



DENTONS

Native title and cultural heritage

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Native title and cultural heritage

1. Recognition of First Peoples' rights

Native title is the term given to the collection of rights held by certain Aboriginal peoples or Torres Strait Islanders (**First Nations Peoples**) to use their traditional lands and waters according to their traditional customs, laws, and beliefs.

In a series of decisions in the 1990s, the High Court of Australia determined that title to land held by the Crown, being the executive branch of the federal government, did not extinguish native title.

In *Mabo and Others v The State of Queensland (No. 2)* in 1992, the High Court of Australia rejected the doctrine of terra nullius (Latin for 'land belonging to no one') and the proposition that absolute beneficial ownership of all land vested in the Crown on the acquisition of sovereignty, in favour of common law recognition of native title.

Native title rights can co-exist with other property rights if it has not been extinguished by an incompatible occupation or use of the land. In *Wik Peoples v The State of Queensland* in 1996, the High Court held that statutory pastoral leases did not bestow a right of exclusive possession on the leaseholder. Since possession was not exclusive, those leaseholders rights could co-exist with native title (depending on the terms and nature of the particular pastoral lease).

2. Native Title Act

The *Native Title Act 1993* (Cth) (the **Act**) was enacted in the wake of the Mabo decision. It commenced operation on 1 January 1994. The Act and the complementary state native title legislation (together, the NTA):

- Regulate the recognition and protection of the rights and interests of First Nations Peoples in Australia's lands and waters.
 - Confirm the native title validity of titles granted in particular time periods (for example, grants made before 1 January 1994).
 - Set out the procedures to be followed regarding certain 'future acts'. A future act is defined in the Act and means a proposal to deal with land that affects native title rights and interests (for example issuing a mining licence).
 - Confirm that a valid grant of certain interests in land and waters have the effect of extinguishing any native title rights and interests.
 - Confirm that once any native title rights and interests are extinguished, they cannot be revived.
 - Set out procedures under which First Nations Peoples can make a native title claim.
 - Set out procedures for how native title holders may be afforded certain procedural rights, including the 'right to negotiate' and to claim compensation.
 - Establish the National Native Title Tribunal (**NNTT**).
- First Nations Peoples may lodge an application in the Federal Court for a determination of native title in a defined area, known as the Determination Area.
- To successfully establish native title rights to land, an applicant who represents a group of First Nations Peoples (referred to as the "Claimant Group") must establish the following in order to meet the "registration test":
- Provide a sufficient description or list of the persons within the native title claim group, and certification from all members of that group.
 - A reasonable identification of the area claimed using a technical description and a map.
 - A description of the native title rights claimed.
 - An ongoing connection to the area, and continuing holding of native title in accordance with traditional law and customs.
 - Information about a traditional physical connection of one or more members of the group with the area. This includes historical physical connection i.e. occupation or use of the land, but does not require current physical connection.

The fact that a claim has been lodged does not necessarily mean that native title exists over the Determination Area. Similarly, the absence of a claim does not necessarily indicate that native title does not exist in that area. If successful, the native title claim is lodged on the National Native Title Register.

3. Impact of native title

Generally, a valid grant of freehold title to land and most leasehold interests will not be directly impacted by a native title claim because the NTA provides that certain acts of the government extinguish native title rights and interests by granting exclusive possession.

Mining tenements and some leasehold interests can be affected by native title claims because they are not considered to be grants of exclusive possession. The most commonly affected projects are mining projects or agricultural projects.

Native title can impact on land use and the operation of projects at multiple stages of the determination process including after the registration of a native title claim, and after the successful determination and registration of native title rights and interests.

The main ways in which native title rights and interests can impact on project operations include:

- Establishing procedures which must be followed before certain actions on or regarding land and waters can occur, known as the 'future acts' regime.
- Requiring proposed dealings with the land (such as the granting of tenure), and the future use of land to follow such procedures.
- Where mining tenements are proposed to be granted, a right for the native title party to participate in negotiations with the government and mining companies regarding the granting of the tenements.
- Creating a mechanism for Native title holders to enter into agreements with land holders and register those agreements, known as Indigenous Land Use Agreement (**ILUAs**) to govern the future use and maintenance of the land. ILUAs can include, for example, agreement on access rights, compensation and the preservation or maintenance of important cultural sites.

4. Indigenous cultural heritage

Indigenous cultural heritage is governed by both federal and state legislation, which protects culturally significant sites and objects (whether or not they are the subject of a native title claim).

Whilst processes vary between states, approval must be obtained from federal and/or state governments prior to disturbing a site of indigenous heritage significance. Consultation is also usually required with local indigenous representatives or land councils where development is proposed in culturally significant or heritage identified areas.

Special notification and consultation procedures apply where objects are found during earthworks or excavation. Usually works must stop if culturally significant objects are discovered to enable further investigation. Local indigenous representatives or land councils are also usually required to be notified of any such findings and are included in the further investigations.

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