

## Lands Rights and the Western Division

*The opportunity for Aboriginal people to claim title to land has been made available by the introduction of both State and Commonwealth legislation. However some confusion exists in the type and manner in which claims are made and how they are determined. Specifically two types of claims exist, 'Aboriginal Land Claims' and 'Native Title Claims'.*

### Aboriginal Land Claims

The Aboriginal Land Rights Act came into force in New South Wales on 10 June 1983. The Act is predominantly administered by the Minister for Aboriginal Affairs, however, the Minister for Lands does have responsibility for deciding the outcome of lands claims.

The Act recognises the special attachment Aboriginal people have with land and puts in place opportunities for Aborigines to receive some compensation for their loss of that land.

The Act provides for the establishment of Aboriginal Lands Councils to pursue this compensation with, amongst other opportunities, the right to make claims to claimable Crown Land which is a defined term in the Act.

While the land claim provisions of the Act are the most important part of the legislation for the Aboriginal community other sections of the Act provide for the acquisition/resumption of lands by the Minister for Aboriginal Affairs and the Minister for Housing and the allocation of funds to Aboriginal Land Councils to purchase the land.

Claims under the Aboriginal Land Rights Act 1983 are initially lodged with the Aboriginal Land Rights Registrar in the Office of Aboriginal Affairs.

The date of lodgement of claims with the Aboriginal Land Rights Registrar is the key relevant date for all subsequent investigations. In this regard only evidence/factors known to affect the land at this date can be used to determine whether the claim should be granted or otherwise.

Following lodgement, claims are sent to the Minister for Lands who has the sole responsibility for deciding the outcome. to the Minister for Lands on determination.

In the Western Division the Department of Natural Resources investigates the land status and the other criteria for assessment of the claims in terms of the definition of 'claimable Crown Lands' contained in the Aboriginal Lands Rights Act 1983 and reports and makes recommendations to the Minister for Lands on determination.

For claims to be successful the claimed land must, when the claim was made, be Crown Land that is:

1. Not lawfully used or occupied (Note: Western Lands Leases are considered lawfully occupied);
2. Not needed, or likely to be needed, as residential lands;
3. Not needed, or likely to be needed, for an essential public purpose;
4. Not the subject of a registered native title application apart from an unopposed non claimant application and,
5. Not the subject of an approved determination of native title.

Where the Minister is satisfied that land is claimable Crown land the Minister must grant the claim by transferring the land to the claimant Aboriginal Land Council. Land is generally transferred for an estate in fee simple (freehold) but in the Western Division transfer is affected by the granting of a lease in perpetuity unless the Minister has determined that the land is within the urban area of a city, town or village, in which case freehold title will issue.

The Minister must generally refuse a claim in respect of land determined to be non claimable although in some instances the Minister may consider other options for concluding a claim such as a conditional grant by way of easement or a grant and leaseback with land identified as being needed for the essential public purpose of nature conservation.

Claimant Aboriginal Land Councils have a right of appeal under the Aboriginal Land Rights Act 1983 to Land and Environment Court against the Minister's refusal of a claim. Further appeals by either the Minister or the Aboriginal Land Council to the Court of Appeal and ultimately the High Court are possible on points of law.

## Native Title

On 3 June 1992, the High Court of Australia brought down its decision in *Mabo and others v the State of Queensland*, a decision which rewrote Australia's law on the impact of colonisation.

In upholding the claims of the plaintiffs—from Murray Island in the Torres Strait—the Court held that Australia was not *terra nullius* ('land belonging to no one') when settled by the British in 1788 but occupied by Aboriginal and Torres Strait Islander peoples.

In response to this judgement the Commonwealth Government introduced the Native Title Act 1993 which became law on 1 January 1994.

The Act provides for a number of things including:

- Recognition of native title rights and,
- Provision of a process for 'determining' or deciding whether native title exists (ie 'Native Title Claims').

Applications ('claims') lodged under this legislation are quite distinct from the "Aboriginal Land Claims" outlined above. 'Native Title Claims' allow Aborigines the opportunity to have their native title rights recognised provided that:

- They show a vital and continuing society that has substantially continued to acknowledge and observe a normative system of traditional laws and customs since British sovereignty and the rights and interests claimed originate from those traditional laws and customs,
- Governments have not used the land or granted it to anyone else in a way which "extinguishes" or takes away forever the native title rights and,
- They have a spiritual, cultural and/or physical connection to the claimed land and waters through traditional laws and customs.

Applications for determination of native title are lodged with the Federal Court of Australia which refers the application to the National Native Title Tribunal.

If the application is accepted for registration the Registrar of the National Native Title Tribunal must give notice of the application to all persons whose interests may be affected by a determination in relation to that application.

Acceptance of the claim by the Registrar does not infer that the applicants have proven their native title rights or interests in the land, it merely means that the submitted application complies with the registration criteria provided for in the Native Title Act and it is not deemed to be frivolous.

Any person who wants to be a party in relation to the application (objector or otherwise) must apply to the Federal Court, in writing within 3 months of a notification day contained in the notice or seek leave of the Federal Court.

The Federal Court refers the application to the National Native Title Tribunal to mediate and try to help the parties reach agreement and if mediation fails, the Federal Court

can order that mediation ceases and set the application trial to decide whether native title exists.

More information about Native Title Claims can be found in the Department's information sheet entitled "frequently asked questions about Native Title".

## The Difference between Native Title and Aboriginal Land Claims

The Aboriginal Land Rights Act 1983 and the Commonwealth Native Title Act 1993 [and Native Title (New South Wales) Act 1994] allow Aborigines the opportunity to have continuing common law rights in land and waters which are still owned by the Government recognised. The onus of providing the rights or interests rests solely with the traditional Aboriginal "owners". Applications can be lodged by individuals, couples, family groups, tribes, etc. who would seek to have their continuing rights or interests recognised. The legislation provides a process for others who want to validly deal with Government land which may still contain native title.

The option of lodging a land claim under the Aboriginal Land Rights Act 1983 for claimable Crown Lands remains where Aboriginal "owners" are unable to prove their rights or interests or where continuing rights or interests (native title) in government land no longer exists. Claims under this legislation are for outright land ownership of title with no proof of continuing Aboriginal rights or interests required. A claim under this legislation can only be lodged by Aboriginal Land Councils constituted under that Act. Land ownership title is only granted if the claimed land, at the time of the claim, is Crown land administered under the Crown Lands Act and is not lawfully used or occupied or not needed as residential lands or for an essential public purpose or the subject of a native title application apart from a non claimant native title determination of native title. The onus for investigating these claims, and all associated costs, rests with the Government.

## 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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Condobolin	Ph: (02) 6895 2033
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Visit the website: [www.naturalresources.nsw.gov.au](http://www.naturalresources.nsw.gov.au)

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Note: This information does not constitute formal legal advice.

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