Native Title Act 1993
(Commonwealth)
How does the Act apply to the University?

- On occasion, the University assists with Native Title claims, by undertaking research & producing reports

- Work is undertaken in conjunction with ARI, Native Title representative bodies & claims groups

- Representative bodies define the University’s obligations & responsibilities with respect to Intellectual Property, ethics, confidentiality & cultural respect

- While these obligations are contractual, as opposed to legislative, the University would be prudent to have an understanding of the **Native Title Act**, how a determination of Native Title is made & the role that the Federal Court has in the management of all applications made under the Act
A brief history of Native Title: Pre-colonisation

- Aboriginal people & Torres Strait Islanders occupied Australia for at least 40,000 to 60,000 years before the first British colony was established in Australia.

- Traditional laws & customs were characterised by a strong spiritual connection to 'country' & covered things like:
  - caring for the natural environment and for places of significance
  - performing ceremonies & rituals
  - collecting food by hunting, fishing & gathering
  - providing education & passing on law & custom through stories, art, song & dance

- In 1788 the British claimed sovereignty over part of Australia & established a colony.
A brief history of Native Title: Post-colonisation

• In 1889, the British courts applied the doctrine of *terra nullius* to Australia, finding that as a territory that was “practically unoccupied”

• In 1979, the High Court of Australia determined that Australia was indeed a territory which, “by European standards, had no civilised inhabitants or settled law”

1992 – The Mabo decision

• The *Mabo v Queensland (No. 2)* case concerned the legal rights of the Meriam people to the lands of the Murray Islands in the Torres Strait

• The High Court held that the common law of Australia recognises a form of native title, to be determined in accordance with Indigenous traditional law & custom

• In doing so, the court rejected the notion that Australia was *terra nullius* at the time of British settlement

• In December 1993, the *Native Title Act 1993* passed through the Federal Parliament
What does the Native Title Act do?

- Provides a process to determine how & where native title can be established
- Sets out how to provide compensation where native title is impaired or extinguished
- Provides for a future regime in which native title rights are protected & conditions imposed on acts affecting native title land & waters
- Establishes a National Native Title Tribunal & the processes for determination of native title rights
- Gives Indigenous Australians who hold native title rights & interests—or who have made a native title claim—the right to be consulted & in some cases, to participate in decisions about activities proposed to be undertaken on the land
- Establishes a framework for the recognition & operation of representative bodies that provide services to native title claimants & native title holders
- Provides for the establishment of a National Aboriginal & Torres Strait Islander Land Fund to assist such people to acquire & manage land
What is Native Title?

- The recognition by Australian law of the rights & interests that are possessed under the traditional laws & customs of Aboriginal peoples & Torres Strait Islanders in land & waters

- Native title rights & interests may include rights to:
  - live on the area
  - access the area for traditional purposes, like camping or to do ceremonies
  - visit and protect important places & sites
  - hunt, fish & gather food or traditional resources like water & wood without the need for a licence or permit
  - teach law & custom on country
What is Native Title? (cont.)

- In some cases, native title includes the right to possess & occupy an area to the exclusion of all others (often called ‘exclusive possession’)

- Exclusive possession includes the right to control access to, & use of the area concerned.
  - This right can only be recognised over certain parts of Australia, such as unallocated or vacant Crown land & some areas already held by, or for, Indigenous Australians

- **Native title rights & interests** differ from **Indigenous land rights**:
  - The source of land rights is a grant of title from government
  - The source of native title rights & interests is the system of traditional laws & customs of the native title holders themselves

- Native Title may be able to be possessed by a community or individual & is indisputable other than by surrender to the Crown
How is Native Title recognised?

- The Australian legal system recognises native title where:
  - the rights & interests are possessed under traditional laws & customs that continue to be acknowledged & observed by the relevant Indigenous Australians
  - by virtue of those laws & customs, the relevant Indigenous Australians have a connection with the land or waters; and
  - the native title rights & interests are recognised by the common law of Australia
Determination of Native Title

- A determination of native title is a decision that native title does or does not exist in a particular area of land &/or waters

- A determination will establish whether the holders have exclusive possession & if not, the native title rights & interests the maker of the determination considers to be of importance

- Determinations may cover the entire area of an application, or only part of the area of an application

- Sometimes the court may decide that native title rights exist over one part of the determination area, but do not exist over another part

- Determinations may be conditional upon some future event occurring, (eg: the registration of an indigenous land use agreement)

- Determinations are made by the Federal Court of Australia, the High Court of Australia or another recognised body, who then notify the Native Title Registrar for entry onto the National Native Title Register (NNTR)
Protection of Native Title

• The Act provides that in the future, only limited acts of governments will be able to affect native title

• This means, that where there is conflict between the rights & interests under native title & those granted by governments, the act or grant will prevail
  – However, once those interests expire, native title will again have full effect
The role of the Federal Court

- Responsible for the management of all applications made under the Native Title Act

- Has powers to manage native title cases & can (among other things):
  - *make a determination recognising that native title does, or does not, exist*
  - *decide whether compensation for the loss or impairment of native title should be paid*
  - *make directions about how an application is to be progressed*
  - *decide whether or not an application should be referred to the National Native Title Tribunal for mediation*
  - *adjourn the proceedings to allow time for the parties to negotiate*
  - *dismiss an application*
Native Title Act 1993 (Cth)

The role of the National Native Title Tribunal

- An Australian Government agency set up under the Native Title Act 1993
- Assists people to facilitate timely & effective native title outcomes
- Mediates native title determination & compensation applications under the direction of the Federal Court
- Conducts inquiries & makes future act determinations where parties can't reach agreements

**Note:** The Tribunal is not a court & does not decide whether native title exists or not
Additional Resources

• Dr Deane Fergie, Senior Lecturer (Anthropology)
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  – 8313 7197 / 8313 5895

• Native Title Act 1993 (Cth)

• National Native Title Tribunal

• National Native Title Register (NNTR)
Disclaimer

The content of this material is intended only to provide a summary and general overview of the Native Title Act as it applies to the University of Adelaide.

It is not intended to be comprehensive nor does it constitute legal advice.

Please contact Dr Deane Fergie if you are unsure of your compliance obligations under the Act.