Native Title Act made simple
History

The Land Rights Act for the Northern Territory was passed in the Federal Parliament in 1976, but this was only a law for Aboriginal people living in the Northern Territory. The other states and territories missed out.

So in 1982 Eddie Mabo complained to the High Court that Queensland didn’t recognise that indigenous people had a system of law and ownership before British settlement. Eventually a decade later in 1992, the High Court ruled that indigenous traditional title to the land had survived British settlement and it was called native title.

As a result, Mabo’s people, the Meriam, had native title rights over their islands.

The decision meant that native title could survive anywhere in Australia so long as:

- Indigenous people had maintained Aboriginal law and customs on that land; and,
- No other titles allowing ownership of that land had extinguished (or finished) the native title.

So what is native title?

- It is recognition by Australia’s laws that Indigenous people had a system of law and ownership of their lands before European settlement;
- It recognises that Aboriginal people have rights and interests in their lands and waters through their traditional laws and customs;
- Native title recognises that Indigenous people have traditional rights to speak for country;
- But native title does not provide Indigenous people with ownership of the land or stop development like land rights does.

Native Title Act

In 1993 the Australian Government made the Native Title Act (NTA). The NTA tries to balance Indigenous and non-Indigenous peoples’ rights to land.

If Native Title was extinguished by the grant of other titles or acts since 1975, the Racial Discrimination Act may require that compensation be paid to Native Title holders.
Nearly 130 years after European settlement began in Central Australia, the common law of Australia finally recognised the native title rights and interests that Arrernte people have exercised as the owners of the Alice Springs area for thousands of years. This decision was the first in Australia to recognise native title in an urban area. The Arrernte people lodged a claimants application with the Native Title Tribunal in 1994 but no agreement could be reached with the Government so in 1996 the application went to Federal Court. The Court heard from the native title claimants about how they and their ancestors have continued to live in and around Alice Springs and hunted and gathered bush tucker and bush medicines and other resources on their country, and have continued to look after the country and exercise their rights to make decisions about it.

In May 2000, six years and several hundred thousand dollars later, the Federal Court recognised coexisting native title rights and interests on most reserve, park and vacant Crown land and waters within Alice Springs (including rights to possess and occupy, use and enjoy the land, and make decisions about the use of the land).

The Arrernte set up Lhere Artepe as the Prescribed Body Corporate to make those decisions about future land use in the town.

When native title is cancelled out

The NTA explains when native title is lost. For example:

- Freehold titles and most leases over land extinguish (or finish) native title completely (except some titles held by Aboriginal people);
- Pastoral leases only partially extinguish native title; and,
- Aboriginal titles, like land rights title or Aboriginal-owned pastoral stations, will generally have no affect on native title.
- Some land titles will generally extinguish (or finish) native title completely, but a pastoral lease will only extinguish some native title rights.
What rights do you get from native title?

Many native title claims are for shared rights to the land with other people who also have an interest in the land.

Recognition of native title may give Indigenous people the right to hold ceremony, gather bush tucker or have a say on what development can happen on the land.

Examples of native title rights:

- The right to protect sites;
- The right to access or hunt;
- In some cases, the right to camp or live on the land and share in money made from the development of the land;
- The right to hold ceremony; and,
- The right to have a say on the management or development of the land.

Native title DOES NOT give you:

- Ownership of the land as recognised by white fellas;
- The power to take away other people’s rights to the land, like a pastoralist or a company with a mining licence; or,
- The right to stop developments.

Compensation

Sometimes native title holders will be financially compensated for the loss of native title rights or because some activities are taking place on the land.

These might include mining, farming and tourism or any other development that extinguishes or affects native title on the land.

Indigenous Land Use Agreements

The NTA also allows governments, companies and native title holders to negotiate agreements about future developments on the land. These are called Indigenous Land Use Agreements (ILUAs). ILUAs are like normal agreements or contracts but the NTA ensures:

- That the future developments covered in the ILUA are valid, and
- That all Native Title holders groups for the area are bound by the ILUA.

This allows developers to make plans for development and means native title holders can negotiate employment opportunities and compensation and the protection of sacred sites.
Under the NTA, the Government must notify native title holders of any new exploration proposal. If the government thinks the effect on native title will be minor, it can fast track the proposal. This is usually done for exploration which doesn’t involve much digging on country.

If the fast track is used, the company does not have to negotiate with native title holders and can just carry out the exploration.

If the Government decides the fast track does not apply, the company needs to negotiate (or talk) with native title holders about its plan.

In the CLC’s experience, companies have been willing to negotiate ILUAs for exploration so they can build relationships with native title holders even if the native title claim hasn’t been registered.

Native title holders will always have a right to negotiate over the actual mining process as long as they have a registered native title claim.

So native title holders can usually negotiate an agreement about exploration or mining with benefits for employment and the protection of sites, but they will not be able to block any application by a company.

Native Title Mining process

**Exploration or look around**

<table>
<thead>
<tr>
<th>If you do nothing</th>
<th>If you want to say no</th>
<th>If you want to make an agreement</th>
<th>Option to make agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>The licence will be granted if there is no objection within 4 months</td>
<td>You don’t have the right to stop the process but you can lodge a native title claim and object to the fast track;</td>
<td>Parties must negotiate in good faith to make agreement, licence cannot be blocked</td>
<td>No requirement but company may agree to make agreement (for relationship and goodwill purposes)</td>
</tr>
</tbody>
</table>

**If you want to make an agreement**

- Parties must negotiate in good faith to make agreement, licence cannot be blocked
- No requirement but company may agree to make agreement (for relationship and goodwill purposes)
- Company must negotiate in good faith to make agreement, lease cannot be blocked

**RESULT: LICENCE GRANTED – NO AGREEMENT**

**RESULT: FAST TRACK DOES NOT APPLY OR LICENCE GRANTED WITHOUT AGREEMENT**

**RESULT: LICENCE GRANTED WITH AGREEMENT**

**RESULT: LEASE GRANTED WITH AGREEMENT**

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CLC Chairman and native title holder Lindsay Bookie at Molyhill discussing the Indigenous Land Use Agreement the Eastern Arrernte native title holders will make with mining company Thor Mining in 2007.

“It’s going to be a good opportunity for us to get jobs - to work on the mine and also contracts. It's a good opportunity for us to benefit.” Mr Bookie said.

“It’s a good thing, what we're looking at. We’re not going to just waste the money it brings us on rubbish, we’re looking at proper stuff for people in the communities.”

Mr Bookie said it would be good for his community to benefit from the mining activities.

Mr Bookie’s comments reflect the importance of negotiating agreements with mining companies to ensure indigenous people have a say in the development of their land and resources.
In September 2007 Tennant Creek became the first town in Australia to have a native title determination made by consent rather than litigation.

The Tennant Creek consent determination

This recognition by the Federal Court was followed immediately by the native title holders, the Central Land Council and the Northern Territory Government signing an Indigenous Land Use Agreement. The agreement sets out the areas within the town boundary where native title is extinguished, areas within the Municipal Boundary where native title is recognised, how the native title holders are to be compensated, and confirms that negotiations are to commence toward the creation of a park at the Devil’s Pebbles.

It has been a long, hard road for the Patta Warumungu people of Tennant Creek. While they won much of their traditional land back under the Aboriginal Land Rights Act, they made enormous compromises in their claims. Not only were they forced to drop much of their legitimate claim for country around the town, but the claim dragged on for at least 20 years as they battled with the Northern Territory Government all the way to the High Court. In addition, under the Land Rights Act, land within the town boundaries was unable to be claimed.

The issue of a native title claim was first discussed in 1996 and the first application made in 1999. A new application was filed in 2006 which covered all of the town. Negotiations and mediation between the claimants and the Northern Territory Government took some time to work through the many complex issues but a solution which suited everybody was reached. That agreement meant that the federal court could hand down a consent determination. Patta Aboriginal Corporation is the native title body representing the Native Title Holders for the Town of Tennant Creek.

In September 2007 Lindsay Turner signs an Indigenous Land Use Agreement for Pine Hill Pastoral Lease at Mulga Bore with NT Minister for Primary Industry and Fisheries, Chris Natt.

The Pine Hill ILUA

Anmatyerr people signed an Indigenous Land Use Agreement (ILUA) on the Pine Hill Pastoral Lease, south east of Ti Tree, in March 2007 which gives the traditional owners compensation in the form of a living area on the Pine Hill Pastoral Lease, an art centre at Mulga Bore and a horticultural block to develop.

In return, native title will be extinguished on two other blocks on the pastoral lease the Government wanted to develop for horticulture and gave the Government certainty for two other blocks which were created many years ago without the native title process.

Now the blocks can become Crown leases and the owners will be able to convert them to freehold.

The process was by agreement and didn’t involve lengthy court cases.

The agreement will provide employment opportunities for young people in the area and potential economic opportunities for the native title group. Aboriginal horticultural company Centrefarm has been assisting with plans for the development of the native title holders’ horticultural block.

In addition, native title holders were given a new Community Living Area on the pastoral lease.

A new organisation, the Ilkewartn Ywel Aboriginal Corporation, has been incorporated in accordance with the requirements of the Native Title Act. Its name reflects the two estate groups - Ilkewartn and Ywel - involved.

The claim was lodged in 1999 in response to a non-claimant application by Pine Hill Pastoral Company which wanted to develop the area to grow grapes.

The Government bought the lease in 2000 to secure horticultural development over the Ti Tree Basin.
Native title claims

A native title claim can be made to help protect country against future development or to have a group’s rights over country recognised. Claims must be made in the Federal Court and include affidavits (or stories) from some of the main people in the group.

A claim is assessed by the Native Title Tribunal (which assists the Federal Court) to test if native title exists. If the claim passes that test, the tribunal will register the claim. That means the indigenous people who’ve made the claim have a right to be consulted about any future development on the land. If the claim does not pass the test, a company or government does not have to consult with the people who made the claim.

After the registration test is completed, the Federal Court will send the claim to mediation. The Native Title Tribunal will work with the NT Government and the claimants to try to resolve the claim by agreement during this mediation.

If the parties can agree, the Federal Court will make a ruling called a consent determination. This means native title is recognised by agreement without a court hearing.

If the parties cannot agree, the claim will be heard by the court. The Court will be looking to check:

► If the indigenous land system has continued, and
► If any government land titles have extinguished the native title

So a group can have native title recognised by agreement or in court providing it has not been extinguished and if it has strong stories about its right to speak for that land.

Looking after native title

If native title is granted, the court must decide what organisation will look after that title. The organisation that manages it is called a prescribed body corporate (PBC).

The native title holders are members of the PBC will be and when doing business governments and companies must deal with that PBC, not the Land Council, but the Land Council can still help the PBC.

The PBC is responsible for any decision which will affect the claimants’ native title rights. Before making a decision, the PBC must talk with the native title holders and get their approval.

All members of the PBC must be members of the native title holding group. [note: the Government proposes to relax this requirement]
Native title claims

Native title bodies

The NTA recognises native title bodies that assist native title holders. The CLC is recognised as the native title body for Central Australia.

All native title bodies must assist native title holders and PBCs to:
- make native title applications
- negotiate agreements about future developments, and
- resolve disputes between groups.

Preserving native title rights

Sometimes governments regulate activities such as fishing, hunting or access to land with licences or permits, but under the NTA, Aboriginal people don’t need these licences or permits if the activities are done as a native title right. If the government prohibits or bans an activity completely, native title does not get around this ban.

For example, if the government regulated bilby hunting with permits, Aboriginal people could still hunt bilbies. If the government banned bilby hunting, Aboriginal people could no longer hunt bilbies, but they might be entitled to compensation for taking away native title rights.

The Davenport Native Claim

The area covered by the application is approximately 1,143 square kilometres and includes land within the Kurundi pastoral lease which was surrendered in 1993 for the proposed Davenport Range National Park.

Also included in the claim was the township of Hatches Creek which is surrounded by the Anurrete land trust. Hatches Creek was gazetted in 1953, but was a “town” in name only, and at the time of the native title application was vacant Crown land. Under the Aboriginal Land Rights Act (Northern Territory) 1976, areas inside town boundaries are excluded from claim so the area was never included in the Anurrete Land Trust.

“Importantly, native title holders around Australia won the right to live on pastoral land and protect sacred sites on pastoral land,” CLC director David Ross.

“That decision meant that strong rights in country can continue to be recognised and native title holders can continue their role in negotiating joint management of the national park,” he said.

Special leave to appeal to the High Court was refused.

The Northern Territory Government appealed the decision to the Full Federal Court but Justice Mansfield’s decision was upheld. Special leave to appeal to the High Court was refused.

The claimants won their case by presenting the Judge Justice Mansfield with very strong evidence about their law and connection to the area.

They told him about their lives, their use of the country and its spiritual meaning to them and took him on site visits across their country where women performed ceremony and men shared ground paintings.

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# Comparison of Land Rights and Native Title

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<td>Native title – recognition of traditional rights to access land and hunt, no right to control entry</td>
</tr>
<tr>
<td><strong>WHERE</strong></td>
<td></td>
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<tr>
<td>NT – vacant (empty) land, not pastoral or town land</td>
<td>Australia – vacant or pastoral or town land</td>
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<tr>
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<td>Mining, developments, cannot sublease because no title to land</td>
</tr>
<tr>
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<td></td>
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<tr>
<td>Strong title for traditional owners</td>
<td>Recognises some rights but not strong title</td>
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For enquiries on the Native Title Act call 08 8951 6202

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