



## State Land Services Native Title and the Management of State Land

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## The strategic and operational management of State land

### Native Title

Native title is the recognition in Australian law that Indigenous people had a system of law and ownership of their lands before European settlement. Where that traditional connection to land and waters has been maintained, and where government acts have not extinguished it, the law can recognise this as native title.

In the 1992 Mabo decision, the High Court of Australia recognised that the Meriam People of the Torres Strait had native title over their traditional lands. This decision overturned the idea that the Australian continent belonged to no-one at the time of European arrival. The decision acknowledged for the first time that Indigenous peoples had certain rights and interests at the time of settlement and that these may now be able to be recognised. Aboriginal and Torres Strait Islander people can apply to the courts to have their native title rights and interests recognised under Australian law.

Australian law recognises native title rights and interests if;

- All the native title rights and interests have not been extinguished by certain prior grants of tenure over the land;
- Indigenous groups can show that they have maintained their connection with the land; and
- Indigenous groups can show that they continue to observe traditional laws and customs.

### 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; and

- 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 1993* (Cth) (NTA) does not allow for native title to be claimed over certain areas including:

- residential freehold;
- farms held in freehold;
- 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; and
- 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; and
- 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.



## Future Act Provisions

Any land dealing that affects native title rights and interests is defined as a future act under the NTA and provides procedural rights to the native title party.

The correct future act procedure needs to be followed so that a valid and secure interest in the land that cannot be challenged at a later date is granted.

The future act provisions outline approximately eleven different options to manage the native title rights and interests. State Land Services select the correct provision based on the tenure to be granted and previous legal advice.

Different future act provisions have different extinguishing effects. Some of the future act provisions will;

- extinguish all native title rights and interests forever - a compulsory acquisition; and
- have a temporarily extinguishing effect due to the 'non extinguishment principle', which suppress the rights and interests only during the term of the tenure.

Future act provisions that use the compulsory acquisition of native title rights and interests will extinguish those native title rights and interests over the specific parcel of land forever. Those interests can never be revived. This is the most common future act provision currently used, and creates a future compensation liability with the State government for the extinguishment of those rights and interests.

## Non-extinguishment

Future acts can be done through an Indigenous Land Use Agreement, making use of the non-extinguishment principle instead of a compulsory acquisition. Once an Indigenous Land Use Agreement has been negotiated and registered, the land can still be used for what a proponent wants, but native title rights and interests are not permanently extinguished. The native title rights and interests are suppressed for the duration of the interest in the land. During that time, the proponent's rights and interests prevail over the native title rights and interests. Indigenous Land Use Agreements are resource intensive and take longer to complete than compulsory acquisitions.

## Future Act Process

State Land Services will officially notify the native title party about a proposal and which future act provision will be used. Other organisations with a possible interest in the land dealing will also be given the opportunity to comment, for example; local government authority; Telstra.

Depending on which future act provision is used there will be the opportunity for the native title party to:

- object and comment to the proposal;
- be consulted about the proposal; or
- have a right to negotiate about the proposal.

Each one of the above processes has different requirements, but all of them will require the native title party to be notified of the proposal and most will require comments from the native title party about how their rights and interests may be impacted on by the proposal.

Both proponents and native title parties are a party to the future act and must actively participate in the process. The three parties need to continue to meet and discuss matters until the native title matters are resolved. If it is not possible for the parties to reach agreement then options are available to have the matter arbitrated.

## What does the Native Title Unit do?

The Native Title Unit is a unit within State Land Services that undertakes negotiation and consultation with native title holders, claimants and proponents to progress proposals through the future act regime of the NTA. The Native Title Unit represents the State and does not act on behalf of native title parties or proponents. The Native Title Unit ensures that the provisions of the NTA are followed in accordance with the Land Administration Act 1997 (WA).

The Native Title Unit has a group of negotiators who are assigned to a Native Title Representative Body region to assist stakeholders with advice and assistance until the native title future act issues are resolved over the land. The Native Title Unit invites discussions at an early stage of the future act process to answer any questions regarding the process that will occur.

In addition to its negotiation and consultation role, the Native Title Unit is also a policy unit that actively participates in inter-agency forums on the development of native title policy initiatives, monitors developments in case law, and provides advice to State Land Services Regional Teams.

## Where to get help

Further advice can be obtained from State Land Services.

**State Land Services** is located at:

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MIDLAND WA 6056

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Department for Planning and Infrastructure  
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