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of ADELAIDE

Legal Compliance Education and Awareness



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Native Title Act 1993

(Commonwealth)

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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*

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)
 - deane.fergie@adelaide.edu.au
 - 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.