

What happens when a native title claim goes to court?



Filing an application with the court

Native title applications under the *Native Title Act 1993* are made to the Federal Court. Application forms are available from the Federal Court in your capital city or from www.fedcourt.gov.au. South Australia is currently the only state with its own recognised bodies that can also deal with native title claims under the Act. Applications may also be made under the common law to State Supreme Courts to have a decision made about native title.

There are four main kinds of applications under the *Native Title Act 1993* that could lead to a determination of native title. The most common type is a claimant application, which is made by Indigenous Australians seeking a determination recognising native title exists.

The other main applications are ‘non-claimant’ applications (where a non-Indigenous person seeks a determination that native title does not exist), applications to revise or revoke an existing native title determination and applications for compensation for loss or impairment of native title.

What does the court do with the application?

If no one contests the application, the court may make an unopposed determination. If all of the parties reach an agreement about native title through mediation, then a consent determination can be made if the terms of the agreement satisfy the requirements of the Act and the court thinks it is appropriate.



The Federal Court’s Justice Tony North hands out copies of the Miriwung Gajerrong determination to a native title holder.

On-country hearings can be an important part of the court process for taking and hearing evidence from traditional owners. Justice Tony North delivered a determination for the Miriwung Gajerrong people, from the East Kimberley region of Western Australia, at Kununurra in December 2003.

Photo: Kimberley Land Council.

A litigated determination is made after a trial where the parties put forward the case for and against recognising native title. This usually happens when mediation does not resolve the claim. The case is argued before a judge.

Reaching an agreement through mediation is usually less costly than litigation. It also allows parties to maintain day-to-day relationships with each other. By mediating, parties have more control over the outcome, which can be specifically designed to address each party’s concerns and interests.

Getting everyone involved

Once an application is filed with the court, a copy is sent to the Native Title Registrar, who must let people with an interest in the area and the general public know the application has been made.

The main purpose of the notification process is to make sure that everyone who may have an interest in the area has an opportunity to become involved in the claim. People apply to the court to become a party to the application.

Preparation for trial

Before an application goes to trial, many things need to happen to ensure that everyone is fully prepared. A judge will direct the parties to do particular things before the case is actually heard. For example, parties may be required to file anthropological, linguistic, archaeological or historical reports with the court and give copies to the other parties.

A location for the trial will also have to be chosen, as parties may want part of the trial to take place on the claim area, instead of in the courtroom. During the preparation period, native title claimants may also raise cultural or customary concerns about discussing sensitive information in front of certain people. The judge will decide whether some people cannot listen to particular parts of the evidence. Finally, a hearing date will be set and the application will go to trial.

Going to trial — what could happen?

Once an application goes to trial, the National Native Title Tribunal will no longer conduct mediation, unless the judge decides that some or all of the issues being raised in court could be resolved that way. If this is the case, the claim will be sent back to the Tribunal for further mediation.

If further mediation is not an alternative, or is unsuccessful, the court will decide whether or not native title exists and, if it does exist, specify both who holds it and the content of their native title rights and interests.

It will also recognise the non-native title rights and interests in the area and set out the basic grounds for the coexistence of those two sets of rights.

If the court finds that native title has not been extinguished, the people affected by the decision will usually need to negotiate the practical issues raised by recognition of native title in the area.

As with all court cases, if one or more of the parties to the application thinks the court is wrong on some issue, they may be able to appeal against the decision.

Do you need more information?

Contact:

Federal Court of Australia in your capital city (details listed in the white pages telephone directory).

For other fact sheets in this series and more information about native title and the Tribunal's services 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.nntf.gov.au**. The National Native Title Tribunal has offices in Adelaide, Brisbane, Cairns, Darwin, Melbourne, Perth and Sydney.

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Resolution of native title issues over land and waters.



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