

What is a native title determination?



A native title determination is a decision by a court or recognised state or territory body that native title does or does not exist in a area.

Where the existence of native title is recognised, the determination will identify the native title holders and describe their native title rights and interests.

There are four kinds of applications under the *Native Title Act 1993* that could lead to a determination of native title. The most common type is a claimant application, which is made by Indigenous Australians seeking a determination recognising native title exists.

The other kinds of applications involving native title are 'non-claimant' applications (where a non-Indigenous person seeks a determination that native title does not exist), an application to revise or revoke an existing native title determination and an application for compensation for loss or impairment of native title.

There are three processes that can lead to a native title determination. If no one contests the application, the court can make what is called an unopposed determination. If all of the parties reach an agreement about native title through mediation, then a consent determination can be made. A litigated determination is made after a trial where the parties put forward the case for and against recognising native title.

Reaching an agreement through mediation is usually less costly than litigation. It also allows parties to maintain day-to-day relationships with each other. By mediating, parties have more control over the outcome, which can be specifically designed to address each party's concerns and interests.



Solicitor David Robens, representing land users, arrives at the on-country hearing for Victoria's first consent determination.

In December 2005, five Indigenous groups—the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagalk peoples—earned non-exclusive native title rights to hunt, fish, gather and camp in crown reserves along the Wimmera River banks in the first determinations that native title exists in Victoria.

The Federal Court of Australia decides whether a native title determination application should be mediated by the National Native Title Tribunal or go to trial. The time it might take to resolve an application through mediation varies depending on the willingness of the people involved to reach agreements and the complexity of the claim. External factors, such as the availability of resources, may also affect the progress of mediation. The parties involved in mediation may decide to settle the claim by making an agreement, including an indigenous land use agreement.

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What kind of rights may result from a determination?

A determination of native title will state whether or not native title exists over the area claimed in the application. If native title is found to exist, the determination will go on to specify both who holds it and the content of their native title rights and interests. It will also recognise the non-native title rights and interests in the area and set out the basic grounds for the coexistence of those two sets of rights.

The content of the native title 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 under those laws and customs. For example, the existence of other rights and interests over the same area may prevent native title being recognised or limit its content.

The native title bundle of rights may include the right to possess and occupy a particular 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. However, this right can only be recognised over limited parts of Australia, such as some areas where the only other interest holder is the crown (sometimes called 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 conducting ceremonies
- visit and protect important places and sites
- hunt, fish and gather food or traditional resources like water, wood and ochre
- 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
- 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.

A full list of determinations is available online at www.nntt.gov.au.

Indigenous Australians may also have the right to be compensated for loss or impairment of their native title. For further information about compensation determinations, refer to the fact sheet Compensation and native title.

"The Tribunal has the mediation skills and resources to assist people to reach native title outcomes in an environment of mutual respect and cooperation."
– Graeme Neate, President, National Native Title Tribunal

For other fact sheets in this series and more information about native title and the Tribunal's services please contact the National Native Title Tribunal, GPO Box 9973 in your capital city or **Freecall 1800 640 501**. A wide range of information is also available online at **www.nntt.gov.au**. The National Native Title Tribunal has offices in Adelaide, Brisbane, Cairns, Darwin, Melbourne, Perth and Sydney.

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Resolution of native title issues over land and waters.



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