

FEDERAL COURT OF AUSTRALIA

NATIVE
TITLE





Native title

Under the Native Title Act 1993 (Cth), the Federal Court of Australia is responsible for the management and determination of all applications relating to native title in Australia.

What is native title?

Native title describes the rights of Aboriginal and Torres Strait Islander peoples to land and waters according to their traditional laws and customs. It was first recognised in the Australian legal system in 1992 by the High Court in the historic Mabo decision.

Native title may include possession, occupation, use and enjoyment of traditional country.

It may include the right to access an area of land or the right to participate in decisions concerning how the land or waters are used by other people. Native title may also vary according to the rights of other people and may exist alongside other rights (called 'co-existence').

Native title cannot be bought or sold. It can be transferred by traditional law or custom, or surrendered to government, which can then pay compensation to the native title holders in the same way as it does when acquiring rights to other property.

What is the law on native title?

The law on native title includes the Native Title Act and decisions made by Australian courts. State and Territory parliaments also have power to make laws on native title.

The Native Title Act provides for:

- the recognition and protection of native title;
- compensation to native title holders;
- the process for making decisions about native title claims;



- the validation of earlier decisions about land which are inconsistent with native title (eg. granting of freehold and leasehold title); and
- a process by which future decisions affecting native title may be made.

Where possible, the people involved in a native title case are encouraged to attempt to come to an agreement through mediation.

What is the role of the Federal Court?

All applications for a determination of native title must be filed with the Court.

The Court has wide powers in native title cases. It can:

- refer native title and compensation applications to the National Native Title Tribunal for mediation;
- decide who are the 'parties' (the people involved in a case);
- decide whether new people or organisations can become involved in proceedings as parties;
- order adjournment of proceedings to allow time for the parties to negotiate;
- make orders to ensure that overlapping native title applications which cover the same area are dealt with in one proceeding; or
- make a determination that native title is to be held in trust.

What is the role of the National Native Title Tribunal?

The main job of the Tribunal is to help people to resolve native title issues and to make agreements about the use of land. The Tribunal is not a court and does not decide whether or not native title exists.

To do its job the Tribunal follows the following procedure:

First, the Tribunal assesses each native title application. If the application passes certain legal tests the application is registered.

After the application has been registered there is a three-month period for the Tribunal to notify people and organisations whose interests may be affected by a native title application (this is called the notification period).

The Federal Court then decides who the parties to the application are, and in most cases the Federal Court will then refer the application to the Tribunal for mediation. If the claim is not resolved by agreement, the matter goes back to the Federal Court.

How do I make a native title application?

To make a native title application you need to fill out an application form. These are available from the Court or can be posted to you. They are also available on the Court's website at www.fedcourt.gov.au.

Once the form has been completed you need to send it to the Court. You can do this by bringing it to the Court, or by posting or faxing it or by sending it by the internet. This is called 'filing'.

Are there any fees?

Yes, there is a fee for filing an application form. If you cannot afford this fee or if you are represented by a native title representative body (NTRB) you can ask the Court to waive it. Some people are also exempt from paying fees (for example, if you have been granted Legal Aid or are the holder of a health care card).

You can get a form to ask the Court to waive or grant an exemption from the fee from the Court Registry.

What information goes in the application form?

You must fill out all the parts of the application form.

You must also attach all the requested documents and maps.

You must provide two copies of the application form and the documents and maps to the Court. Make sure that you have a copy for yourself.

The application form must be signed.

Each person who is named as an applicant also needs to fill out the affidavit attached to the application form (Native Title Form 1) and affirm or swear that what is written in the affidavit is true.

Who can apply for a determination of native title?

Applications for a determination of native title can be made to the Court by:

- Aboriginal or Torres Strait Islander people who assert that they hold native title in respect of land and/or waters. Use Form 1: Native Title Determination Application (Claimant Application);
- people who hold non-native title interests who wish the Court to determine whether native title rights exist over an area of land and/or waters. Use Form 2: Native Title Determination Application (Non-claimant Application);

- Aboriginal or Torres Strait Islander people seeking compensation for the loss or impairment of native title rights or interests. Use Form 4: Native Title Determination Application (Compensation Application);
- people who believe they have evidence which requires a native title determination to be revised. Use Form 3: Revised Native Title Determination Application.

How do I become a party to an application?

A party is a person or group of people who have an interest that may be affected by a native title determination.

There are two ways to become a party to an application, depending on the stage the application has reached.

1. If the notification period has not ended you can tell the Court that you want to become a party to the application. Use Form 5: Notice of Intention to Become a Party. There is no fee for becoming a party in this way.
2. If the notification period has ended you will need the permission of the Court to become a party. Use Form 27: Notice of Motion.

Can I withdraw as a party to an application?

There are two ways to withdraw as a party to an application.

1. If the hearing has not started you can withdraw by writing to the Court (Form 162).
2. If the hearing has started you will need the permission of the Court to withdraw as a party (Form 27).

Can an application be changed?

Yes, with the permission of the Court an application can be changed at any time. This is called amending the application. Some amendments might involve:

- decreasing the size of the land or waters claimed;
- combining your application with another application;
- replacing an applicant with a new applicant.

Will I have to pay the costs of the other parties?

In native title the general rule is that each party must pay their own legal costs.

What happens when an application is referred for mediation?

The Native Title Act encourages negotiation and agreement. Once the parties are identified, the Court may refer the application to the National Native Title Tribunal for mediation. At the Tribunal, a Tribunal member will act as a mediator to assist the parties to come to an agreement on whether native title exists and if so, who holds it.

The mediation can continue for at least three months. After this time, any of the parties can ask the Court to stop the mediation and have the application heard by a Judge.

Can mediation occur at the Federal Court?

After an application has been filed with the Court a Judge may order that a mediation or case management conference be arranged. Usually all of the parties agree. The mediator, who may be a Registrar of the Court, will help the parties to reach an agreement or to clarify the issues that are really in dispute.

If the mediation is unsuccessful the application will usually be heard by a Judge. At the hearing each of the parties will present their evidence. It is still possible, even after the hearing has started, for the Judge to direct the parties to try to reach an agreement on some of the issues in dispute through mediation.

Native title cases

Resolving native title applications is a complex and time-consuming process. It involves recognition of the operation of two systems of law: Australian common law and statute law on the one hand and the traditional law and custom of the Aboriginal and Torres Strait Islander peoples on the other.

To decide the question of whether native title exists and who it belongs to, the Judges will usually take evidence in the area subject to the claim and also visit important sites.

Sometimes the Court uses video link-up technology so that people living in remote areas can give evidence which is then televised to the courtroom.

Management of cases

The Court has implemented an innovative case management system called the Individual Docket System. Under this system, Judges of the Court are actively involved in managing a case from beginning to end. Most cases are allocated to Judges soon after they are filed in the Court.

The native title list is managed as a national list. Once an application has been filed it will be allocated to a 'provisional docket judge' who monitors the application for the Court.

The Court has established a National Native Title Co-ordination Unit to provide advice to the Chief Justice and other Judges on management of native title cases. Staff with experience in native title are also available in most Registries of the Court to assist applicants and parties in the practice and procedures of the Court and to assist in the organisation of hearings in remote localities.

Who can represent me?

You can attend hearings in person (without a lawyer) or be represented by a lawyer. You can also ask the Court to allow you to be represented by a person who is not a lawyer.

You can ask an association, society, organisation or other body to act as your agent in the proceedings. An agent can act for more than one party in the proceedings.

What is a determination?

A determination of native title is a decision by the Court whether or not native title exists in relation to a particular area of land or waters. If the Court decides that native title does exist it will also make decisions about:

- who the people who hold the common or group rights comprising native title are; and
- the nature and extent of the native title rights and interests in relation to the area; and
- the nature and extent of any other interests in relation to the area; and
- the relationship between the rights and interests between the people and their rights; and
- whether the native title rights and interests allow the native title holders to possess, occupy, use and enjoy the land or waters to the exclusion of all others.

The Court can make a determination of native title when:

- an agreement reached through mediation is referred to the Court; or
- parties are unable to reach agreement and the Court hears the evidence and determines if native title exists.

What is the process for determination?

1. Filing: Once the application is filed the Court checks whether it is complete and correct. If it is, the application is sent to the Tribunal.
2. Registration: The Tribunal will apply the registration test. Passing the registration test gives the native title claim group certain procedural rights, including the right to negotiate (eg. over mining or mineral exploration). Applications which fail the registration test usually proceed to mediation and/or trial, but the applicants do not have the right to negotiate. If the Tribunal does not accept the claim for registration, the applicant may ask the Court to review the Tribunal's decision.
3. Notification: The Tribunal will advise the public and any individual or body (including State or Territory governments) whose interests may be affected by a native title determination to apply to the Court to become a party to mediation. The period in which a person can apply to the Court is three months.
4. The Court will receive the applications to become a party and will decide whether or not the person is a party.
5. Then there is usually a directions hearing which is attended by the applicants and other parties (and their legal representatives). At the directions hearing, the Judge may finalise the party list and refer an application to the Tribunal for mediation.
6. If mediation in the Tribunal is successful, the agreement reached will be referred to the Court, which may make a determination of native title consistent with the agreement.
7. If the mediation is not successful, the Tribunal will provide a report to the Court. The Court may direct that further mediation occur or may hear the case.

Where can I get forms?

You can get all of the forms mentioned in this brochure from any Federal Court Registry. They can also give you a copy of guides which show you how to fill out some of the forms.

You can also get the forms and guides from the Court's web site: www.fedcourt.gov.au

What other information can the Court provide?

The Court can give you information about:

- mediation;
- where to get legal help or legal representation;
- court procedures.

You can also find this information on the internet at www.fedcourt.gov.au

FEDERAL COURT REGISTRIES

ACT Registry

Commonwealth Law Courts Building
Childers Street
Canberra City ACT 2601
Telephone: (02) 6267 0566
Fax: (02) 6267 0625
TTY: (02) 6267 0537
Email: actman@fedcourt.gov.au

NSW Registry

Level 16, Law Courts Building
Queens Square
Sydney NSW 2000
Telephone: (02) 9230 8567
TTY: (02) 9230 8270
Fax: (02) 9230 8535
Email: nswdr@fedcourt.gov.au

NT Registry

Level 3, Supreme Court Building,
State Square, Darwin NT 0800
Postal address: PO Box 1806
DARWIN NT 0801
Telephone: (08) 8941 2333
Fax: (08) 8981 6081
TTY: (08) 8982 0838
Registry Filing Fax: (08) 8981 9421
Email: ntreg@fedcourt.gov.au

QLD Registry

Level 6, Commonwealth Law Courts
119 North Quay
Brisbane QLD 4000
Postal Address: P.O. Box 13084,
George Street Post Shop
Brisbane QLD 4003
Telephone: (07) 3248 1100
Fax: (07) 3248 1260
TTY: (07) 3248 1272
Email: qldreg@fedcourt.gov.au

VIC Registry

Commonwealth Law Courts
305 William Street
Melbourne VIC 3000
Telephone: (03) 8600 3333
Fax: (03) 8600 3281
TTY: (03) 9670 0320
Email: vicreg@fedcourt.gov.au

SA Registry

Level 5 Commonwealth Law Courts
3 Angas Street Adelaide SA 5000
Postal address: GPO Box 1350
Adelaide SA 5001
Telephone: (08) 8219 1000
Fax: (08) 8219 1001
TTY: (08) 8219 1011
Email: sareg@fedcourt.gov.au

TAS Registry

Commonwealth Law Courts Building
39-41 Davey Street
Hobart TAS 7000
Postal address: GPO Box 903
HOBART TAS 7001
Telephone: (03) 6232 1715
Fax: (03) 6232 1701
TTY: (03) 6232 1865
Email: tasreg@fedcourt.gov.au

WA Registry

Commonwealth Law Courts
1 Victoria Avenue
Perth WA 6000
Postal address: GPO Box A30
PERTH WA 6001
Telephone: (08) 9268 7100
Fax: (08) 9221 3261
TTY: (08) 9325 7053
Email: waregistry@fedcourt.gov.au

Principal Registry

Level 17, Law Courts Building
Queens Square
Sydney NSW 2000
Telephone: (02) 9230 8542
Fax (02) 9223 7706
Email query@fedcourt.gov.au