

Frequently asked questions about Native title

Information provided by the National Native Title Tribunal and the Native Title Branch of the Department of Lands was used in the preparation of this Information Sheet. The law concerning native title is very complex and this information should not be used as a substitute for legal or other relevant professional advice.

What Is Native Title?

Native Title is the interest that may be held by Indigenous people in land and water arising from the observances of traditionally based laws and customs. This in turn defines or constitutes the rights and interests comprising native title.

The concept of native title is not unique to Australia. Indigenous people in many countries around the world have had their connection to the land recognised in some way or another.

Native title varies depending on the traditional laws and customs of a particular group, how it is recognised by the group, how it is practised, what is claimed and what is negotiated by the parties who have an interest in the land.

What was The Mabo Decision?

The Mabo decision, handed down by the High Court of Australia in 1992, recognised that the Meriam People of the Torres Strait had native title over their traditional lands.

The decision overturned the concept of 'terra nullius' (land belonging to no-one) and acknowledged occupation of the Australian continent by Aboriginal and Torres Strait Islander people.

The decision also recognised that Indigenous Australians may continue to hold native title to the present time.

The *Native Title Act 1993 (Commonwealth)* was then enacted by the Commonwealth Parliament to:

- validate past acts undertaken between the commencements of the *Racial Discrimination Act 1975* and the handing down of the Mabo decision;
- provide for a means in the future to validly undertake future acts on land where native title might still exist;

- recognise and record native title by means of applications and determinations by a National Native Title Tribunal and the Federal Court; and
- provide for the establishment of the Indigenous Land Corporation and Indigenous Land Fund, which could purchase land in situations where native title could not be claimed.

What was The Wik Decision?

In 1996, a majority of the High Court held that the Queensland pastoral leases under consideration in the Wik case did not confer exclusive possession upon the lessees. It was also held that the leases in question would not necessarily extinguish native title.

As a result of the Wik decision, the *Native Title Act 1993* was amended to:

- provide for the validation of certain acts that took place between the commencement of the *Native Title Act 1993* and the Wik decision;
- authorise the enactment of laws by the State and the Northern Territory confirming that certain past acts have extinguished native title;
- establish a regime for the validity of acts occurring in the future that would affect native title;
- remove the responsibility for dealing with native title applications from the National Native Title Tribunal to the Federal Court;
- impose stricter tests for lodgement of native title determination applications in the Federal Court and registration by the National Native Title Tribunal.

A feature of the amended Act is a schedule of types of leases and other interests where the grant based on common law has conferred exclusive possession and has therefore extinguished native title. The schedule principally contains specific types of residential, commercial, community purpose and agricultural leases. There are many of these types of leases in the Western Division of NSW.

Native title in the Western Division of NSW

In August 2002 a majority of the High Court, in the case *Wilson v Anderson and Others*, held that Mr Wilson's perpetual grazing lease, granted under the NSW Western Lands Act 1901, extinguished any native title in the land. It was held that the perpetual grazing lease had granted exclusive possession over the lease area. Under the *Native Title Act 1993*, this means that native title had been extinguished by the granting of the lease.

The High Court's decision effectively means native title has also been extinguished in land that is subject to other Western Lands grazing leases in perpetuity.

There are just over 20 native title claims in the Western Division that remain as applications before the Federal Court. However, under the Native Title Act a claim may not apply to land which is or was subject to a previous exclusive possession act and consequently the claims have been worded so that they do not apply to land such as land subject to Western Lands grazing leases in perpetuity.

The National Native Title Tribunal is likely to continue mediating claims that are already in mediation but only in respect of land in which native title may not have been extinguished.

There are still some areas in the Western Division where native title may continue to exist such as Crown land which has never been subject to extinguishing acts. This may include land that is or has only been subject to some non-perpetual grazing leases.

Where Might Native Title Exist?

The law in relation to native title is very new and still developing. It is not possible to be certain of every situation where native title might still exist.

Native title might continue to exist in areas such as:

- Crown land (such as Reserves, Licences, Vacant Crown Land) which has not been subject to previous extinguishing acts
- some National Parks, Forests and Public Reserves;
- some types of pastoral lease (but not Western Lands Grazing Leases in perpetuity);
- some land held by Aboriginal communities;
- beaches, oceans, rivers, creeks and other waters that are not privately owned.

However in all these cases there is also legislation and/or other law which may affect the capacity to claim native title.

Native title cannot take away validly granted rights. Where native title rights conflict with rights and interest conferred by the State to another person, the rights of the other person prevail.

Native title can be lost if, for example, traditional laws and customs which underlie rights and interests are no longer observed or practised. However, the law allows for a degree of change in the way people exercise their rights. So, for example, to hunt with a gun instead of a spear does not mean by itself that a traditional right to hunt has been lost.

What rights arise from native title?

Native title holders have a right to continue to practise their law and customs over traditional lands and waters while respecting Australian laws. This could include visiting important places, hunting, gathering and collecting bush medicines.

Registered native title claimants gain a right to negotiate in certain circumstances such as the proposed grant of a mining lease. Registered native title claimants also gain a right to be notified of and to comment on certain acts which Government proposes doing which may affect land within their claim area. Native title holders may have the right to be compensated where native title is acquired for future developments or affected by legislation.

What access rights do native title applicants have?

The Native Title Act provides an access regime for Indigenous people who already have de facto access. This right does not apply to land held under a Western lands agricultural lease or a grazing lease in perpetuity and other leases listed in the Schedule to the Native Title Act. Access rights are for traditional activities such as hunting and fishing. The lessee's rights override those of the native title claimants if there is an inconsistency.

There is provision for agreements to be made between lessees and native title claimants relating to access arrangements. If there is a dispute then the parties may agree to have the dispute mediated by the National Native Title Tribunal.

There is also an existing regime under the *Aboriginal Land Rights Act 1983 (NSW)* which provides a means for Aboriginal people to obtain access to land for hunting, fishing and gathering, however this regime is not specifically limited to native title holders.

For more information

For more information on Western Division issues contact your local Department of Natural Resources office.

Far West Region Offices

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Visit the website: www.naturalresources.nsw.gov.au

Note: This information does not constitute formal legal advice.