

Native title is the recognition by Australian law that some Indigenous groups hold rights and interests in land and waters based on their traditional laws and customs.

This information sheet is intended to assist members of the community to understand:

- whether they may be affected by a native title application;
- how they might be affected by a native title application; and
- the options that are available if a person thinks they might be affected.

In order for native title to be recognised an Indigenous group must make a native title application (also called a claimant application) under the Commonwealth *Native Title Act 1993*. After a claim is filed, the National Native Title Tribunal notifies people who have a registered interest in the claim area, such as a lease over Crown land. Notice of a claim is also published in a local and national newspaper.

If you have not been notified and wish to find out whether a native title claim covers land in your area, you may contact the Tribunal on 1800 640 501 or visit www.nntt.gov.au for further information.

Will I be affected by a native title application?

Apart from the applicants and governments, the people who are generally most interested in native title applications are infrastructure providers (such as telecommunications or energy supply companies), other Indigenous groups, and people with leases or licences over state land and water.

Even if a native title claim covers a large area of land, most people will be unaffected by a claim as native title does not exist where past grants or government action is

wholly inconsistent with it, for example, granting freehold land or constructing public works such as schools, roads and hospitals.

In addition, NSW land currently or previously covered by one of the exclusive-type leases listed in Schedule 1 of the *Native Title Act 1993* cannot be claimed as native title has been extinguished by the grant of these tenures. Western Lands Leases granted in perpetuity have also extinguished native title over the lease area.

Once native title has been extinguished it cannot be revived. This means that, even if the current tenure would not extinguish native title, if an extinguishing event occurred in the past the interest holders will not be affected by native title. Only people with leases, licences or other permits over state land and water (such as Crown reserves, national parks, state forests and river beds) where native title has not been previously extinguished may be affected.

How could I be affected by a native title application?

Native title cannot take away validly granted rights. Where native title rights conflict with rights and interests conferred by the state to another person, the rights of the other person prevail.

The lodging of an application does not affect:

- the ability of current tenure holders to continue to exercise their rights under their lease or licence;
- in most instances the ability to renew or re-grant existing interests provided that the state gives notification to the native

title applicants in accordance with the *Native Title Act 1993*; and

- the continued operation of reserves for their declared purpose.

Once a claim has been lodged but before it has been determined, many types of new activities can still be done in the claim area provided that notification is given and any other procedural rights are afforded to the applicants by the state in accordance with the *Native Title Act 1993*. The procedural rights may include an opportunity to comment on the proposed activity, a right to be consulted or, in a limited number of instances, a right to negotiate with the proponent.

Claims can be resolved through a contested Federal Court hearing or a consent determination made by the Federal Court, or the claim may be withdrawn by agreement. In most cases, an Indigenous Land Use Agreement (ILUA) would also be negotiated between the applicant and the state.

Once a claim has been determined, the native title holders will be able to exercise their rights in accordance with the determination and ILUA, and any other statutory rights. For example, the *Water Management Act 2000* recognises that native title holders may take and use water in exercise of their native title rights. This use is restricted to personal, domestic and non-commercial purposes and does not involve a right to control the access to or the use of water by other interest holders.

Each determination will vary to reflect the rights and interests recognised. Native title often includes rights to access and use land for a variety of purposes, including the right to hunt, fish, gather, camp, undertake ceremonies and use certain natural resources.

In some cases, applicants may claim the right to possess and occupy an area to the

exclusion of all others, similar to a freehold interest. However, in NSW the early, comprehensive land settlement patterns have greatly reduced the areas where exclusive native title may continue to exist.

In some instances native title rights can only be non-exclusive in nature, such as native title in tidal and sea areas, and in flowing or subterranean water. Non-exclusive native title rights to land or water do not include a right to control access to or use of the area by others.

What are my options if I think I may be affected by a native title application?

After a native title claim is made three key decisions need to be made:

- Is there sufficient evidence that the applicants hold native title in the claim area?
- What land and waters do the native title rights apply to?
- What are the native title rights in this area?

If, after a careful review of evidence supplied by the applicants, the NSW Government is satisfied that native title exists, negotiations will commence with the applicant and the respondent parties to seek a consent determination from the Federal Court that specifies where native title applies and the nature of the native title rights. In undertaking these negotiations the NSW Government represents the interests of NSW generally, it does not directly represent the interests of each individual that might be affected by a native title application.

To determine what land native title applies to, the NSW Government reviews tenures previously granted by the state to help make a decision about whether native title has been partially or fully extinguished within the area being claimed.

In most cases, an Indigenous Land Use Agreement would be negotiated to detail the native title rights that are recognised. To date these agreements have only involved land reserved as National Parks and State Forests.

If, following negotiations, the parties cannot agree on whether native title exists, the land to which it applies, or the nature of the native title rights, the application will be determined by the Federal Court.

If you consider that your rights may be affected by a claim you may apply to the Federal Court to become a party. Alternatively, if you do not wish to become a party you may consider approaching relevant industry groups or representative organisations (such as your local government, fishing, mining or pastoral industry group) to find out if the organisation intends to apply to become a party to the proceedings.

These bodies may also be able to offer advice and assistance on native title relevant to your particular business or interest.

What assistance is available if I wish to become involved?

Ultimately, it is up to each individual interest holder whether or not he/she wishes to request to join as a party to the proceedings. Independent legal advice should be obtained to determine whether this is the appropriate course in each case.

Further information is available from:

The National Native Title Tribunal provides general information about native title and the native title process. Further information is available from www.nntt.gov.au, or by contacting the Tribunal on 1800 640 501.

The Federal Court of Australia has information for people interested in becoming a party and learning more about the Court's role in native title. See:

www.fedcourt.gov.au/law-and-practice/areas-of-law/native-title

Financial and legal assistance may be available from the Commonwealth Attorney- General's Department. Contact the Financial Assistance Section on (02) 6141 4770 or visit:

www.ag.gov.au/Legalaid/Pages/NativeTitle

Important note:

This circular does not constitute legal advice. Users are advised to seek professional advice and refer to the relevant legislation, as necessary, before taking action in relation to any matters covered by this circular.