



FNLRS

FIRST NATIONS
LEGAL & RESEARCH
SERVICES

FORMAL RECOGNITION
AS TRADITIONAL
OWNERS OF COUNTRY
IN VICTORIA

**What is a Native
Title Determination?**



WHAT IS A NATIVE TITLE DETERMINATION?

Under the *Native Title Act 1993* (Cth), native title is the recognition by Australian law of the rights and interests in land and waters held by Aboriginal and Torres Strait Islander peoples under their traditional laws and customs, which existed before the start of colonisation.

Native title was first recognised in Australian law in 1992 in the *Mabo* decision.

In *Mabo*, the High Court recognised that:

- When Britain assumed sovereignty, the common law recognised that Aboriginal and Torres Strait Islander peoples held a native title under their own system of law and customs.
- The land and waters of Australia were not terra nullius, a land belonging to no one.
- Native title continues to exist unless the ongoing connection to the land was lost or the government did something to extinguish it.

Since 1993 the *Native Title Act 1993* (Cth) (the **Native Title Act**) has set processes and requirements around native title. Court cases have further decided how the native title system works, and what its limitations are.

Native title is a communal title, meaning it is held by the members of the native title group together. It can include the right to camp, hunt, fish, collect plants, protect sites of cultural significance and conduct ceremony. In Victoria, native title rights may exist over Crown land and waters, except where native title has been extinguished.

WHAT IS A NATIVE TITLE DETERMINATION?

Under the Native Title Act, a group can lodge a native title claim over Crown land and waters within their Country.

A native title determination under the Native Title Act is a decision handed down by the Federal Court recognising the connection of a native title group to a particular area of land and waters, which has continued unbroken since the start of colonisation.

OUTCOMES OF A NATIVE TITLE DETERMINATION

A determination can provide formal legal recognition of a native title group, as well as recognition of the group's right to exercise their native title rights and interests.

A determination formally recognises a range of rights and responsibilities for native title holders, including to:

- do activities on their Country such as camp and hunt;
- have a say about activities and works on their Country through the future act regime;
- conduct business and receive funding through the Registered Native Title Body Corporate (**RNTBC**) that holds native title on behalf of the group; and
- receive other benefits through negotiation with the State of Victoria (the **State**).

The native title rights recognised will depend on what is claimed by each group under their traditional laws and customs, the amount of extinguishment and what is negotiated in a consent determination with the State or determined by the Federal Court of Australia (the Federal Court). Native title determinations list the rights and interests recognised.

In Victoria, RNTBCs have a reserved seat in the First Peoples' Assembly of Victoria, the current elected voice for Aboriginal people and communities in the treaty process.



HOW IS A NATIVE TITLE DETERMINATION REACHED?

Making a native title claim

The native title application process begins with interviews with the native title claimants to find out more about the group, their Country and their rights and interests, as well as research into historical records. The native title application (called a Form 1) requires evidence that at least one member of the native title claim group has or had a traditional physical connection with the land or waters claimed and a description of:

- the claim area;
- the members of the native title group; and
- the native title rights and interests claimed.

Once there is enough information to complete the Form 1, the native title claimant group meets to authorise the application and appoint a group of authorised representatives, known as the Applicant, to act on behalf of the claim group. The Applicant then lodges the Form 1 with the Federal Court.

The registration test and future act rights

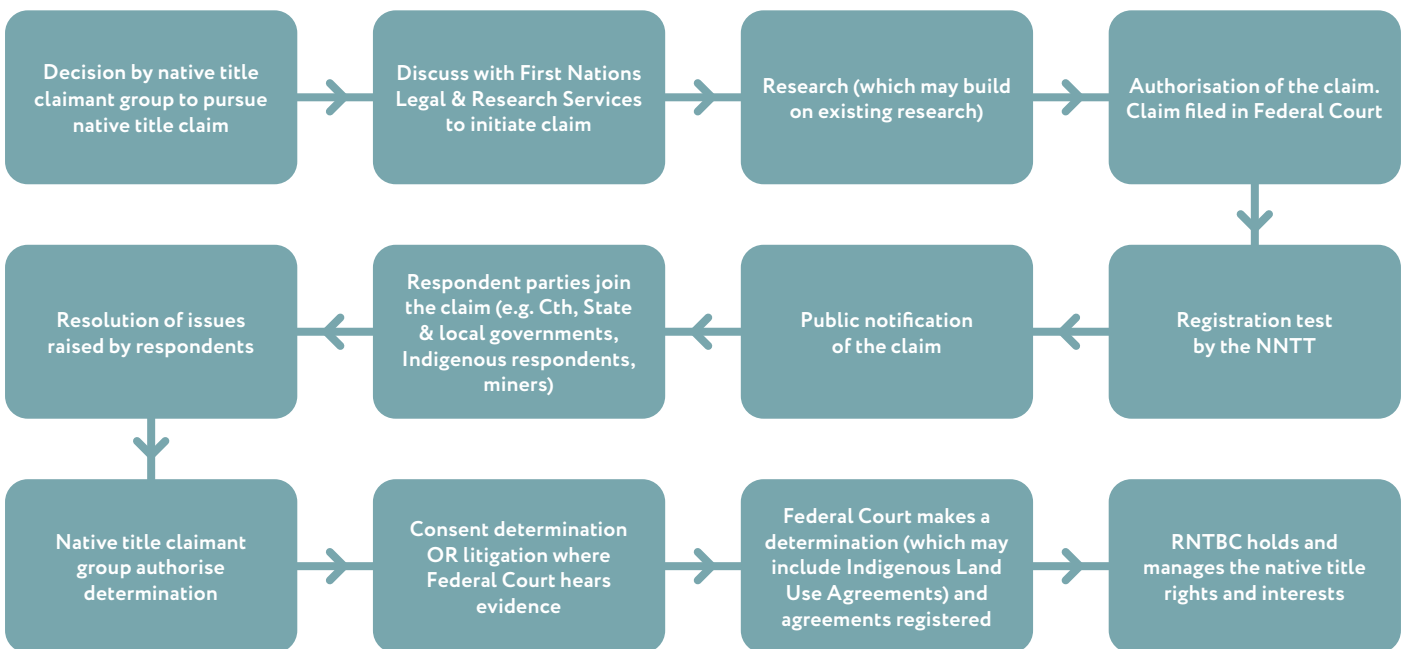
The registration test is used to determine whether the application meets the criteria to be registered and give the group certain rights while the claim is being progressed in the courts. The National Native Title Tribunal (NNTT) assesses the application to determine whether it passes the registration test however a claim can still be progressed even if it fails the registration test.

Once a claim is registered, the native title group has rights in relation to future acts, which are activities on Country that may affect their native title rights and interests. The type of procedural rights which the native title group can exercise will vary (from the right to comment, be consulted, object or negotiate) depending on the type of act proposed. This is a key benefit of registering a native title claim. For large activities, such as mines and major infrastructure, native title claimants get the Right to Negotiate.

This means that the person or organisation wanting to do the activity should negotiate an agreement with the group in good faith.

Visit the NNTT website for more information about future acts www.nntt.gov.au/futureacts.

The native title claim process



The State is typically the first respondent and starts the court process of a native title determination application. This is because native title is a matter to be decided between native title applicants and the Crown. The State also represents the general community in a native title claim.

WHEN WILL NATIVE TITLE BE RECOGNISED?



Connection

Native title will be recognised where the native title claimant can establish their ongoing connection to land and waters. Connection is established by providing evidence of the rights and interests claimed and the traditional laws and customs that support them. The laws and customs must have been acknowledged and observed by the group since before the start of colonisation to the present.



Tenure and extinguishment

Once connection is established, work must be done to check where native title rights have been extinguished, either partly or wholly, based on an analysis of what other interests exist in relation to the claim area. This is called 'tenure analysis'.

A native title determination can only recognise native title rights and interests which have not been extinguished by government action. Extinguishment means that another property interest has been granted that cannot co-exist with the exercise of native title rights and interests. For example, native title is extinguished where freehold title has been granted to allow for private home ownership and where public works like roads, bridges schools and hospitals have been constructed.

Native title can co-exist with some rights and interests, such as pastoral leases. In those cases, the other interests take priority over native title rights if there is ever a conflict in their exercise.

Native title that has not been extinguished is referred to as 'exclusive possession native title'. Native title that has been partially extinguished is called 'non-exclusive native title'. Even if native title has not been extinguished a group may not be able to prove that exclusive possession exists in accordance with its laws and customs.



Determination by consent or litigation

In Victoria, native title is agreed between the native title claimants, the State and any other parties to the claim (known as a consent determination). This involves the parties agreeing on what rights and interests will be recognised and how the determination will be worded. The parties then apply to the court for a determination to be made by consent. To date, the State has only agreed to non-exclusive and non-commercial native title rights.

Native title determinations can also be made where a judge decides the claim. This typically occurs where the State Government disagrees with the claims of the native title claimant group. Reaching a consent determination requires a lower standard of proof than a litigated native title outcome. A determination may also be reached when an application is not contested and the court makes an unopposed determination, but this is rare.



Compensation

A native title group can also make a claim for compensation from the Commonwealth or State governments, for acts that have extinguished or impaired native title rights and interests. These claims can be made separately to a native title determination, like in the Timber Creek decision. If successful, the court may decide that the government has to pay the native title group an amount of money that reflects the economic cost of the impact, as well as the non-economic impact on the group – the cultural loss.

HOW NATIVE TITLE IS MANAGED

Once native title is determined, the native title group must nominate a corporation to hold and manage native title on their behalf. These corporations are known as Prescribed Bodies Corporate (**PBCs**).

The group can create a new corporation or choose an existing one that represents their interests, but it must be established under the Corporations (*Aboriginal and Torres Strait Islander*) Act 2006 (Cth).

Once the court makes a determination that the corporation will be the PBC, it is entered onto the National Native Title Register and becomes a RNTBC.

The role of the RNTBC is to manage and protect native title rights and interests on behalf of the native title group and obtain the consent of the group before making any decisions that may affect native title. The RNTBC is also the main point of contact for government and other stakeholders that want to do business within the determination area, including in relation to future acts.

RNTBCs are eligible to receive government funding to carry out their functions. For more information about RNTBCs, visit the PBC website nativetitle.org.au.

MORE INFORMATION

For more information about native title, visit the

National Native Title Tribunal
www.nntt.gov.au

Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS)
aiatsis.gov.au

First Nations Legal & Research Services
606/425 Smith Street, Fitzroy VIC 3065
(03) 9321 5300
info@fnlrs.com.au
www.fnlrs.com.au

A **Glossary of Terms** used in this document can be found at www.fnlrs.com.au/formal-recognition-resources

The purpose of this information sheet is to provide an overview of the three types of formal recognition available to Traditional Owners of Country in Victoria. It is intended to provide an overview of what you can expect the process to involve, understanding that the process will be different for each group. This information sheet is not legal advice and should not be relied upon as legal advice.

October 2022