

What rights do I get from native title?

This information sheet is intended to provide a quick overview of what native title rights Traditional Owners gain following recognition of native title.

How is native title different to land rights?

The main difference is that native title recognises the rights and interests of Traditional Owners that already existed and have existed before Australia was colonised.

Native title does not create new or additional rights.

On the other hand, land rights are rights created by Australian, State or Territory governments. Land rights usually involve a grant of freehold or perpetual lease title to Traditional Owners, native title on its own does not.

What does a native title determination get you?

A native title determination is a decision about native title under Australian Federal law. A positive native title determination is when the Court recognises that a group of Aboriginal or Torres Strait Islander people are the Traditional Owners of particular lands and waters and that they had a system of law and ownership of their land before European settlement, and that system of law and ownership has continued to the present day. Native title sits at the bridge between traditional/customary rights and Australian law.

A native title determination does not give ownership of the land. It can only recognise the rights that already existed under traditional law and custom before colonisation. Every native title claim group must list the rights they are claiming and provide evidence of them.

This means that each determination is different. The existing rights of other people, companies or governments and the history of the area affect what is included. In some areas, the Native Title Holders (also referred to as Common Law Holders) may have exclusive rights, while in other areas, rights to the land are shared with others, such as leaseholders, miners, pastoralists, or the State Government.

Native title rights fall into two categories – substantive native title rights and procedural native title rights.



Substantive native title rights

Substantive native title rights are the rights of Native Title Holders to access and do things on their native title land. Each native title determination includes a list of substantive native title rights that are recognised in that determination. These rights vary based on the laws and customs of each native title holding group, and what other interests have been granted on the land.

Common examples of rights that are recognised in a native title determination are:

- The right of exclusive possession, in other words to be able to control access to the land;
- The right to access, enter and remain in the area, and to use the area for any purpose including to live, camp and erect shelters;
- The right to take and use the resources of the area including hunting, fishing and lighting fires;
- The right to do cultural activities in the area including conducting and participating in ceremony and ritual, and the transmission of cultural knowledge;
- The right to invite or allow others to use the area and participate in traditional activities;
- The right to travel over, visit, care for, maintain and protect places and objects of cultural significance;
- The right to bury people and be buried within the area including conducting burial rites; and
- The right to have a say in the management or development of the land.

For the most part, these rights will be things that Native Title Holders will have been doing on their Country their whole lives. Following a determination of native title, it should be easier for Native Title Holders to enforce their exercise of their substantive native title rights.

Substantive native title rights have some limitations:

- The rights do not include mineral rights as these have been taken by the Crown.
- Native title rights can be extinguished in an area where the government has granted freehold, or other interests.
- Native title cannot be bought and sold similar to other interests in land.
- Where native title co-exists with other land interests, such as pastoral leases, the other interest take precedence.

Procedural native title rights

The *Native Title Act 1993* (Cth) (NTA) says that native title can only be affected by new grants of land if the government and other parties follow particular procedures. These are called 'procedural' native title rights.

Procedural rights include:

- the right to negotiate,
- the right to be consulted,
- the right to be notified, and
- the right to comment in relation to certain future acts.

There are different procedures to be followed in relation to different types of acts that affect native title. For example, the grant of a mining lease, or some compulsory acquisitions, provide native title parties the right to negotiate. In some cases, the NTA will only allow some interests to be granted on native title land through an Indigenous Land Use Agreement (ILUA). ILUAs can only be signed if they are consented to by the holders (or likely holders) of native title for the area.

The NTA provides native title claimants procedural rights when their claim is registered. For the most part, determined Native Title Holders have the same procedural rights as registered native title claimants.

How can I get more involved in the decisions that affect my native title?

While the claim is on foot, there are two main ways:

1 Become a member of the Native Title Applicant. The NTA works on the basis that there is a small group of Traditional Owners chosen by the whole group to make and progress the claim on the whole group's behalf. This small group of Traditional Owners is called the Applicant. The Applicant has a particular definition under the NTA. The Applicant (subject to any conditions imposed by the claim group) has the authority to deal with all matters to do with the claim. For example, they attend negotiation meetings, they give instructions about heritage, and they sign documents to bind the whole group. Being a member of the Applicant requires a real time and energy commitment. You need to be able and willing to attend meetings, respond to documents, where relevant, and be engaged with the claim's progress.

2 Be an engaged member of the claim group. Not everyone can be a member of the Applicant, but you can still get involved as a member of the claim group. Some important decisions about the claim are made at community meetings. For example, decisions about who should be a member of the Applicant and any other decisions that the Applicant is restricted from making by the claim group. All members of a native title claim are invited to community meetings for their claim and asked to participate in making group decisions.

One way to get involved is to make sure that YMAC has your contact details so that you are notified of meetings and other information. When notified, make sure you attend community meetings and read documents sent to the claim group. Sometimes you may be asked to contact YMAC if you have any questions or comments regarding the information provided. If you move to a new place of residence, make sure you update your new address with YMAC.

How do you get native title?

A native title claim must be lodged in the Federal Court by the Applicant as authorised by the claim group. A claimant group must prove it continues to hold native title over its Country. If the State Government and other parties agree a claimant group holds native title, and the terms of their native title, a claimant group's native title can be recognised by agreement (Consent Determination). If they cannot agree, or if another native title claimant group makes a claim over the same area, the claimant group may have to go to trial to prove to the Court that they hold native title.

1 Registration Test. Once a native title claim is lodged, it is assessed by the National Native Title Tribunal (NNTT). The NNTT tests if the claim meets certain procedural and merit requirements called the "registration test". The NNTT checks to see if there is a sufficient basis for the rights and interests claimed. If the claim passes that test, the NNTT will add the claim to their register of native title claims. The benefit of having a registered claim is that the people in the claim then have procedural rights over the area claimed. The procedural rights vary, ranging from the right to negotiate, which is the strongest procedural native title right, to the right to be notified, depending on the future act and where the future act is proposed to be done. If the claim does not pass the registration test, the claim is not registered and the native title claimants will not have procedural rights in relation to things that happen on their claim. Additionally, the claim may be dismissed.

2 Connection Evidence. In order to have native title recognised, the claim group is required to give evidence to show that people have a connection to their land and sea Country under the systems of traditional law and custom. ‘Connection’ evidence can include stories and information from Aboriginal people, genealogical and historical research, cultural mapping, site maps, records and stories of laws, customs and language. This information is usually put into a report by an expert anthropologist and called a Connection Report. Connection Reports are ordinarily provided to the State Government to convince them to agree to a determination of native title.

3 Mediation and Determination. After a native title claim is lodged, if the parties are unable to reach an agreement, the Federal Court may send the claim to mediation so that the parties (being the claim group, the State Government and the other respondents, such as pastoralists and any overlapping claim groups) can negotiate with each other. The purpose of mediation is for the parties to resolve their disputes so the claim can be resolved. Mediation can be done by Federal Court Officers, such as Registrars and Judges, and other mediators like the NNTT. If the parties can’t reach agreement to resolve the claim in mediation, the matter may be listed for trial. If the parties can agree and the Court is satisfied that the native title group holds native title, the Federal Court may make a Consent Determination recognising native title.

4 Looking After Native Title. If native title is determined to exist, the Court must also determine an organisation that will look after and be responsible for that native title. The organisation that manages native title is called a Registered Native Title Body Corporate (RNTBC) – commonly referred to as a Prescribed Body Corporate (PBC)¹ – and it is nominated to the Court by the Native Title Holders.

PBCs must represent the Native Title Holders and consult with them about big decisions that affect the native title. In most cases, Native Title Holders can be members of the PBC, but they must apply and consent to become members. However, even if a Traditional Owner does not become a member of the PBC, they are still a Native Title/Common Law Holder and can exercise their substantive native title rights on the Country.

When doing certain things on-Country, governments and companies must deal with the relevant PBC.

¹ Note, for simplicity, YMAC uses the term “PBC” in most publications to refer to both Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs). This is in line with terminology that is regularly used in the native title sector.

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