



What is native title?



Native title is the recognition in Australian law that some Indigenous people continue to hold rights to their lands and waters, which come from their traditional laws and customs. Native title exists as a bundle of rights and interests in relation to land and waters where the following conditions are met:

- the rights and interests are possessed under the traditional laws currently acknowledged 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 and
- the rights and interests are recognised by the common law of Australia.

Native title has its source in the body of law and custom acknowledged and observed by the claimant's ancestors when Australia was colonised by Europeans. Those laws and customs must have been acknowledged and observed in a 'substantially uninterrupted' way from the time of settlement until now.

Native title:

- can be extinguished (refused recognition) because of things the government has done, or allowed others to do, over a particular area that are inconsistent with native title
- is not granted by governments — it is recognised through a determination made by the Federal Court, High Court and possibly some state and territory courts
- will vary for each group because it comes from the traditional laws and customs of the group
- exists alongside and is subject to, the rights of other people in the same area.

What was the Mabo decision?

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



Torres Strait Islander Eddie Mabo.

Eddie Mabo took his claim to the High Court of Australia and was the first to have his native title rights recognised on behalf of all Meriam people. The landmark decision paved the way for the recognition and protection of native title across Australia and led to the establishment of the *Native Title Act 1993* (Cwlth).

The Tribunal acknowledges Mrs B Mabo for permission to publish the image of her late husband.

Photo: News Limited.

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

What is the Native Title Act?

The year after the Mabo decision, the Australian Government passed Commonwealth legislation which set out how native title would operate. The Native Title Act established the National Native Title Tribunal and, among other things, provided a process through which Indigenous Australians could lodge claims for recognition of native title. In 1998, significant amendments were made to the Act, including the introduction of the registration test and indigenous land use agreements (ILUAs).

Where might 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 because of acts done, or allowed, by government. These areas may include:

- vacant or unallocated 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.

Public access to places like parks, recreation reserves and beaches is not affected by native title. Native title cannot take away anyone else's valid rights.

The Native Title Act does not allow for native title to 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.

What rights arise from native title?

The content of the bundle of rights will depend on the native title holders' traditional laws and customs and on the capacity of Australian law to recognise the rights and interests they hold.

The native title bundle may include the right to possess and occupy an area to the exclusion of all others (often called a right of exclusive possession). This includes the right to control access to, and use of, that area. This right can only be recognised over limited parts of Australia, such as unallocated or vacant crown land and certain areas already held by, or for, Indigenous Australians.

Over other areas, the native title bundle is most likely to be a set of non-exclusive rights (which means there is no right to control access to, and use of, the area). These may include the right to:

- live on the area
- access the area for traditional purposes, like camping or to do ceremonies
- visit and protect important places and sites
- hunt, fish and gather food or traditional resources like water, wood and ochre
- teach law and custom on country.

There can be no native title rights to minerals, gas or petroleum recognised under Australian law and in tidal and sea areas, only non-exclusive native title can be recognised.

Whether exclusive or not, native title:

- is subject to regulation by Australian law in the same way as other peoples' rights are
- does not give native title holders the right to veto future developments but may mean their rights and interests need to be taken into account.

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.nntt.gov.au**. The Tribunal welcomes feedback on whether this information was useful. Email Public Affairs with your comments and suggestions to **enquiries@nntt.gov.au** or telephone (08) 9268 7495.

This fact sheet is provided as general information only and should not be relied upon as legal advice. Published by the National Native Title Tribunal © Commonwealth of Australia August 2000, revised and reprinted April 2003, February 2004, June 2006, July 2007, March 2008 and August 2008. ISSN 1444-0962

Resolution of native title issues over land and waters.



National
Native Title
Tribunal

