



National
Native Title
Tribunal



About Native Title

Resolution of native title issues over land and waters.

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Native title

What is native title?

Native title is a set, or bundle, of rights and interests in relation to land or waters that has the following qualities:

- It is possessed under the traditional laws currently acknowledged by and the traditional customs currently observed by the relevant Indigenous people
- Those Indigenous people have a 'connection' with the area in question by those traditional laws and customs
- The rights and interests are recognised by the common law of Australia.

Native title must come from laws and customs acknowledged and observed by the claimant's ancestors at the time when sovereignty was asserted over the area by the British.

Those laws and customs must have been acknowledged and observed in a 'substantially uninterrupted' way from the date of sovereignty to the present.

Native title:

- is not granted by governments — it is recognised through a determination made by the Federal Court, High Court or possibly by some state and territory courts
- can be extinguished (refused recognition) over a particular area because of things the government has done, or allowed others to do, that are inconsistent with native title
- may vary from group to group because it gets its content from the traditional laws and customs of the particular group

- exists alongside, and is subject to, the rights of other people who share the same area — for example, people with leases, licences or a right of public access continue to have those rights, and native title must give way to people exercising those rights (this is sometimes called ‘coexistence’).

The development of native title in Australia

In the 1992 Mabo decision, the High Court of Australia recognised that the Meriam People of the Torres Strait held native title over part of their traditional lands.

This decision paved the way for Aboriginal and Torres Strait Islander people to have their native title recognised under Australian law.

On 1 January 1994, the *Native Title Act 1993* (Cwlth)—known as the Act—commenced operation and the National Native Title Tribunal was established. The Act was substantially amended in 1998.

There have been six landmark decisions on native title in Australia. These cases have gone to the High Court of Australia and helped clarify native title law:

- Mabo (*Mabo v Queensland (No 2)*) 1992 — the High Court held that native title could be recognised under the common law of Australia
- Wik (*Wik Peoples v Queensland*) 1996 — found that grants of two Queensland pastoral leases did not necessarily extinguish all native title and that some native title rights may coexist with the rights of the pastoral leaseholders

- Croker Island (*Commonwealth v Yarmirr*) 2001 — found that native title could be recognised in the sea but it would only amount to certain non-exclusive rights
- Ward (*Western Australia v Ward*) 2002 — found that native title is made up of a bundle of rights and that native title can be partially extinguished, for example, by the creation of a reserve
- Wilson (*Wilson v Anderson*) 2002 — found that perpetual pastoral leases granted under the New South Wales *Western Lands Act 1901* (NSW) completely extinguished native title
- Yorta Yorta (*Members of the Yorta Yorta Community v Victoria*) 2002 — found that in order to maintain native title, the claimant group must show that they have acknowledged and observed their traditional laws and customs in nearly the same way since European settlement.

Who holds native title?

Aboriginal and Torres Strait Islander people who, through their traditional law and custom, have maintained a continuing connection with their country may hold native title. They have to prove that the traditional laws and customs that they get their native title from are acknowledged and observed today and have been continued since the time of European settlement.



Erub (Darnley) Islanders in the Torres Strait celebrate the recognition of their native title rights in December 2004.

Where does native title exist?

Native title may exist in places where Indigenous people continue to follow their traditional laws and customs and have maintained a link with their country, and where it has not been extinguished (refused recognition) because of acts done, or allowed, by government. Areas where native title may exist include:

- vacant Crown land (or unallocated state/Crown land)
- some reserve lands
- some types of pastoral lease
- some land held by or for Aboriginal people or Torres Strait Islanders
- beaches, oceans, seas, reefs, lakes, rivers, creeks, swamps and other waters that are not privately owned.

What rights make up native title?

The set, or bundle, of rights that makes up native title may include the right to:

- possess and enjoy traditional country (exclusive possession), including the right to control access to, and use of, the area
- access the area
- visit and protect important places
- hunt and gather food
- take water, wood, stone and ochre
- teach law and custom on country, and
- collect bush medicines.

There are no native title rights to minerals, petroleum or gas. Native title to tidal and sea areas can only be non-exclusive.

Native title is subject to Australian law.

Native title does not give Indigenous Australians the right to veto future developments but it does mean that their native title rights and interests may have to be taken into account, for example, through consultation about proposed developments.

Native title holders may have the right to be compensated for loss or impairment of their native title caused by acts done, or allowed, by the government.

How is native title recognised?

Indigenous people can apply to have their native title rights recognised under the Act by filing a claimant application in the Federal Court.

The court refers the application to the Native Title Registrar (the Registrar) who must consider the information in the application against what is known as the registration test.

Native title claimants, assisted by the Tribunal, meet at Spear Creek in South Australia to discuss the native title rights they are claiming. Tribunal member Dan O’Dea addresses a group during the meetings.



What is the role of the Native Title Registrar?

The Native Title Registrar's main functions are:

- applying the registration test to claimant applications
- notification of native title applications and applications to register ILUAs
- providing assistance to the parties
- compliance testing applications to register ILUAs
- maintaining the register of claims, ILUAs and determinations.

The registration test

The registration test is a set of conditions set out in the Act that the Registrar must apply to claimant applications. A claimant application must satisfy all the conditions of the test to get registered. Registration means that the claimants gain certain rights (called 'procedural rights') over the area claimed, like:

- the right to negotiate about the grant of a mining lease
- rights of access to some pastoral and agricultural leases, if certain conditions are met
- the right to be notified and to comment on certain proposals.

If an application does not satisfy all of the registration test conditions, the claim does continue in the Federal Court. However, the claimants will not have procedural rights unless they mount a successful challenge in the court, go on to prove that native title exists or amend their application so that it satisfies the registration test conditions.

Notification

Once the registration test has been applied, the Registrar notifies the general public and people with an interest in the area subject to the claim, that a claim has been made. This is called 'notification'.

The main purpose of notification is to make sure that everyone who may have an interest in the area has the opportunity to become involved in the native title process.

Notification generally involves advertising in national, state or territory, local and some indigenous newspapers, as well as directly informing people and organisations with a registered interest in the area including:

- leaseholders
- mineral tenement holders
- other relevant people and organisations.

During the three-month notification period, people who have an interest in the claim area can apply to become a party to the native title application. Being a party to a native title application gives people a say in mediation and, if necessary, in court.

The Federal Court deals with applications to become a party to a claim.



Claimants in Western Australia study a layered map of their claim area provided by the National Native Title Tribunal in order to identify where their native title may exist.

Native title cannot take away other people's rights

Native title cannot take away anyone else's valid rights. So, if there is a pastoral lease or a fishing licence over an area where native title is found to exist, that lease or licence continues on unaffected. If native title rights and other, non-native title rights (for example, those under the lease or the licence) come into conflict, the non-native title rights of the other person prevail.

Public rights to access places like parks, recreation reserves and beaches are not affected by native title.

Native title cannot be claimed over certain areas including:

- residential freehold
- farms held in freehold or
- pastoral or agricultural leases that grant exclusive possession
- residential, commercial or community purpose leases, and
- public works like roads, schools or hospitals.

Commercial fishing ventures and native title rights and interests coexist.



Native title on pastoral and agricultural leases

Pastoralists and farmers in Australia have various lease arrangements which are governed by different state and territory laws. It is necessary to look at the lease and the legislation under which it was granted to assess the impact the grant of the lease had on native title. But, in any case, native title rights cannot be used to force pastoralists and farmers off their properties.

If a pastoral or agricultural lease is 'non-exclusive' (which means it does not give the lessee the right to exclusive possession), then that land may be claimed. Some native title rights may still exist and, if they do, they will coexist with the rights of the leaseholder. Most pastoral leases around the country are non-exclusive and so the area covered by the lease can be claimed.

But it is important to understand that Indigenous people can usually only claim shared rights with the leaseholder over the lease area. They cannot claim exclusive possession of the lease area. The only exception is if, when the application is lodged, the lease is:

- held by some or all of the native title holders or
- is being held on trust for any of those people or
- is held by a company whose only shareholders are native title holders.

Also, only native title holders who have maintained their traditional laws and customs and their connection to the land may have native title rights to non-exclusive lease areas.



Karen and Alan Pedersen with native title holder Des Brickey of the Western Yalanji people after negotiating a second consent determination over the Karma Waters pastoral lease in Queensland, 2005.

Pastoralists and farmers may negotiate agreements with native title holders so that native title holders can have access to, and use of, their traditional homelands. That way both the leaseholders' and the native title holders' rights and interests in the land can be accommodated.

Where the pastoral or agricultural lease gives the leaseholder a right of exclusive possession, then native title is completely extinguished and the area cannot be claimed. For example, the High Court found that pastoral leases in the New South Wales Western Division are 'exclusive' leases that completely extinguish native title.

Native title and exploration, mining and future development

The Act sets out the procedures to be used for making valid those developments that affect native title. Developments that may affect native title are called ‘future acts’.

Native title parties have the right to negotiate about some future acts (usually only those involving the grant of a mining lease) if:

- their application satisfies the registration test conditions, and
- their claim is registered on the Register of Native Title Claims (see page 8).

The right to negotiate is not a right to stop, or veto, projects going ahead — it is a right to have some say in whether, and how, the project is done.

Mines and other works such as this road construction near Kalgoorlie, Western Australia, must be validly done according to the *Native Title Act 1993*.



If the right to negotiate applies, the government, the developer and the registered native title parties must negotiate ‘in good faith’ about the effect of the proposed development on the registered native title rights and interests of the claimants.

The parties can ask the Tribunal to mediate during the negotiations.

If the negotiations do not result in an agreement, the parties can ask the Tribunal to decide whether or not the future act should go ahead, or under what conditions it should go ahead.

Some states and the Northern Territory use a fast-tracking process (called the ‘expedited procedure’) for future acts, such as some exploration and prospecting licences. If this procedure applies, the future act can be done without negotiations with the registered native title parties. There is a process for native title claimants to object to the use of the expedited procedure. If they do, and there is no agreement following the objection, the Tribunal hears and makes a determination about it.

In situations where the right to negotiate does not apply, native title parties may have other procedural rights, like the right to be notified and consulted about the future act.



During the hearing of a future act matter, Tribunal Deputy President Chris Sumner (left) is shown around the Burrup Peninsular in Western Australia by Wong-Goo-Tt-Oo spokesperson Wilfred Hicks.

Agreement-making

What is mediation?

Mediation is a way of reaching agreement about native title. Parties are brought together to discuss their interests in the area and explore ways to reach agreement about any issues between them. It can take a long time, sometimes years, because mediation may be influenced by factors such as:

- multiple parties being involved (in some cases, hundreds of parties)
- difficulties in contacting all parties
- overlapping applications
- the need for further research to be done
- the complexity of land tenure
- parties having limited resources, and
- the history of relations between the parties.

What happens during mediation?

During mediation, the parties meet to discuss the native title application. The aim is to reach agreement about whether or not native title exists in a way that respects everyone's rights and interests in the area covered by the application.

Native title claimants must show that they have rights and interests under traditional law and customs, and that they have maintained their connection to the area being claimed according to those laws and customs. State and territory governments provide information about, among other things, the land tenures in the area.

An agreement to recognise native title can be one outcome of mediation, in which case the Tribunal reports to the Federal Court on the agreement and the court may make a determination of native title. However, there are other types of agreements which can also occur as a result of mediation such as indigenous land use agreements or agreements on some issues.

If the parties cannot agree, either the Tribunal or the parties report this to the Federal Court and the court will make a determination on how to proceed. If the court finds that native title exists, the parties may still need to negotiate the practicalities of how their rights can coexist.

Mediation success: Brian Wyatt of the Goldfields Land and Sea Council addresses claimants, Tribunal members and others during intense mediation meetings to settle overlapping claims out of court in the WA Goldfields region.



Making agreements

Agreements between Indigenous people and other people with rights and interests in land and waters are one of the most practical ways of dealing with native title matters.

Depending on the circumstances, different types of agreements may be made without a court determination of native title. Agreements can, for example, assist Indigenous peoples who have maintained strong connections to land and waters but where, as a matter of law, their native title no longer exists, or only survives in a limited way.

Where native title determinations are not possible, parties may be willing to negotiate alternative outcomes to ensure that they reach solutions which meet their needs and recognise, respect and protect each other's interests.

Indigenous land use agreement

An indigenous land use agreement (ILUA) is an agreement about the use and management of land, made between a native title group and other people.

An ILUA may be a stepping stone on the way to a native title determination or it may suit the parties better than a determination. For example, an ILUA may deal with matters such as coexistence and future developments. An ILUA, once registered, is binding on all native title holders of the area covered by the agreement, whether or not they are parties to the agreement.

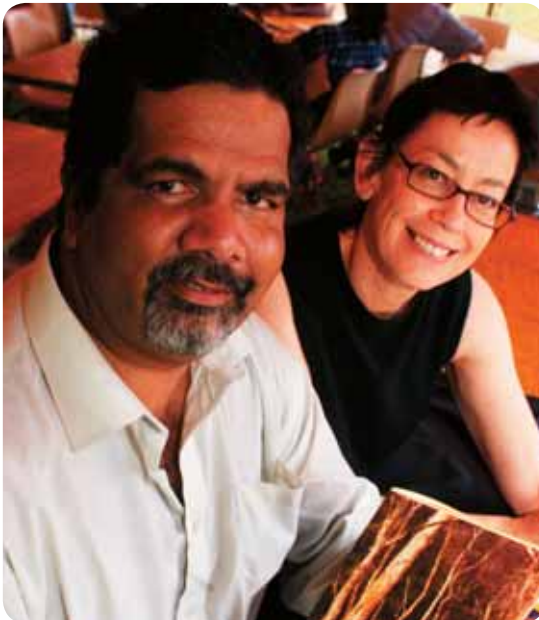
The advantage of an ILUA is its flexibility — it can be tailored to suit the needs of the people involved and their particular land use issues. By making agreements, Indigenous Australians

may gain benefits such as employment, compensation and recognition of their native title.

Courts are not involved in the ILUA process — it is conducted between the parties who wish to negotiate the agreement. To gain statutory recognition, ILUAs must be registered by the Native Title Registrar.

Other kinds of agreements

There are other kinds of agreements made between parties that may or may not involve a court determination of native title. These can lead to creative and flexible solutions that deliver benefits that may be related, but not confined, to native title. These benefits can include joint management arrangements for the land, employment and training opportunities and initiatives to maintain and promote indigenous cultural heritage.



Tribunal member Gaye Sculthorpe with native title holder Vince Mundraby at the celebration of the Mandingalbay people's determination of native title, North Queensland, 2006.

Role of the Tribunal

The National Native Title Tribunal is the impartial, independent and expert body that assists people resolve issues over land and waters.

The Act provides the foundation of the work of the Tribunal.

The objectives of the Act include:

- providing for the recognition and protection of native title
- establishing ways in which future dealings affecting native title may proceed and setting standards for those dealings
- establishing a mechanism for determining claims.

The Tribunal's main functions are:

- providing information about native title processes
- mediating between parties to native title applications and assisting parties to reach agreement about relevant matters
- mediating between parties to assist them in reaching agreement about certain future acts that might take place on areas where native title exists (for example, mining)
- arbitrating in relation to certain future acts where parties are unable to reach agreement
- assisting parties to negotiate legally binding agreements (such as ILUAs) that resolve a variety of native title issues.

In carrying out its functions, the Tribunal must be fair, just, economical, informal and prompt. It can take into account the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders so long as doing this does not prejudice any other party.

The Tribunal is not a court and does not decide whether or not native title exists, although it does make arbitral decisions including determinations about some future act matters.



National Native Title Tribunal



For more information about native title and services of the Tribunal please contact the National Native Title Tribunal, GPO Box 9973 in your capital city or **Freecall 1800 640 501**. A wide range of information is also available online at **www.nntt.gov.au** .

The National Native Title Tribunal has offices in Adelaide, Brisbane, Cairns, Darwin, Melbourne, Perth and Sydney.