1983, there have been approximately 36,000 land claims lodged, with 2,473 of these successfully granted. However, there are still approximately 26,000 to be determined.	There have been four determinations that native title exists in NSW and nine Indigenous Land Use Agreements (ILUAs) registered. A number of other section 31 deeds have been reached. There are currently 24 claimant applications and 6 non-claimant applications in NSW yet to be determined. There are 232 determinations nationally that native title exists.

APPENDIX FIVE: RECOMMENDATIONS

Several recommendations have arisen from the development of this document.

1. REVIEW OF MoU

The MoU may benefit from being updated to include any relevant legislation that sits behind a clause or priority project. This would really flesh out the MoU and its enforceability. For example, clause 1.2.3 mentions legislative changes making it an offence to knowingly damage or destroy Aboriginal sites. This could be further supported by actually listing the specific sections of the NPW Act that outlines the offence.

An update of the MoU to include legislative requirements would make it clearer to the parties involved where there are statutory obligations. It will allow for a clearer defining of relational boundaries when it comes to creating service agreements with other stakeholders, such as LALCs.

2. FUTURE ACTS

A clear process needs to be developed for identifying Future Acts. Depending on the proposed activity, this can be very simple or it can require negotiations and community benefits to the relevant Indigenous group. BSC may be a party to such an agreement, which would need to be resolved prior to the activity occurring.

3. PROGRESS OF ILUA IMPLEMENTATION

If it has not already been done, or hasn't been updated recently, it would be beneficial for an audit report to be undertaken on each ILUA in terms of the progress of the implementation of projects identified in the ILUAs, whether community benefits have been delivered and whether BSC has any outstanding responsibilities. This may potentially be dealt with by the MoU committee, or BSC could undertake an audit report on this as a way of measuring its liability.