



## Native Title Explained

*Understanding native title is an important part of establishing positive community relationships. This fact sheet provides answers to common questions about native title and is designed to assist the NSW minerals industry to understand its obligations under the Native Title Act. Separate legal advice should always be sought in relation to specific native title issues or projects.*

### What is native title?

Native title refers to the rights and interests in relation to land and waters that Aboriginal and Torres Strait Islander people hold in accordance with their traditional laws and customs.

Native title is protected by *the Native Title Act 1993 (NTA)* and the common law of Australia. Native title was first recognised in Australia in the 1992 *High Court decision of Mabo and Others v Queensland (No. 2)*.

### Where does native title exist?

Whilst you should always get legal advice as to where native title may exist, generally speaking, native title may exist in relation to:

- Unallocated Crown land (unallocated State land)
- State Forests and National Parks
- Crown reserves (for example camping reserves and travelling stock reserves)
- The bed and banks of watercourses
- Certain leasehold interests such as grazing, some mining leases and pastoral leases.

### Where does native title not exist?

The grant of a property or other interest in land by the State can be wholly or partially inconsistent with the existence of native title. Native Title can be wholly or partially extinguished.

Whilst you should always get legal advice as to where native title is and is not, generally native title will not exist where, prior to 1 January 1994, there has been in relation to an area of land:

- The grant of a freehold estate
- The grant of a 'Scheduled Interest'. Schedule 1 of the NTA contains a list of 'scheduled interests' for each state
- The dedication of a road to the public
- The grant of a Western Lands Lease
- The construction or establishment of a 'public work'.

Subject to limited exceptions, native title cannot be revived where it has been extinguished.



## What is the difference between native title and land rights or Aboriginal land?

Some parts of Australia have legislation that allows grants of Crown land to Indigenous people. In NSW the *Aboriginal Land Rights Act 1983* establishes a process for Aboriginal Land Councils to claim certain Crown land in NSW. When land is vested in the Land Council, there are a number of conditions on the land under the *Aboriginal Land Rights Act 1983*. Many Aboriginal Land Councils are significant landholders.

## What is the difference between native title and Aboriginal culture and heritage?

Aboriginal culture and heritage refers to the sites, places, objects and stories that relate to Aboriginal life. Land or sites may be of cultural value regardless of whether native title exists or whether the land is freehold, Crown land or otherwise.

In NSW, cultural heritage is regulated by the *National Parks and Wildlife Act 1974* (currently under review). This Act contains a number of offences for unlawfully impacting certain protected Aboriginal cultural heritage. This includes harm to an Aboriginal object, whether or not the person knows it is an Aboriginal object. The *NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects* provides guidance and a due diligence procedure to satisfy the requirements of this Act.

## What is a native title claim?

A native title claim or a native title determination application is an application to the Federal Court of Australia to have native title recognised in relation to a specified area of land and/or waters.

A native title claim is generally made by a number of named individuals (called the applicant) for and on behalf of the broader 'native title claim group'. Where the claim is registered by the National Native Title Tribunal (see below), the person or persons whose names appear on the Register as the applicant are referred to as the 'registered native title claimants'.

The process typically followed by native title claim is set out below:

- **Application.** The application is made to the Federal Court of Australia to have native title determined in relation to a specified area of land and/or waters.
- **Registration testing.** Once the Federal Court has received the native title claim, it refers the claim to the National Native Title Tribunal for registration testing (see below).
- **Notification.** Following registration testing, the National Native Title Tribunal will notify the public of the claim. Certain persons with an interest in the claim area can then apply to the Federal Court to be joined as parties to the claim.
- **Mediation.** In most cases, the Federal Court will refer the claim to mediation. It is not uncommon for a native title claim to remain in mediation for a number of years.
- **Litigation.** Where mediation is unsuccessful, the claim may proceed to a formal court process and hearing.
- **Determination.** Once it has been established, through mediation or litigation, that native title exists and, if so, in what form, or that native title does not exist, the Federal Court will make a determination to that effect.

It is not uncommon for the resolution of native title claims to take a number of years.



## **What does it mean when a claim is 'registered'?**

Once a claim has been lodged with the Federal Court of Australia, the National Native Title Tribunal applies the 'registration test'. This is a procedural step and is separate to the process of determining the claim and finding whether or not native title exists.

The registration test requires the National Native Title Tribunal to assess whether a claimant application meets certain formal requirements for registration as set out in the NTA.

If the claim passes the 'registration test', it becomes 'registered' for the purpose of the NTA. This gives the native title claim group procedural rights in relation to future acts being conducted on land and/or waters overlapped by the claim, such as the 'right to negotiate'.

## **What happens if a claim fails the registration test?**

If a claim fails the registration test, the applicant may seek to have the claim re-tested.

If a claim remains unregistered, the native title claim may still proceed to determination by the Federal Court but the claimants are accorded no procedural rights.

## **What is a determination of native title?**

The Federal Court determines whether or not native title exists in relation to an area of land. Where the Federal Court determines that native title exists, it will determine:

- the persons, or each group of persons, holding the common or group rights comprising the native title
- the nature and extent of the native title rights and interests in relation to the determination area
- the nature and extent of any other interests in relation to the determination area
- the relationship between the native title and the other rights and interests in the determination area.

## **What is an 'indigenous land use agreement' (ILUA)?**

An ILUA is a voluntary agreement that, provided it meets certain criteria under the NTA and is registered by the National Native Title Tribunal, can (amongst other purposes) provide an alternative process for compliance with the NTA. For example, a minerals company and a native title group can enter into an ILUA whereby the native title group agrees to the grant of a mining lease without the need for compliance with the 'right to negotiate' process.

The NTA prescribes who may be a party to an ILUA and the subject matter of ILUAs. Importantly, ILUAs need to be registered with the National Native Title Tribunal.

ILUAs can be entered into with native title claim groups as well as native title holders where there has been a determination of native title.

## **What is the 'right to negotiate' in the NTA?**

The 'right to negotiate' is the most common NTA process for the grant of mining leases, assessment leases and exploration licences.

As a general rule, the 'right to negotiate' will apply to the grant of a mining lease, assessment lease or exploration licence over land where native title may exist.

The 'right to negotiate' has three stages: notification; negotiation; and where agreement cannot be reached, arbitration and determination by the National Native Title Tribunal.

The 'right to negotiate' requires the State to publicly advertise the application for the mining lease or exploration licence. This notice is called a 'section 29 notice'.

If a native title claim is not yet on foot, Aboriginal persons have three months to lodge a native title claim from the 'notification day' set out in the section 29 notice. The National Native Title Tribunal must then register the claim within a further month. Where this occurs, or where there is already a registered claim in place, the native title claim group has the 'right to negotiate'.

The 'right to negotiate' requires the native title party, the mining or exploration company and the State to negotiate in good faith for the purpose of reaching agreement in relation to the grant of the mining lease, assessment lease or exploration licence. The parties negotiate regarding the impacts of the grant on the native title rights and interests.

Where agreement cannot be reached, and after 6 months has passed, the matter may be referred to the National Native Title Tribunal for a future act determination.

### **If a native title claim is made over a mine or exploration project, what should I do?**



**Pictured: Meeting with the registered native title claimants is an important part of positive community relationships**

In all but a limited number of cases, a native title claim will not require immediate action.

The most common circumstance where some action is required is where the project proponent has applied for a new mining lease or is seeking to vary an existing lease. The registration of a native title claim will mean that the native title group obtains the right to negotiate in relation to the grant of the mining lease where such a grant overlaps the native title claim boundaries.

### **What are the consequences of a native title claim being lodged over**

#### **an operating mine?**

As a general rule, there are no immediate consequences of a native title claim being lodged over an operating mine.

However, the existence of a native title claim over an operating mine may mean that the registered native title claimants obtain certain procedural rights if the mining company wishes to obtain a new mining lease, assessment lease or exploration licence or other tenure or licence over land where native title may exist.

Native title claimants should also be seen as key community stakeholders and part of any community engagement strategy.



## **Does the making of a native title claim over my project require me to negotiate a native title agreement or an indigenous land use agreement (ILUA)?**

No. The simple making of a native title claim over a mining or exploration project is unlikely to require a project proponent to negotiate an ILUA or native title agreement, however many proponents find that negotiating a formal agreement may assist the parties to establish a cooperative and mutually beneficial relationship.

## **Should I meet with the registered native title claimants? If so, what issues should I discuss?**

Meeting with the registered native title claimants and their representatives is an important part of positive community relationships.

Topics to discuss include the nature and status of the project as well as any community activities presently being undertaken. It is also helpful to understand more about the claim, important Aboriginal sites in the area, and the preferred protocol for communications.

You may also wish to discuss any proposed future development or exploration plans depending on their status.

## **What does it mean if my exploration licence requires me to obtain the consent of the Minister before exploring on native title land?**

Some exploration licences in NSW are granted subject to a condition that requires the holder to obtain the consent of the Minister before exploring on native title land.

The Minister's consent must be specifically requested in writing. Where the Minister's consent is sought, the Minister cannot grant consent without first triggering the NTA. The process in the NTA that is triggered is the 'right to negotiate process'.

### **Further information:**

National Native Title Tribunal <http://www.nntt.gov.au>

NSW Minerals Industry Due Diligence Code of Practice for the Protection of Aboriginal Objects  
<http://www.nswmining.com.au/community/aboriginal-culture-heritage>

NTS Corp <http://www.ntscorp.com.au/>

NSW Aboriginal Land Council

For additional Fact Sheets, go to <http://www.nswmining.com.au/menu/media/fact-sheets>

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