

# Native Title on Crown land

Native Title describes the rights and interests of Aboriginal and Torres Strait Islander people in land and waters, according to their traditional laws and customs. As a common law right, native title may exist over areas of Crown land or waters, irrespective of whether there are any native title claims or determinations in the area.

Native Title is a necessary consideration when Government is proposing or permitting any activity on or relating to Crown land that may affect native title.

## Native Title rights

Native Title rights may include the possession, use and occupation of traditional country. In some areas, Native Title may be a right of access to the area. It can also be the right for native title holders to participate in decisions about how others use their traditional land and waters. Although the content of Native Title is to be determined according to the traditional laws and customs of the title holders, there are some common characteristics. It may be possessed by a community, group, or individual depending on the content of the traditional laws and customs. It is inalienable (that is, it cannot be sold or transferred) other than by surrender to the Crown or pursuant to traditional laws and customs. Native Title is a legal right that can be protected by legal action, where appropriate.

## Application of Native Title

Native title may exist on Crown land and waters if it has not been extinguished (removed) by a valid act of government, or some other event. Native Title may exist in areas such as:

- Unalienated Crown land public reserves;
- Some types of pastoral leases;
- Land held by government agencies;
- Land held for Aboriginal communities; and
- Seas, reefs, rivers and other waters that are not privately owned.

## Activities which impact on Native Title

Any activity on Crown land where Native Title is not considered to be extinguished may impact on native title (see explanation of extinguishment below). The construction of new buildings and other facilities, issue of any lease or licence and any major earthworks may impact on Native Title.

Some examples include:

- Construction of new facilities such as toilet blocks, walking tracks and tennis courts;
- Extensions to existing buildings;
- New roads or tracks; and
- Installation of infrastructure such as powerlines, sewerage pipes etc.

Any activity that impacts on Native Title is considered to be a 'future act' under the *Native Title Act (1994)*. Some activities require a notice to be forwarded to the native title claimants' representative body.

## What happens if Native Title is determined to exist over a Crown reserve?

Some reserves will have had past usages, occupations or works constructed on them that may have extinguished native title. However, some areas may still be subject to native title. The law states that native title cannot take away the valid rights and interests of other citizens, including lease, licence or permit holders. Native title can be extinguished by the granting of freehold land, the issuing of Crown leases and the construction or establishment of public works.



## Other people's rights

Native Title cannot take away anyone else's valid rights, including owning a home, holding a pastoral lease or having a mining lease. Where native title rights and the rights of another person conflict, the rights of the other person always prevail.

When the public has the right to access places such as parks, reserves and beaches, this right cannot be taken away by Native Title. Native Title allows inclusion of everyone's rights and interests in land and waters to be taken into account and does not give Indigenous Australians the right to veto any project.

## Ways Native Title can be extinguished

### Granting of freehold estate

The granting of freehold estate before 1 January 1994 will extinguish native title. Exceptions are:

- Crown to Crown grants after 31 October 1975;
- Grants to or for the benefit of Indigenous peoples;
- Vesting occurred under legislation; and
- Scheduled interests.

If a commercial lease (that is not an agricultural lease or pastoral lease), residential lease, community purpose lease or any other lease that provided exclusive use existed prior to 1 January 1994 then native title is completely extinguished over the lease area.

Exceptions are:

- Mining leases
- Public works
- Indigenous Land Use Agreement

### Mining leases

Under the *Petroleum and Geothermal Energy Act (2000)*, a licensee is precluded from undertaking any regulated activity unless a statement of

environmental objectives is in force for the relevant activity. For purposes of a statement of environmental objectives, an environmental impact report is required to be prepared. An environmental impact report must take into account cultural, amenity and other values of indigenous and other Australians insofar as those values are relevant to the assessment.

The 'owners' of land are entitled to compensation for damage to the land and deprivation or impairment of use of the land. The definition of 'owner' includes native title holders.

The *Mining Act (1971)* provides ways a mining operator may enter land to carry out mining operations, including through authorisation under a registered Indigenous Land Use Agreement.

### Public works

Public works include buildings and other structural fixtures, roads, bridges, wells and bores and any major earthworks that are constructed by or on behalf of the Crown, local government authority or other statutory authority of the Crown. The authorised construction of such work on Crown land prior to 1 January 1994 will have completely extinguished native title over the land on which the public work is situated and includes any adjacent land or waters necessary, or incidental to, for the construction or establishment of the work.

Extinguishment will also have occurred over the land on which the public work is situated in the case of a public work completed after 1 January 1994, provided that the construction of the public work commenced prior to 1 January 1994.

### Indigenous Land Use Agreements

Indigenous Land Use Agreements allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances. They can provide for native title to be extinguished.

### Future acts

A future act is any activity that affects Native Title that occurs on Crown land.

The *Native Title Act (1994)* allows for a range of future acts to occur on Crown land and specifies the level of consultation that must be carried out before the act can occur. Depending on the nature of the acts, some can occur without any reference to native title claimants, potential Native Title claimants or their legal representatives. These acts usually have either a very low impact or no impact at all on native title rights and interests.

Other acts can occur after sufficient notice is given to native title claimants or their legal representatives and after they have had an opportunity to comment. Still other acts can occur only after a more involved negotiation process is undertaken.

Extinction will occur as a result of future activities where the non-extinction principle does not apply such as:

- Under a registered Indigenous Land Use Agreement;
- The granting of freehold estate or a right of exclusive possession;
- The construction of a public work; and
- Compulsory acquisition or surrender of Native Title rights and interests.

## Where a future act is not provided for in the Native Title Act

Some future acts are not specifically provided for in the legislation. These acts usually have a major effect on native title rights and interests. If the future act being proposed is not identified in the legislation, it means that it can only proceed after an Indigenous Land Use Agreement has been negotiated and registered with the National Native Title Tribunal.

## Native Title claims

Indigenous people can apply to have their native title rights recognised by Australian law by filing a native title application (native title claim) with the Federal Court. Applications are required to pass a test to gain certain rights over the area covered in

the application. The Native Title Tribunal was established to administer application processes.

Once applications are registered, the Native Title Tribunal will notify other people about the application and will invite them to become involved so all parties can try to reach an agreement that respects everyone's rights and interests. If the parties cannot agree, the Native Title Tribunal refers the application to the Federal Court and the parties argue their cases before the court.

## Other considerations

The *Aboriginal Heritage Act (1988)* is the legislation designed to protect Indigenous heritage. Under this legislation, all sites, objects and remains in South Australia that are of significance to Indigenous tradition, archaeology, anthropology and/or history are protected. Guidelines are available for individuals and organisations who propose to undertake activities that may impact on Indigenous sites, objects, remains or traditions protected by the *Native Title Act (1994)*.





## For more information

For enquiries, please contact the Department of Environment Water and Natural Resources:  
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