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The views expressed in this document are those of contributors and do not necessarily represent the views of the Australian Government or the Aurora Project. The information supplied in this document is intended to provide a general overview of some areas of native title and to provide you with general information that may assist you in your internship. You should not rely on any legal information provided in this Handbook to take action or make decisions about any specific situation or circumstance. No liability is accepted for use of, or reliance upon, any information in this document.
This publication contains insights into working in the native title system at Native Title Representative Bodies* and Native Title Service Providers* around Australia.

*Note: References to Native Title Representative Bodies (NTRBs) within the Handbook also include Native Title Service Providers (NTSPs) who receive specific funding to perform some NTRB functions. They are: Central Desert Native Title Services Limited (Central Desert), Native Title Services Victoria Limited (NTSV), NTSCORP Limited (NTSCORP), Queensland South Native Title Services Limited (QSNTS) and South Australia Native Title Services Limited (SANTS).

IMPORTANT NOTE: This resource is a supplement to the Handbook for Interns. Please be reminded to refer to the Handbook for Interns for other important information regarding:

- Cross-cultural communication
- Confidentiality
- Other general resources for interns
- General hints and tips
- Directory of Host organisations
- Insurance and emergency details.
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Chapter 1:
An overview of native title

Introduction

This chapter is designed to give you an understanding of the most important aspects of native title law in Australia and the relevant processes involved in making native title claims and related agreements.

Section 1 explains how native title has developed in Australia.

Section 2 explains the legal test that must be satisfied to ‘prove’ that native title exists in court.

Section 3 briefly explains native title compensation

Section 4 provides an overview of the native title process. This includes a brief look at:

1. The major players in the process
2. The typical steps involved in making a native title claim
3. Future Acts
4. The Right to Negotiate
5. Indigenous Land Use Agreements (ILUAs).

Section 5 explains additional outcomes that can be achieved in the native title process. This includes a sample of settlements achieved in Australia:

1. Traditional Owner Settlement Act 2010 (Vic)
2. Ord Final Agreement ILUA - Miriwung Gajerrong people and WA
3. Cape York State Land Dealings and National Parks Transfer Program
4. Noongar Native Title Settlement.

Section 6 provides maps and figures showing progress in native title since 1992, including:

1. Determinations of Native Title since 1992
2. Determinations of Native Title since 1992 (text)
3. Other native title decisions of interest
4. Locations of currently registered native title applications
5. Locations of Indigenous Land Use Agreements.

Following this document are some other useful resources for future reference:

1. Some common abbreviations and acronyms
2. A glossary of terms used in the native title context
   NB: terms defined in the glossary are in red the first time they appear in this document.
3. Preamble to the Native Title Act 1993
4. Factsheet on Future Acts
5. Factsheet on Right to Negotiate
6. Factsheet on Indigenous Land Use Agreements

An overview of native title
Michael Pagsanjan, Principal Solicitor (MPS Law)
Chapter 1: An overview of native title

Section 1: How native title has developed in Australia

For many years, the Australian legal system insisted that Indigenous peoples had no rights in land or waters arising from their original occupation of the land that is now Australia. In Cooper v Stuart (1889 NSW) it was held that Australia was “practically unoccupied, without settled inhabitants or settled law”, that is terra nullius – a land belonging to no one.

In other common law jurisdictions (based on the British system), native title and Indigenous sovereignty was recognised in the 19th Century, for example in New Zealand R v Symonds (1847). In the USA, Johnson v McIntosh (1823) and Worcester v Georgia (1832) confirmed that Indian tribes or nations: “had always been considered as distinct, independent, political communities, retaining their original natural rights”.

In 1971, the Yolgnu people of the Northern Territory attempted to prove in court that they had native title rights under the Australian legal system, as the original occupiers of that land. The case is called Milirrpum v Nabalco (1971), (also known as the Gove land rights case) and was unsuccessful despite the judge stating:

“The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called a ‘government of laws, and not of men’ it is that shown in the evidence before me.”

The legal action focused political attention on the need to recognise land rights. As a result, the land justice debate in Australia moved away from the courts and into the political arena, and the Aboriginal land rights movement developed in the 1960s and 1970s. Important milestones included:

The Yirrkala Bark Petitions (1963): The petitions stated that Yolgnu people owned the land where a bauxite mine was to be established and protested the grant of mining rights to Nabalco. A House of Representatives Committee inquired and recommended that a land grant be made for the benefit of traditional owners and compensation be paid. This didn’t occur and the mine went ahead and traditional owners commenced the Gove land rights case. The petitions are historic Australian documents being the first traditional documents prepared by Indigenous Australians to be recognised by the Australian Parliament.

The Gurindji Strike - Wave Hill Walk-off (1966): In August 1966 the Gurindji people at Wave Hill cattle station in the Northern Territory went on strike demanding fair wages and a return of some of their traditional lands.

The 1967 Referendum: This successful referendum gave the Federal Parliament the constitutional power to make special laws in relation to Aboriginal affairs, and thus the ability to over-ride any state legislation. The referendum meant the Federal Parliament had the constitutional authority to pass the Native Title Act 1993 (Cth) (NTA).

The Tent Embassy (1972): The Tent Embassy was established on the lawns outside Parliament House in Canberra by Indigenous activists as a political protest and to demand national land rights. A list of demands was presented that included land title, mining rights and compensation. The Tent Embassy continues to this day.

Land Rights legislation

The political response of the incoming Whitlam government in 1972 was to establish the Woodward Royal Commission to inquire into Aboriginal land rights in the Northern Territory. It recommended legislation to allow traditional owners to claim vacant Crown land rather than land that had been sold or leased to private parties. The Australian Parliament with the Fraser government passed the Aboriginal Land Rights (Northern Territory) Act (ALR Act) in 1976.
Chapter 1: An overview of native title

The ALR Act only applies in the Northern Territory, and so its land claim scheme did not benefit Indigenous people in other parts of Australia. It was also a legislative scheme that meant that Parliament could decide what land could be claimed and what could not. Since the passing of the ALR Act, all states except WA have passed legislation recognising land rights. The relevant Acts are:

- Aboriginal Land Rights Act 1984 (NSW)
- Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)
- Aboriginal Land (Northcote Land) Act 1989 (Vic)
- Aboriginal Lands Act, 1991 (Vic)
- Aboriginal Land Act, 1991 (Qld)
- Torres Strait Islander Land Act, 1991 (Qld)
- Aboriginal Land (Manatunga Land) Act 1992 (Vic)
- Aboriginal Lands Act 1995 (Tas).

Western Australia undertook an inquiry in 1984 on the basis that it would then introduce land rights (The Seaman Inquiry), however political opposition was substantial and no legislation was enacted.

Legislation and agreements providing for joint management of national parks have also been enacted and agreed at federal, state and territory levels.

United Nation Declaration on the Rights of Indigenous Peoples

In 2007 the United Nations General Assembly adopted the Declaration on the Rights of Indigenous People (the Declaration). Australia endorsed it in 2009 after initially opposing it. It forms an important basis for analysing the extent to which Australian native title law complies with international standards with respect to the rights of Indigenous peoples.

Article 32 of the Declaration is specific to land rights and states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Native Title

Until 1992, the common law of Australia did not recognise that Indigenous people had any rights to land arising from their original ownership of land under traditional law and custom. The common law is the law made by the accumulated decisions of courts as opposed to law in the form of legislation or an Act made by a Parliament.

On 3 June 1992, the High Court in the Mabo v Queensland (No 2) case decided in favour of a claim to Murray Island in the Torres Strait based on ownership under traditional law and custom. For the first time, Australian courts accepted that traditional law and custom could be a basis for a claim to land ownership by Indigenous people.

To quote from the decision:

“Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”
Chapter 1: An overview of native title

This meant that for the first-time Indigenous laws and customs were recognised on their own terms by the courts.

This recognition is, however, limited in a number of respects by the common law and the NTA. The common law has determined that there are fundamental principles that limit the recognition of traditional law and custom. For example, traditional rights of exclusive possession will not be recognised in the seas. Further in Western Australia v Ward (2002) the High Court stated 10 years after the Mabo judgement:

“As is now well recognised, the connection which Aboriginal peoples have with “country” is essentially spiritual.

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests, which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.”

Native title is a concept in Australian law. It is not the same as Aboriginal and Torres Strait Islander people understand their rights, interests and responsibilities to country. Native title is where Australian law recognises traditional laws and customs as they relate to lands and waters. This ‘recognition’ of Aboriginal and Torres Strait Islander peoples based on an acceptance of their own law is significant. It is different from land rights legislation which ‘grants’ land to Aboriginal people.

In 1993, and following the Mabo decision, Indigenous leaders and their advisors negotiated with the Keating government to establish a special procedure for making native title claims and to establish ground rules by which governments could deal in land where native title existed. The ‘right to negotiate’ provisions were a significant outcome in the face of calls for general extinguishment of native title. At the end of 1993, the Commonwealth Parliament enacted the Native Title Act 1993 (Cth) (NTA). Importantly the Indigenous Land Fund (now administered by the Indigenous Land Corporation) was also established as a result of direct negotiations with Indigenous leaders at that time. This fund allows for the purchase of land where native title has been extinguished either wholly or partly. The Keating government also agreed to consider a broader response to the Mabo decision through a Social Justice Package, but this has not been implemented.

Since 1993 there have been extensive amendments to the NTA. In 1998 the Native Title Amendment Act was passed as a result of the High Court decision in Wik Peoples v Queensland (1996) which found that native title and a pastoral lease could co-exist on the same area of land. The Howard Government and Senator Harradine agreed to a series of amendments that diminished the rights of native title holders that had been negotiated with the Keating Government in 1993. Further changes to the native title system have been regularly made by the Commonwealth Parliament since that time, some technical and some substantive.

The most recent attempt to substantially reform the NTA was the Native Title Amendment (Reform) Bill 2014 (the Reform Bill) introduced to the Senate in 2014. The Reform Bill proposed amendments to the right to negotiate by extending the procedure to off-shore areas, clarification of the requirement to negotiate in good faith, insertion of a new provision to disregard extinguishment in relation to national parks, a reversal of the burden of proof, defining key terms and acknowledgment of commercial rights and interests. However, the Reform Bill lapsed at dissolution in 2016 and was accordingly not passed by Parliament.

On 4 June 2015, the Australian Law Reform Commission tabled a report into the connection requirements and authorisation and joinder provisions of the NTA. The Report made thirty recommendations for reform of the NTA. The recommendations have not been implemented by Parliament.

In 2017, the Australian Government commissioned the Australian Institute of Aboriginal and Torres Strait Islander Studies to ‘research law, policy, practice, and stakeholder attitudes about the native title ‘connection’ test’, which will ‘inform the government’s future policies on connection’.


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As at the date of updating this Handbook in October 2018, the research is being finalised.

In November 2017, the Commonwealth Attorney-General’s Department published an options paper for reforms to the NTA (the 2017 Options Paper). The options for reform addresses recommendations from:

- the Australian Law Reform Commission’s report on Connection to Country: Review of the Native Title Act 1993 (Cth);
- the Council of Australian Government’s Investigation into Land Administration and Use, and

The 2017 Options Paper suggests that reforms are aimed to improve the efficiency and effectiveness of the native title system to resolve claims, better facilitate agreement-making around the use of native title land, and promote the autonomy of native title groups to make decisions about their land and to resolve internal disputes. Submissions responding to the questions were received in early 2018. Feedback from these submissions will inform the development of an exposure draft native title amendment bill to be released for public comment later in 2018.

Role of the Racial Discrimination Act 1975 (Cth) (RDA)

The RDA prevented both the States of Queensland and Western Australia from abolishing native title in those jurisdictions. The Queensland Parliament passed the Queensland Coast Islands Declaratory Act 1985 (Qld) prior to the finalisation of Mabo No. 2. That Act purported to abolish native title on Murray Island in the Torres Strait and was determined by the High Court to be invalid because it breached the RDA.

Similarly, the Western Australian Parliament passed the Land (Titles and Traditional Usage) Act 1993 (WA) seeking to abolish native title throughout the State and the High Court also held that legislation to be in breach of the RDA.

The outline of the native title process below (see ‘An overview of the native title process’, page 9ww) explains the way the NTA works at the moment.

Even though most of the rules relating to native title are in the NTA, judicial decisions have an important role in the development of native title law. This is because the NTA does not set out all of the ways in which native title is extinguished, or some of the things needed to achieve native title recognition, or the type of native title rights which can be recognised in a specific area. Court decisions and the NTA both determine these matters.

Distinction between NTA and other Indigenous recognition reforms

As at the date of updating this Handbook in October 2018, there is significant ongoing public discussion in relation to other possible Indigenous recognition reforms. At the Commonwealth Government level, this includes public discussion in relation to possible amendments to the Australian Constitution, and the Australian Government’s rejection of the Uluru Statement from the Heart. At the State Government level, this includes Ministerial statements inviting treaty discussions with traditional owners. Two examples are as follows:

1. **Buthera Agreement with Narungga Nation**

   - SA government signed a formal agreement with an Aboriginal nation, Narungga Nation as a first step towards establishing a state based treaty in February 2018.
   - Agreement committed both parties to negotiate for a treaty over the next three years and included a commitment by the government to provide support to Narungga in economic and community development work and acknowledged ownership and relationship with country.
   - State government also entered into treaty discussions with other South Australian traditional owner groups.
   - Change of government, and change in policy direction means that further treaty negotiations will not be pursued.
Chapter 1: An overview of native title

2. Victorian Treaty Legislation

• Victoria will be the first state to enter into formal treaty negotiations with Aboriginal Victorians.
• The Advancing the Treaty Process with Aboriginal Victorians Bill 2018 was passed by the Victorian Parliament in June 2018.
• Provides an opportunity for Victoria to recognise and celebrate the unique status, rights, cultures and histories of Aboriginal Victorians, and an opportunity for reconciliation.
• Treaty process is currently under way.
• The Bill:
  o Requires the establishment of a representative body to work with the Victorian government to establish elements to support future treaty negotiations. This includes a treaty authority, treaty negotiation framework and a fund to support Aboriginal self-determination;
  o Sets a mechanism to enable the Aboriginal Representative Body to be formally recognised once it has been established as the State’s equal partner in the next phase of treaty;
  o Sets guiding principles for the treaty process, including self-determination and empowerment that all participants must abide by; and
  o Requires annual reporting to Parliament on progress.

These Indigenous recognition forums are different to the recognition process provided by the NTA.

Section 2: How to prove native title

The NTA sets out the basic requirements to prove native title. The two key legal questions that must be answered when making a native title claim are:

1. Under the traditional laws and customs of the group of Indigenous people claiming native title, are there rights and interests to the claim area based on their traditional connection to the area?

To determine this, the courts ask themselves five questions:

1. ‘was there a recognisable society of Indigenous people at the time of settlement who possessed rights to the land in question through their traditional laws and customs, and is that same society still in existence and presenting the claim today?’ Note this question was very important in the Yorta Yorta (2002) decision and it was also a significant reason why the Larrakia (2006) claim to Darwin failed.

2. ‘at the time the British claimed the territory (asserted sovereignty) that is now subject to native title claim, what was the content of the traditional law and custom?’ Note that in the eastern states the time when the British asserted sovereignty is 1788 but the date varies from place to place. In Western Australia it is 1829 with the arrival of Lieutenant- Governor Stirling.

3. ‘what is the content of the traditional law that is being exercised now — that is, what does the traditional law look like today?’

4. ‘how much difference is there between the traditional laws and customs that were in place at the time the British first exercised control over that area, and what is being done today?’ Some change, over time, is permissible but too many changes mean that the courts do not regard the law and custom as ‘traditional’ and so native title is lost.

5. the traditional laws and customs that have satisfied the above tests must be able to be shown to have a definite and specific connection to the lands and waters claimed, so that it can be said that those laws and customs create the right for certain Indigenous people or communities to control and/or use the specific claim area.
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These are complex questions. Aboriginal and Torres Strait Islander claimants obtain assistance from lawyers, anthropologists, researchers, and other staff working at NTRBs to establish their claim. Primarily courts rely upon the evidence of the Indigenous traditional owners.

If a connection under traditional law and custom is found, the courts ask the following question:

2. Has this connection been either entirely or partially ‘extinguished’ (lost) by specific government actions? For example, selling that area of claimed land.

‘Extinguishment’ means that all or some native title rights are lost forever in Australian law. Once native title has been extinguished, it cannot be revived except in very limited circumstances.

The extinguishment of native title takes two forms – total extinguishment and partial extinguishment. Total extinguishment takes away all native title rights. Partial extinguishment takes away only some native title rights. Partial extinguishment shows the difference between two categories of native title rights – ‘exclusive’ and ‘non-exclusive’ native title.

The difference between them is that exclusive native title allows native title holders to control access to land. Non-exclusive native title does not.

In general, partial extinguishment reduces an exclusive native title to a non-exclusive native title. This is only a generalisation, of course, because native title rights are always capable of varying from place to place because of differences in the traditional law and custom that native title in a particular place is based upon.

a) Exclusive native title

As mentioned above, native title rights can be ‘exclusive’, which means that the native title holders have the right to control access to, and the use of, the area for which native title has been proven. Courts have decided that exclusive native title rights exist in a few situations, such as unallocated or vacant crown land and areas already held by or for Indigenous people, for example, on an Aboriginal owned pastoral lease or Aboriginal reserve.

Even where exclusive native title exists, non-native title holders can use the land where the NTA gives them permission to do so (see below Section 4 – An overview of the native title process).

b) Non-exclusive native title

Native title rights can also be ‘non-exclusive’ rights. This means that although the traditional owners holding native title have certain rights, they do not have the right to exclude all others. Non-exclusive rights may include the right to:

• live on the area
• access the area for traditional purposes, like camping or to conduct ceremonies
• visit and protect culturally important places and sites
• hunt, fish and gather food or resources like water, wood and ochre
• teach law and custom ‘on country’.

Courts have decided that, in tidal and sea areas, only non-exclusive native title can exist. Also, there can be no native title rights to minerals, gas or petroleum where legislation says those things are the property of a State or Territory Government or the Commonwealth Government.

Where non-exclusive native title exists, non-native title holders can undertake activities that interfere with the non-exclusive native title where a government follows the Native Title Act (part 2 division 3, ‘future acts’) and gives them permission to do so (see below Section 4 – An overview of the native title process, Part 3 - Future Acts).
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c) The link between ‘exclusive’ or ‘non-exclusive’ native title rights and ‘extinguishment’ under this second test

As noted above, Government land dealings can extinguish native title entirely (total extinguishment) or in part (partial extinguishment). These land dealings may be recent or may have happened long ago – any land dealing that took place after the British first claimed (asserted sovereignty for) an area of land for which native title is claimed can potentially extinguish native title. In addition to land dealings (such as leasing or the sale of land), a range of other government authorised uses of land can extinguish native title. These uses of land are listed in the NTA. An example is the construction of public infrastructure. Whether a land dealing or other use of land causes total extinguishment or partial extinguishment is, in general, decided by comparing the land dealing or use with the native title rights that existed before the dealing or use occurred. If the dealing or use is totally inconsistent with the native title rights, then total extinguishment is the result. Where there is partial inconsistency, partial extinguishment is the result. Partial extinguishment means that an exclusive native title right becomes a non-exclusive native title right. The courts have found that there are some land dealings that always cause total extinguishment. An example is the complete sale of land by government (a grant of freehold title).

For some land dealings and land uses, the NTA itself sets out whether total extinguishment or partial extinguishment is caused. In that case, the comparison described above is not required.

The following metaphors can help explain what is meant by the extinguishment of native title:

- The extinguishment of native title rights can be compared to removing the layers of an onion. When land dealings or land uses inconsistent with some native title rights happen, a layer of the onion is removed. If the dealing or use is totally inconsistent with native title rights, then all layers are removed. If it is partially inconsistent, only the layers that are inconsistent are removed.

- Native title rights can also be thought of as a bundle of sticks, each stick representing some of the specific native title rights (e.g. the right to exclude non-native title holders, and the right to use natural resources). Every time an inconsistent act occurs, such as selling or leasing of the land, it reduces the size of the bundle of sticks until, sometimes, nothing is left.

The Wik High Court (1996) decision made clear that pastoral leases (of the variety under Queensland law relevant to the Wik People’s native title claim) do not cause native title to be totally extinguished. The pastoral leases considered in the Wik case were a kind of Government lease that allowed land to be used primarily for grazing purposes. The effect of those pastoral leases was like peeling off only one layer of the onion, or taking only some of the bundle of sticks that together make up the native title rights.

This was because the pastoral leases did not allow the lease holder to exclude native title holders from the leased land. Rather, they only permit control of the leased land for grazing purposes. This is different to the effect of a lease, which does authorise the lease holder to exclude native title holders at all times (for example, residential leases). In general, these leases (called ‘exclusive possession’ leases) totally extinguish native title.

3. Applying the two legal tests

The two legal questions or tests above (connection under traditional law and custom and extinguishment) are each looked at separately by the court, and both must be satisfied before the court will decide that native title exists. This means that a native title claimant could prove there is a connection under traditional law and custom to a claimed area, but not satisfy the second test because of total extinguishment.

Both of the legal tests are hard to satisfy, and involve a lot of historical research into the area involved in the native title claim. This is a time-consuming and resource-intensive process for NTRB staff involved in presenting a claim to the court, including the efforts of field officers, anthropologists, legal officers and research staff.

The NTA sets out what claimants need to do when the native title claim is being processed by the Federal Court and the National Native Title Tribunal (see Section 3 below).
Section 3: A brief summary of native title compensation

This section includes a brief look at:

1. The relevant sections of the NTA; and,
2. Recent developments

Native title compensation is an important developing area in native title, with limited decisions so far. As at the date of updating this Handbook in October 2018, there have been three noteworthy decisions on native title compensation, being Jango v Northern Territory of Australia [2007] FCAFC 101 (Jango), De Rose v State of South Australia [2013] FCA 988 (De Rose) and Griffiths v Northern Territory (No 3) [2016] FCA 900 (Timber Creek Single Judge Decision) and the associated Northern Territory of Australia v Griffiths [2017] FCAFC 106 (Timber Creek Full Court Decision). These will be discussed further below under ‘recent developments’.

1. The relevant sections of the NTA

The Act does not provide compensation for all things that have damaged native title rights and interests. While native title cannot be extinguished contrary to the Act (s. 11), this is only in respect of acts done on or after the Racial Discrimination Act 1975 (Cth) (the RDA) came into force on 31 October 1975. Generally, acts before that date cannot be invalidated because of the existence of native title. As a result, compensation only arises to those acts after 31 October 1975. It is also required that native title be impaired, such that native title would have existed but for the compensable acts. In other words, a determination of native title is a necessary precursor to a claim for compensation.

Section 61 of the NTA provides that an application can be made to the Federal Court by native title holders for compensation for any loss, diminution, impairment or other effect on their native title. That application may be brought by the RNTBC, if there is one, and otherwise by Applicants, on behalf of a compensation claim group.

Importantly, s 53 of the NTA provides that this is an entitlement to ‘just terms’ compensation. This is notwithstanding s. 51A(a), purporting to correlate the payment of compensation to the acquisition of that particular land or waters to the freehold estate that is compulsory acquired. However, pursuant to s. 51A(2), s. 51A(1) must be expressly read with the entitlement to ‘just terms’ compensation as provided by s. 53.

The Court may make an order that compensation is payable, and if so, a determination is required to set out who is entitled to compensation or the method for determining who is entitled, the method (if any) for determining the amount to be given to each person, and a method for determining any dispute (see s. 94 of the NTA).

Unlike a native title determination application consent determination, which recognises rights in rem, there is the potential for multiple compensation applications and determinations to be made over the same area, depending on the nature of the compensable acts.

2. Recent developments

As noted above, there have been few native title compensation decisions. In Jango, the Court determined that compensation was not payable because native title rights did not exist in the first place. In De Rose, Mansfield J determined by consent that the State of South Australia was to pay native title holders compensation for acts. That consent determination came following extensive mediations, including on-country sessions, and resulted in a settlement whereby the parties agreed to the amount the State of South Australia was ordered to pay.
Chapter 1: An overview of native title

However, that agreed amount was kept confidential. A second native title consent determination for compensation in an area abutting the De Rose determination was determined in 2017 (the Tjayuwara Unmuru compensation determination).

The first litigated compensation decision that has resulted in an order of compensation was made by Mansfield J on 24 August 2016. This was the Timber Creek Single Judge Decision. In Timber Creek, Mansfield J approached the issue of quantum by assessing economic loss and interest, and separately and additionally, non-economic loss, making orders for compensation including:

1. 80% of freehold value of the land subject to the acts that extinguished non-exclusive native title rights; plus,
2. Simple interest on that market value of the acts from the date of respective acts to the date of the judgment calculated in accordance with Practice Note C16 of the Federal Court Practice Notes (Pre-judgment interest, being 4% above the cash rate published by the Reserve Bank of Australia: See http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm16); plus,
3. Solatium (or non-economic loss) of $1.3 million.

The Timber Creek Single Judge Decision was appealed to the Full Federal Court. This resulted in the Timber Creek Full Court Decision. Generally speaking, the findings in the Timber Creek Single Judge Decision were upheld. However, the Timber Creek Full Court Decision reduced the value of non-exclusive native title rights and decided that interests were more appropriately calculated at 65% of the value of freehold title (rather than 80%). Significantly, The Timber Creek Full Court Decision did not disturb the findings on non-economic loss, but queried the appropriateness of separating economic and non-economic loss in calculating compensation.

The Timber Creek Full Court Decision was appealed to the High Court. As at the date of updating this Handbook in October 2018, the High Court’s decision is pending.

Section 3A: A brief summary of recent noteworthy decisions

Determinations

_Agius v South Australia (No 6) [2018] FCA 358_

Facts

• Application for determination of consent made on 9 March 2018.
• Orders made on 7 March 2018 vacating trial on the basis that the parties’ agreement was to be formalised with an application under s 87 of the NTA.
• Claim comprised the heavily populated part of South Australia (including the city of Adelaide).
• Applicant and the State accepted the Kaurna Peoples as the traditional descendants of the area.
• A determination was sought in relation to non-exclusive native title rights and interests, and only in relation to a limited number of land parcels (seventeen to be exact).
• Agreement reached between the parties that included that part of the area claimed will be dismissed and that there will be a negative determination, that is, that native title does not exist in any part of the claim area other than those seventeen parcels identified.
• Determination made before full tenure assessment was undertaken.

Decision

• The Court made orders that there be a Determination of native title in the Determination Area, and that the Determination takes effect upon the registration of the ILUA.
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- That the native title rights and interests established are for personal, domestic and communal use but do not include the right to trade in, or the commercial use of the Native Title Land or the resources from it.
- The Court congratulated the Kaurna People and the State on reaching an agreement on the claim.

Reasons for Decision
- A negative determination can be made where the Court is satisfied that “there is no native title that can be recognised and thus protected” (Badimia). Before making a negative determination, an assessment needs to be made with great care (Badimia).
- The Court was satisfied that a negative determination was appropriate on the basis that the Applicant and the State had the benefit of receiving advice from experienced senior counsel, solicitors and expert anthropologists before making the decision, and that significant hurdles would be faced by the Kaurna Peoples had the claim gone to trial.
- The Court was satisfied that no other group of peoples had rights to that area and thus a positive determination could be made over the seventeen parcels of land.
- The Court was satisfied that a negative determination would provide certainty to those with proprietary rights in the claim area and would resolve the question of native title claims over the land comprising the city of Adelaide on a final basis.

Weribone on behalf of the Mandandanji people v State of Queensland [2018] FCA 247

Facts
- Consent determination under s 87 of the NTA.
- The Application was made on behalf of the Mandandanji people for a determination of native title under s 225 of the NTA.
- On 21 February 2018, the Applicant, State and other respondents signed an agreement pursuant to s 87(1) of the NTA that provided the Court to make a negative determination.
- The parties agreed that native title had been extinguished in all but 5% or 6% of the claim area.

Decision
- The Court decided that native title did not exist in the Determination Area, and made orders that there be a determination of native title in the terms set out by the agreement (a negative native title determination).

Reasons for Decision
- The Applicant and the State gave substantive consideration to the decision and received expert advice prior to making the decision to seek the negative determination.
- The agreement for a negative determination was appropriate on the basis of the significant differences between the expert anthropologists, the small portions of scattered land and waters where native title could be found to exist, the complexity, personal stress on many witnesses, the expense of trial and the opinions of the Applicant’s senior counsel regarding prospects of success.
- The Court was satisfied that no other claim group existed that could make a case for a positive determination over the area (in relation to the small number of areas where native title had not been extinguished).
- The Court was satisfied that a negative determination provides certainty as to the land title status to all persons with interests in the claim area.
- The Court flagged that the area could be subject to a future application for variation or revocation under s 13(1)(b) of the NTA if events occur that cause the determination to no longer be correct or where the interests of justice require it.
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ILUA Authorisation and Registration Validity

*Kemppi v Adani Mining Pty Ltd (No 4) [2018] FCA 1245*

**Facts**

- The Applicant was a group of Wangan and Jagalingou Aboriginal Peoples (W&J Aboriginal Peoples) opposed to the Adani Carmichael coal mine in Central Queensland.
- The area of the proposed mine is within the W&J determination application, as such Adani needs the consent of the W&J Aboriginal Peoples with respect to any native title that may be affected by the development of the mine.
- In April 2016, W&J Aboriginal Peoples and Adani entered into an ILUA pursuant to Div 3 Part 2 of the NTA. Adani then successfully applied to the Native Title Register to have the ILUA entered on the Register of ILUAs under Part 8A of the NTA.
- The Applicant wanted the ILUA registration set aside. As such, the Applicant’s argument comprised the following:
  1. The certificate issued by the native title representative body (NTRB) under s 203BE(1)(b) of the NTA was “void and of no effect” on the basis that the NTSP acted unreasonably and committed jurisdictional error. And secondly, that the NTSP failed to take into account a number of relevant considerations resulting in that jurisdictional error, including the laws and customs of the W&J Aboriginal Peoples concerning the criteria by which a person is entitled to W&J membership, and the extent to which persons who asserted W&J identity but who were not entitled to that status voted and participated at the ILUA authorisation meeting).
  2. Adani’s application to register the ILUA did not comply with regulations 5 and 7(2)(e) of the Native Title (Indigenous Land Use Agreements) Regulations 1999 (Cth) and for that reason the Registrar’s decision to register the ILUA was “void and of no effect”.

**Decision**

- The Applicant’s grounds of challenge to the Certificate and the registration of the Adani ILUA do not have any merit.
- The Court dismissed the application.

**Reasons for Decision**

- The Applicant’s unreasonableness ground had no merit on the basis that the Applicant’s construction of the critical question to be asked by a NTSP in forming the opinion referred to in s 205BE(5)(a) was incorrect. The identification process, which is the object of the opinion under s 203BE(5)(a) is intended to be inclusive and expansive.
- The other defect in the Applicant’s submissions was that it sought to limit the identification process to a person who can demonstrate they may hold native title in the area of the proposed ILUA. In addition, no one came forward to claim that they were not identified in the process.
- The Applicant’s relevant considerations ground had no merit on the basis that under s 203BE(5)(a) and (b) NTSP was not bound to have regard to the laws of the W&J Aboriginal Peoples and that membership of the W&J Aboriginal Peoples or the W&J claim group was not a criterion for participation in the authorisation process for the ILUA. As such, the extent to which persons who attended the authorisation meeting and were permitted to vote and participate despite not being W&J Peoples was not a consideration to which the NTSP was bound to have regard when issuing the certificate.
- The Applicant’s complete description ground had no merit on the basis that regulation 7(2) is not concerned with the authorisation process for an ILUA as the Applicant asserted, rather it concerns the application for registration of such an agreement under s 24CG of the NTA.
- Second, to this point regulations 5 and 7(2)(e) only require the complete description to be such that “it enables identification of the boundaries of” the area in question, “area” refers to that area where “it is intended to extinguish native title rights and interests”. As such, the ILUA contained a complete description.
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of the area as required by reg 7(2)(e). This construction of the meaning of ‘complete description’ is also supported by other statutory provisions (ss 24CH, 199B(1)(a), 24EB NTA).

Overlapping Claims

*Starkey (on behalf of the Kokatha People) v South Australia; Anderson (on behalf of the Adnyamathanha People) v South Australia; Paige (on behalf of the Barngarla People) v South Australia [2018] FCAFC 36*

Facts

* The case involved an appeal by 3 native title groups: Kokatha Peoples, Adnyamathanha Peoples and the Barngarla Peoples in relation to competing and overlapping native title claims over Lake Torrens area.
* Each group separately filed a native title determination application with the Court claiming they held native title rights and interests as defined by s 223 of the NTA in relation to the land and waters comprising Lake Torrens and sought an approved determination of native title to that effect.
* Each claimant group had already received a consent determination of native title over separate areas of the shores and surrounding land of Lake Torrens.
* All three groups failed in their claims before the primary judge.
* The Kokatha Peoples failed on the basis that their claimed rights and interests were contemporary in origin rather than traditional and thus did not meet the requirements of s 223(1)(b) of the NTA.
* The Adnyamathanha Peoples failed on the basis that they had not established a continual substantially uninterrupted connection with the claim area under the traditional laws and customs they held with respect to that area at sovereignty.
* The Barngarla Peoples failed on a similar basis to that of the Adnyamathanha Peoples but the primary judge raised greater concern regarding the credibility of the evidence produced.
* The primary judge found that it was not possible to prioritise one set of spiritual beliefs over the other for the purpose of a finding of native title over Lake Torrens in terms of ss 223 and 225 of the NTA and that the competing sets of spiritual beliefs asserted by each of the groups demonstrated a lack of continuance of a dominant particular set of spiritual beliefs (of one of the three groups over the others) from sovereignty to contemporary times for the purposes of s 223(1)(b) of the NTA.
* The question on appeal was whether the primary judge erred in his decision by not drawing an inference in favour of any of the appellants.

Decision

* The Court found that the appellants did not successfully demonstrate error on behalf of the primary judge and dismissed the appeal.

Each of the three unsuccessful claimant groups have lodged an application for special leave to appeal to the High Court.
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Future Acts

**BHP Billiton Nickel West Pty Ltd v KN (dec'd) (Tjiwarl and Tjiwalr #2) and Others (2018) 351 ALR 491**

**Facts**

- Involved an appeal from the judgements in Narrier v Western Australia [2016] FCA 1519; and Narrier v Western Australia (No 2) [2017] FCA 104. During trial the Tjiwarl Peoples challenged the validity of a number of mining tenures on the ground that the State’s failure to comply with the future act procedures under the NTA rendered the grant of those tenures invalid.

- The primary judge held that an act will only be covered by the validating provisions of the NTA if it meets the relevant description of acts to which the provisions apply and all the relevant procedures relating to those acts are complied with. As such, a number of licences were held invalid.

- BHP contended that the primary judge erred in holding that a miscellaneous licence relating to an access road was invalid because it had been granted without complying with the future act provisions of the NTA.

- The State contended that the primary judge erred in respect of an exploration licence granted under s 59 of the Mining Act in that her Honour ought to have found this was a “lease” for the purposes of the NTA and that as a result s 47B(1) (prior extinguishment to be disregarded) could not apply to the area of land covered by the exploration licence.

**Decision**

- The Court made findings that a failure to comply with certain procedural requirements of the NTA will not affect the validity of a grant.

- The text, structure and context of the NTA did not support the primary judge's conclusions about the consequences of non-compliance with procedural requirements. There is nothing in the statutory scheme that supports the primary judge's conclusion other than perceived unfairness.

- If invalidity was the consequence of non-compliance with procedural requirements, then that consequence applies to native title claims irrespective of their merits.

- Exploration licence E57/676 was a lease for the purposes of the NTA including s 47B(1)(b)(i). Section 47B(1)(b)(i) of the NTA applies in the case of an exploration licence, as such, historical extinguishment cannot be disregarded.

**Reasons for Decision**

- The provisions of the NTA are expressed to the effect that if an act is “covered” by the provision then it will be valid, the NTA does not mention words to the effect: “complies with” or “satisfies” this provision. Therefore, procedural requirements are then imposed in relation to the valid acts.

- Section 24OA (future acts invalid unless otherwise provided) is not the “starting point”, it is the finishing point and applies only if the act is not covered by an earlier provision and if an expressly stated condition of validity is not satisfied.

- Section 47B:
  - A lease that permits the lessee to use land solely or primarily for exploring or prospecting for things that may be mined is a lease that permits use of the land solely or primarily for mining. Where the contrary is intended, express words are used (s 26C(4)(c)(i) of the NTA).
  - The legislative intention to treat all licences and authorities to mine as leases for the purpose of the NTA is evident from that scheme, as is the legislative intention to treat the concept of a “mine” or “mining” as encompassing exploring or prospecting for things to mine.
  - The reference to “lease” in s 47B(1)(b)(i) of the NTA includes any mining lease. “Mining lease” includes any licence to mine, and licence to mine includes a licence to explore or prospect.
  - An exploration licence granted under s 59 of the Mining Act satisfies the terms of s 245(1) of the NTA, as the exploration licence is taken to be a mining lease, which “permits the lessee to use the land or waters covered by the lease solely or primarily for mining”.

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Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources [2017] FCAFC 218

Facts

• Western Australia made a s 29(2) future act notification with respect to a mining lease for Sheffield.
• The traditional owners, Mount Jowlaenga and Sheffield agreed to a negotiation protocol.
• It was agreed in the negotiation protocol that negotiations would be with the traditional owners' lawyers and not directly with the traditional owners.
• On 24 October 2016, a s 35 application – arbitration application (determination that a future act might be done) was made with the NNTT.
• After the application was made, Sheffield departed from the negotiation protocol and made direct contact with the traditional owners.
• The traditional owners argued that Sheffield had failed to meet its obligation to negotiate in good faith under s 31 of the NTA and that subsequently the NNTT was prevented from making a determination.
• The NNTT followed earlier decisions and held that there was no legal obligation to negotiate in good faith once a s 35 application was made and that the mining lease should subsequently be granted.
• The traditional owners appealed the decision in the Federal Court. The appeal was dismissed, and an application to appeal to the Full Court was then made.

Decision

• The Court found that the obligation to negotiate in good faith imposed by s 31 of the NTA continues to apply to negotiations conducted after an arbitration application has been made.
• The appeal was allowed and the decision of the primary judge and the NNTT was set aside.
• The good faith issue was remitted back to the NNTT for re-hearing.

Reasons for Decision

• The obligation to negotiate in good faith is not subject to a particular point in time or cut-off date.
• Because there is no obligation on the Government party or a grantee party to continue to negotiate once a s 35 determination has been made does not necessarily mean that the obligation to negotiate in good faith, does not apply as a matter of implication where the parties do agree to continue to negotiate.

Upon rehearing in Sheffield Resources Ltd and Another v Charles and Others on behalf of Mount Jowlaenga Polygon #2 [2018] NNTTA 48 the NNTT determined that Sheffield did not negotiate in good faith.

Variation of Approved Native Title Determination

Talika Matuwa Piarku (Aboriginal Corporation) RNTBC v Western Australia [2017] FCA 40

Facts

• A Form 3 Revised Native Title Determination Application (variation application) was made pursuant to s 61(1) of the NTA.
• The variation application sought to vary an approved determination of native title (the consent determination of native title which was made on 29 July 2013, in WF (dec'd) on behalf of the Wiluna People v Western Australia).
• A Minute of Consent was filed on 24 November 2016, wherein parties reached an agreement on the terms of the orders and varied determination of native title.
• The section 13(5) grounds for variation were satisfied on the basis that the determination was no longer
correct as areas of pastoral improvements were listed in the determination as areas where native title
does not exist, contrary to Western Australia v Brown (which found that pastoral improvements do not
extinguish native title). Pursuant to the decision in Brown native title now existed in those areas and was
reflected in the amended determination.

Decision
• The Court was satisfied that variation should be made and made orders varying the Determination made
  on 29 July 2013 in WF (Deceased) on behalf of the Wiluna People v Western Australia.

Reasons for Decision
• The Court was satisfied that an event had taken place since the determination was made which rendered
  the determination incorrect – Western Australia v Brown and it was in the interests of justice to vary the
  approved determination. The pending decision in Brown was contemplated at the time the determination
  was made and reflected in the Minute in support of the determination.

Section 4: An overview of the native title process

This section includes a brief look at:
1. The major players in the process
2. The typical steps involved in making a native title claim
3. ‘Future Acts’
4. The ‘Right to Negotiate’ (RTN)
5. Indigenous Land Use Agreements (ILUAs).

Until a court decides that native title exists or does not exist, there is no certainty about the location of
native title, the exact content of native title rights where native title is present, and who holds those rights,
except of course in the collective mind of the native title holders. The court’s decision is called a ‘native title
determination’. These determinations can be made with the consent of all the parties to a claim (called a
‘consent determination’), or without consent after a trial before a judge. A determination can also state that
native title does not exist.

Native title is an ‘existing’ or ‘original’ right. This means that where a court finds that native title exists, then it
has always existed in that area, including since the British claimed sovereignty for that particular land, subject
to any extinguishment that has occurred since sovereignty.

Thus the role of the courts and the Australian legal system is to resolve disputes about where the native title
rights exist within Australian territory, and what those rights consist of in a specific location for the native title
applicants.

This is very different to the idea of ‘land rights’ under Commonwealth, State and Territory legislation. ‘Land
rights’, unlike native title, are only created for the first time after a claims process is completed, such as the
process under the ALR Act.

1. The major players in the native title claim process

Listed below are major players you will come across when working in native title. These will each be
examined in turn:
  i  Applicants
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Respondents

Federal Court of Australia

National Native Title Tribunal (NNTT)

Department of the Prime Minister and Cabinet (PM&C), (formerly FaHCSIA)

Commonwealth and State/Territory Attorney’s-General Departments

State or Territory Native Title Units

Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs)

Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs)

The following organisations have specific roles and also provide information and support:

a) Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), in particular the Native Title Research Unit (NTRU)

b) Office of the Registrar of Indigenous Corporations (ORIC).

Applicants

An ‘applicant’ is a person or a group of people that have made an application to the court. An applicant has a special legal status in the NTA. In a native title application, the applicant may be one or more persons (from the group) who must be authorised by the native title claim group to lodge the application with the Federal Court, conduct negotiations in relation to it and make decisions concerning the application. It is a significant responsibility to act on behalf of the native title group as authorised by that group.

Respondents

A ‘respondent’ to a native title application is a person, corporation or group whose legal interests may be affected by a claim for native title. Consequently, they are entitled to participate in the legal processes of an application and put their case. A respondent has the power to consent or not to the recognition of native title in a consent determination.

In the majority of native title determination applications, the most important respondent is the government.

- In most cases, it is the State or Territory government agency that deals with land matters (For example, the Queensland Department of Natural Resources and Mines, or the Victorian Department of Sustainability and Environment) that will have responsibility for their government’s handling of the response to a native title determination application.

- In some instances a State or Territory government may have granted responsibility for a particular area of land or water to a statutory body. Where a native title claim involves a national park controlled by a statutory body, for example, that body will also be a respondent.

- The Commonwealth Government may also choose to be a respondent in any native title claim, although sometimes this right is not exercised. Where the Commonwealth does become a respondent, it has the same rights and responsibilities as any other respondent – that is, it is not treated differently by the court.

- Private individuals and organisations may also be respondents in native title proceedings. It is not uncommon for the interests of farmers, mining companies, fishermen, and other users of land and waters to be represented in native title claims by an industry representative body. Another Indigenous group or individual claiming native title may also be a respondent as may an Aboriginal Corporation holding an interest in land, for example a pastoral lease.
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(iii) Federal Court of Australia

Indigenous peoples or groups hoping to prove that native title exists must lodge a native title determination application with the Federal Court. The Court decides whether or not native title exists for the land or waters claimed in each native title determination application. If the Court decides native title does exist, it will then determine the exact substance and nature of those native title rights.

The Federal Court can also hear native title compensation applications for the loss (extinguishment) or impairment of native title rights. To receive compensation (which might be money or, in some circumstances, non-monetary benefits such as land grants), native title holders must lodge a compensation application with the Federal Court.

The Federal Court manages the native title determination or compensation application once the application has been filed. This is generally done by a Judicial Registrar of the Court who conducts case management conferences and sometimes mediation of the application. A particular judge is generally assigned to oversee the case — the “provisional docket judge” and conduct directions hearings. If there is no agreement about part or all of the application, then the same judge will often conduct a hearing to decide the issues in dispute. Mediation is no longer conducted by the NNTT, but now by a Federal Court Registrar or a member of a panel of native title mediators. Mediation can also be conducted by external mediators approved by the Federal Court.

(iv) National Native Title Tribunal

The National Native Title Tribunal (the Tribunal) is an Australian Commonwealth Government agency which was set up under the NTA. Originally one of its primary roles was to make native title determinations and conduct mediation to achieve agreements recognising native title. The Tribunal no longer conducts mediations in relation to the recognition of native title, nor does it make determinations of native title.

The main role of the Tribunal now is to assist a party to make a native title or compensation application by providing information and research; to conduct future act mediations and arbitrations; and to administer the registration test for new native title claimant applications. The Tribunal also assists parties to make ILUAs and can provide mediation services in relation to those Agreements (see below ‘Indigenous Land Use Agreements’).

The Tribunal oversees the ‘right to negotiate’ and has decision-making powers under that process. Because it is not a court, the Tribunal cannot decide whether native title exists.

The Native Title Registrar (the Registrar) is primarily responsible for the procedural operation of the Tribunal, and undertakes functions including:

- applying the registration test (see below) to native title determination applications
- maintaining and providing public access to the Register of Native Title Claims (a public record of registered claims), the Native Title Register (a public register of native title determinations) and the Register of Indigenous Land Use Agreements (a public register of registered ILUAs)
- processing applications for the registration of Indigenous Land Use Agreements
- providing assistance to applicants and other people involved in native title proceedings, and notifying specified people, organisations and governments of native title determination applications and Indigenous Land Use Agreements.
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(vi) Prescribed Bodies Corporate (PBCs) and Registered Native Title Bodies Corporate (RNTBCs)

A PBC is a corporation formed to hold native title, or to represent native title holders, after the Federal Court makes a determination that native title exists. PBCs act as the main channel for communication between the native title holders and other persons and groups, such as mining companies, farmers or governments.

Under the NTA, the native title holders must establish a PBC once they are found to have native title. The PBC must receive approval as a PBC from the Federal Court, at which point the PBC is placed on a register maintained by the National Native Title Tribunal. Once it is registered, a PBC is known as a registered native title body corporate (RNTBC).

It is also common for native title holders to establish a trust and/or a company limited by guarantee to conduct business activities and to separately ensure registration as a Public Benevolent Institution (PBI) to conduct charitable activities, obtain tax exemption and deductible gift recipient (DGR) status.

There are 175 RNTBCs according to the Office of the Registrar of Indigenous Corporations (ORIC), as of the date updating this Handbook on 14 November 2017. Most have next to no income. Institutionally this is the most challenging part of the “system” and constitutes a significant problem in achieving real native title outcomes for Indigenous peoples in Australia.

The following organisations have specific roles and also provide information and support:

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

AIATSIS has a Native Title Research Unit (NTRU), which can assist with native title research. It also conducts a number of native title related research projects including Agreement Making, Connection, Corporations, Development and Tax, Land and Water, Law and Negotiation and Mediation. See www.aiatsis.gov.au/ntru/overview.html. AIATSIS is the primary organiser of the annual Native Title Conference. It also maintains a website on PBCs, see www.nativetitle.org.au

The Office of the Registrar of Indigenous Corporations (ORIC)

The Registrar is an independent statutory office holder who administers the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act). This Act guides how Indigenous corporations are run. The CATSI Act started on 1 July 2007, replacing the Aboriginal Councils and Associations Act 1976.

The Registrar’s office supports and regulates the corporations that are incorporated under the Act. It does this in a variety of ways: by advising them on how to incorporate, by training directors, members and key staff in corporate governance, by making sure they comply with the law and by intervening when needed. As most NTRBs and all RNTBCs are incorporated under the CATSI Act, ORIC and its regulatory and support functions play an important part in the management and administration of native title.

Reforms to the CATSI Act

As at the date of updating this Handbook in October 2018, there are significant changes to the CATSI Act being proposed. The proposed changes follow a technical review and public consultation conducted in late 2017 and aim to reduce red tape, especially for small corporations, increase transparency for members and align the CATSI Act with the Corporations Act 2001 (Cth) (Corporations Act). It is intended that the proposed changes will take effect on 1 July 2019 with a two-year transition period. A summary of the proposed changes can be found below.
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1. **Size classification of CATSI corporations**

   Proposed change: Simplify the classification system for corporations to a revenue-based test.

   Under the CATSI Act corporations are classified as large, medium or small by a three-part test based on income, assets and number of employees. The current test however is far too complicated and the threshold between small and medium corporations is too low. Under the proposed revenue-based test, corporations with revenue under $250,000 per year will be classified as small corporations.

2. **Rule books**

   Proposed changes: Require that a corporation’s rule book include all the ‘replaceable rules’. Allow the Registrar to refuse to register rule books that are not fit for purpose.

   The intent of the ‘replaceable rules’ are for corporations to adopt or tailor them to suit in the corporation’s constitution. As it stands there are 35 ‘replaceable rules’ spread throughout the CATSI Act. It is intended that all the replaceable rules will be put into one document and model rule books in plain English will be provided for corporations to easily adapt and adopt. The proposed changes are intended to allow directors and members to more easily navigate their rule book and participate more successfully in their corporation's affairs.

3. **Business structures**

   Proposed change: Make it easier to create subsidiaries and allow joint venture organisations to be set up under the CATSI Act.

   It is very difficult to create wholly-owned CATSI Corporations as subsidiaries under the CATSI Act compared to the Corporations Act. As such, the proposed changes seek to allow for CATSI Corporations to incorporate wholly-owned CATSI Corporations as subsidiaries under the CATSI Act as well as joint ventures. By allowing a variety of business structures to be established under the CATSI Act this is intended to provide ongoing regulatory support and open the door to greater economic opportunities.

4. **Meetings and reporting**

   Proposed changes: Allow small corporations to pass a special resolution to not hold an AGM for up to three years. Require medium and large corporations to table their annual reports at the AGM. Allow corporations to activate a once-only extension of time for a period of 30 days to hold an AGM or lodge reports.

   It is a current requirement under the CATSI Act that a corporation holds an annual general meeting (AGM) after the end of every financial year. This can be quite costly for small corporations. As such the proposed changes to defer the AGM for up to three years provide greater flexibility for small corporations. It will still be a requirement however, that small corporations submit and provide their general report to members annually. In addition, the tabling of annual reports at the AGM aim to make medium and large corporations more transparent and accountable to members.

   The added change around extension of time for AGM’s and annual reports seeks to address uncontrollable situations such as where there is a death in the community, a natural disaster, cultural activity or an unavoidable delay in the audit.
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5. Membership

Proposed changes: Allow use of alternative member contact details. Enable suppression of personal information in certain cases.

The proposed changes seek to make better use of alternative member contact details for communications, in particular where members of a corporation are graphically dispersed and for cancellation of memberships. Under the current provisions of the CATSI Act membership may be cancelled by special resolution if the member has been uncontactable for two years and two attempts have been made to contact them. The proposed amendments are intended to reduce the time to 12 months with three attempts and provide options to use alternative contact details.

The proposed change in relation to the suppression of personal information is intended to keep people safe.

6. Transparency of senior executives

Proposed change: All medium and large corporations will report the remuneration and work history of senior managers to members.

The proposed change requires medium and large corporations to provide a director report for senior executives, namely the CEO, CFO or Managing Director. The reports will then be provided to members at the AGM and publicly listed on ORIC. The intention of this change is to provide members with more information about their senior management team. A question this raises is how should ‘remuneration’ be defined.

7. Related third party transactions

Proposed changes: Allow corporations to make some low-value related third party transactions, up to $5,000 per party annually. Allow discretion for the Registrar to allow other transactions.

The current regime under the CATSI Act requires member approval for any related party benefit which works against corporations with small communities and limited options for purchasing goods or services. The proposed changes allow small corporations to approve third-party transactions up to $5,000 per party annually rather than getting member approval and give discretion to the Registrar to allow other transactions to be approved.

8. Special administration

Proposed changes: Broaden and clarify the grounds for putting corporations into special administration. Streamline the ‘show cause’ process if a board unanimously requests a special administrator be appointed.

The proposed changes seek to revise outdated processes for the appointment of a special administrator and broaden the grounds for appointment, in particular where the corporation has no directors, is insolvent, there is doubt as to whether the board of directors is validly constituted, there has been a substantial or repeated breach of related party transactions rules or where a Registered Native Title Body Corporate is conducting its affairs contrary to the interests of the common law holders.

9. Voluntary deregistration

Proposed change: Make the criteria for voluntary deregistration more flexible by reducing the requirement to a special resolution of the members (75% of votes cast).
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Under the current regime 100% of the members of the corporation must agree to voluntary deregistration, which is practically impossible. The intention of this change is to reduce the requirement to a special resolution (75% of the votes cast) which in turn would save costs by allowing more corporations to voluntarily deregister rather than voluntarily wind up.

10. Compliance powers

*Proposed change: Broaden investigation and compliance powers to address lower-level compliance problems.*

The Registrar’s current powers are limited and only suited to more serious levels of non-compliance. As such the proposed changes seek to give the Registrar additional powers, such as the power to issue fines and require enforceable undertakings in relation to lower-levels of non-compliance (for example a failure to lodge annual reports).

11. Other technical changes

- Prohibiting entities using names like ‘Aboriginal Corporation’ if they are not incorporated under the CATSI Act.

- Reversing the default position on independent directors in model rule book so that the corporation can appoint independent directors if they want to.

- Extending the provisions to protect native title bodies from conflicting statutory duties under the CATSI Act and State/Territory native title legislation.

2. The typical steps involved in making a native title claim

The formal name for a native title claim is a ‘native title determination application’ or a ‘native title compensation application’. Native title determination applications and native title compensation applications are started in the Federal Court. Before an application may be made to the Court, a community claiming to hold the native title over a certain area must hold a meeting (called an ‘authorisation meeting’).

At the authorisation meeting the community may decide to make a native title determination or a native title compensation application and choose their community representatives for court appearances.

Once the application is made, those community representatives become the ‘applicant’ in the Federal Court proceedings. This means they are responsible for dealing with court matters and claim negotiations. It does not mean, however, that they can make major decisions without consulting their community. For native title compensation applications, the application can be brought by a RNTBC (pursuant to in respect of acts that have impaired native title in a determined area), or, by Applicants (in respect of acts that have extinguished native title) on behalf of a Compensation Claim Group, pursuant to section 61 of the NTA.

Once the application is lodged in the Federal Court, it is referred to the Tribunal for registration testing.

(a) The Registration Test

Once a native title determination application has been made to the Federal Court, the Court hands the application to the Native Title Registrar at the NNTT, who considers whether the claim satisfies a set of conditions (the Registration Test). The conditions require that the application contain specified content and meet a sufficient standard of merit (i.e. it must have sufficient chances of success). If the Registrar decides that an application satisfies the conditions, then the application is registered on the Register of Native Title Claims and the applicants are entitled to the ‘right to negotiate’ (RTN - see below). This is the most significant aspect
Chapter 1: An overview of native title

If the registration test is not satisfied, the application is not registered on the Register of Native Title Claims and the applicants are not entitled to the ‘right to negotiate’ and other procedural rights as ‘registered claimants’. The application does, however, continue as an application in the Federal Court and nothing prevents a native title determination from being made as a result, although it is unlikely to succeed if it has not passed the registration test.

The native title claims process is outlined below:
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b) Mediation and ‘consent determinations’

Mediation is where a Registrar of the Federal Court or an appointed mediator meets with the applicants and respondents involved in a native title determination application, to try to resolve the matter by agreement. Where this occurs the agreement is called a ‘consent determination’.

Mediation by the Court typically involves many meetings between the applicants and respondents. Sometimes, all of these parties are assembled for one large meeting. Often, however, applicants meet with respondent parties separately to try to resolve the individual issues between them.

The most important respondents are usually state or territory governments. Governments, as part of the governing structure of the State have responsibilities to ensure claims are genuine and represent all citizens in their jurisdiction. Other respondents may have different interests in the area claimed, but the NTA requires that all parties, no matter how large or small their interest, agree to a ‘consent determination’ before it is made. A consent determination can be made for the whole or part of an area subject to a native title claim. If it is for part of the claim area, only the parties with an interest in that part need to come to agreement.

Most native title applications are now settled by agreement through mediation – as consent determinations.

Mediation often lasts for many years, but it does not go on forever. The Federal Court may stop mediation where it has been unsuccessful. The next step is a full or part trial in the Federal Court, ending with the court making a determination of native title. Sometimes only limited issues are in dispute, for example, the type of native title rights that can be recognised because of extinguishment, and not connection to country by the native title claim group.

For native title compensation applications, as at the date of updating this Handbook in October 2018, there has been two mediated native title compensation applications that have resulted in consent determinations (De Rose v State of South Australia [2013] FCA 988 (De Rose) and Pearson on behalf of the Tjayuwara Umuru Native Title Holders v State of South Australia (Tjayuwara Umuru Native Title Compensation Claim) [2017] FCA 1561.

3. ‘Future Acts’

A ‘Future Act’ is any use of land or waters that affects native title. The NTA provides for a complex set of procedural rights that apply in relation to a proposed development or use of land and waters where native title exists or where there is a registered native title claim. In most cases, native title holders and registered native title claimants have a right to be notified about, and comment upon, proposed future acts. In these cases, generally the non-extinguishment principle applies and compensation for the effect upon native title can be claimed in the Federal Court.

For example, if the government wishes to grant a licence to take water that affects a native title right to take and use water for domestic and cultural purposes, a notice is to be sent to the native title holders. The notice advises of the application for the licence and provides an opportunity to comment. It may be that it is a spring that is a sacred site. In those circumstances the native title holders would presumably advise the government not to grant the licence. The government would then decide whether to grant the licence or not. If the government decided to grant the licence the legal action generally available to native title holders would be to seek protection under Indigenous heritage protection legislation and/or seek compensation for the adverse impact on the native title rights. Each state has its own heritage protection legislation, which is additional to the requirements in the NTA.
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For a special category of authorised future acts, mostly related to mining, exploration activities and the compulsory acquisition of native title, native title holders and registered native title claimants have the additional entitlement to the ‘right to negotiate’ (see below).

There is no veto or consent requirement in native title law in relation to developments that take place where native title exists. This means that if the native title holders say no to a new development, native title law will not enforce this decision. This is different to the ALR Act where in relation to mining traditional owners have a veto that is only subject to legal override by the Federal Minister if it is in the “national interest” to do so. No Federal Minister has exercised this power to date.

There are however substantive rights under native title where the RTN applies.

4. The ‘Right to Negotiate’

The ‘right to negotiate’ is a compulsory negotiation process overseen by the Tribunal. It applies mainly to proposed mining and exploration activities and the compulsory acquisition of native title, but does not apply to off-shore activities. ‘The right to negotiate’ involves a specified period of mandatory negotiation followed (if agreement is not reached) by a decision of the Tribunal about whether to permit the activity.

The aim of the procedure is to allow all the groups affected by a proposed development (that is, the government, the developer, and the claimant group or native title holders) to talk about the development and come to an agreement about whether, or on what terms, it should go ahead. Under the ‘right to negotiate’, the developer and the government wishing to authorise the development must meet and negotiate with the native title holders or registered native title claimants for a set period of time. If no agreement is reached between these parties within the set time, any of the parties may make a ‘future act determination application’ to the Tribunal. The Tribunal must then decide whether the application goes ahead or not. It can refuse the development application, or it can approve the application with or without conditions. Most commonly development applications are approved with conditions. A relevant Minister can also finally determine a future act matter.

5. Indigenous Land Use Agreements (ILUAs)

An alternative procedure for dealing with proposed future acts is the negotiation of an ILUA. This is a voluntary process that can only be used if everyone involved agrees. This agreement is made by native title holders, native title claimants or persons claiming to hold native title (even if they have not yet made a claim for the specific area), NTRBs and other parties proposing to undertake future acts in the area. These people may ask the NNTT for help in making an ILUA.

Commonly, ILUAs authorise future acts, in exchange for benefits to the Indigenous parties to the ILUA. Where native title has not yet been determined for an area, ILUAs are commonly used to settle practical issues involving the recognition of native title in a consent determination. For example, where native title is recognised on a pastoral lease an ILUA is often negotiated to deal with the access and use of the land and waters to lessen conflict between the pastoral use and the native title use of the same area. ILUAs are also commonly used to provide non-native title outcomes and in more comprehensive settlements of native title claims such as those described in Section 5.

Before they can be registered, the ILUA goes through a public notice period, during which time interested parties (or those claiming an interest) may object. Once any objections have been resolved, and this period has passed, the ILUA may be registered by the NNTT. An ILUA is binding on all native title claimants or holders for the area which it covers, regardless of whether they signed it.
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On 22 June 2017, the Federal Parliament enacted the Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth) (the ILUA Act). The ILUA Act sought to overcome uncertainty regarding the registration of ILUAs arising from McGlade v Native Title Registrar & Ors [2017] FCAFC 10, where an ILUA is not executed by all people comprising the Applicant, including those who are deceased, not contactable, or are exceeding the authority of a claim group who has authorised the ILUA by refusing to sign.

An ILUA is a form of contract between a native title community and other persons or groups wishing to use the native title land. The terms of the contract must be followed by both the native title community and the other parties to the contract. See Image 5 for locations of ILUAs across Australia.

Section 5: Native title settlements and comprehensive agreements

The Indigenous leaders that negotiated with the Keating Government in 1993 understood that many Indigenous people would not have native title recognised and that where it was recognised it would only provide partial justice for those concerned. It was for this reason that the ‘Peace Plan’ was put to the then Federal Government that sought much wider outcomes than the recognition of native title.

The other outcomes that were achieved as part of the native title negotiations were:

the Indigenous Land Fund

the Social Justice Package – the Reports to Government on Native Title Social Justice Measures by the Aboriginal and Torres Strait Islander Commission and Council for Aboriginal Reconciliation. The Social Justice Reports were never implemented with the change of government in 1996

the provisions in the NTA (now repealed) providing for local and regional agreements.

The inclusion of the potential recognition of regional agreements was an attempt to establish the building blocks within the NTA of the notion of comprehensive agreements as a means of settling native title claims. A Comprehensive Agreements settlement policy has been successfully agreed and implemented in Canada and New Zealand as a means of settling traditional land claims without litigation in most cases. These agreements generally include compensation, land title, resource rights and in Canada forms of self-government.

There is no established Comprehensive Agreement policy in Australia as a means of settling native title claims, although the word comprehensive is used by parties in the Australian context. The NTA was amended in 2009 to allow the Federal Court to make orders that included non-native title matters as part of the final agreement or consent determination resolving a claim, and the following is a brief sample of the range of Agreements that have been reached in Australia to date:

1. Traditional Owner Settlement Act 2010 (Vic)
3. Cape York State Land Dealings and National Parks Transfer Program
4. Noongar Native Title Settlement.
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1. Traditional Owner Settlement Act 2010 (VIC)

This Act provides for what is described as an "alternative framework for settling native title in Victoria". Native Title Services Victoria (now known as First Nations Legal & Research Services) states that it is a process whereby traditional owners can enter a "comprehensive settlement" to address their claim. Instead of a native title application being filed in the Federal Court a "threshold statement" is lodged with the State Government to consider. A decision is then made to negotiate which may include the following subject matters:

- Recognition and Settlement Agreement to recognise the special relationship of a Traditional Owner group to their traditional land
- Land Agreement providing grants of freehold title for cultural and economic purposes and grants of Aboriginal title over land that is to be jointly managed with the State
- Land Use Activity Agreement which provides a simplified process for providing comment or consent to activities on public land
- Natural Resource Agreement that recognises customary use of natural resources and provides for consultation and participation of Traditional Owners in managing natural resources
- Funding Agreement to enable Traditional Owner corporations to undertake their Settlement Agreement responsibilities and engage in economic development activities
- Indigenous Land Use Agreement that resolves outstanding native title issues.

A final agreement may also include the recognition of native title through an associated consent determination of native title in the Federal Court.

The Gunaikurnai Settlement Agreement was the first to be finalised under the Victorian Settlement Act in 2010. It included the recognition of native title in certain areas, joint management of some national parks with the State and the grant of freehold title in some areas to the Gunaikurnai Land & Waters Aboriginal Corporation.


2. Ord Final Agreement ILUA - Miriuwung Gajerrong people

This is an agreement between the Miriuwung Gajerrong people and the State of Western Australia and various third party interests executed in 2005 and registered as an ILUA in 2006. In summary the agreement provides for:

- benefits of $24 million dollars to the Miriuwung Gajerrong Corporation
- $11 million dollars for Social and Economic Impact
- $6 million dollars for ownership and joint management arrangements for 6 conservation areas

4 See Native Title Services Victoria (the local NTSP) at http://223.130.27.135/~ntsvcom/native-title/traditional-owner-settlement-act/ (viewed 5/7/13)
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allocation of freehold land for commercial and community purposes

approval for the second stage of the Ord irrigation development; and includes compensation for Ord Stage 1 development in the 1960’s.

3. Cape York State Land Dealings and National Parks Transfers Program

In association with the settlement of native title through consent determinations and ILUAs Balkanu Cape York Development Corporation and the Cape York Land Council have negotiated a process with the State of Queensland to secure broader outcomes for native title holders.

This process includes the Cape York Peninsula Aboriginal Land (CYPAL) National Park initiative for cultural and environmental purposes and secures land for traditional owners for economic development purposes. The process utilises the Aboriginal Land Act 1991, which provides for Aboriginal freehold to provide both ownership and joint management outcomes for conservation and cultural purposes and separately freehold title and leasing which can act as a fungible interest for economic development purposes.

Some 2,272,977 hectares for both Aboriginal owned protected areas and freehold has been handed back under this scheme as of the end of the financial year 2012.

4. Noongar Native Title Settlement

On 17 December 2009 a ‘Heads of Agreement’ between the South West Aboriginal Land and Sea Council (SWALSC - an NTRB) and the government of Western Australia was signed, aimed at resolving the six Noongar native title claims over south-west Western Australia. Following this SWALSC and the Noongar Negotiation Team undertook substantial consultations with the Noongar community and negotiated with the WA Government about the detail of the settlement. These negotiations were completed in late 2014. Between January and March 2015, SWALSC convened 6 Authorisation meetings attended by more than 1500 Noongar people. All 6 claim groups voted to accept the negotiated settlement contained in Indigenous Land Use Agreements (ILUAs).

On 8 June 2015, the Government of Western Australia executed the 6 ILUAs.

Under the Settlement native title is exchanged for statutory recognition of the Noongar people as the traditional owners of the south west of the state. Other components of the settlement include: $600 million to be paid in instalments over 12 years, approximately 320,000 hectares of land transfers (including ‘up to 20,000).

The Settlement ILUAs were accepted for registration by the NNTT in October 2018.
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1b. Native title determinations since 1992 – the figures
Image 1b shows that there have been 369 decisions in relation to native title since 1992. Of these 328 have been positive (of which 41 have been litigated and 292 settled by the agreement of the parties, 36 were unopposed, and 6 were conditional determinations). There have been 63 determinations that native title does not exist. These figures are from the National Native Title Tribunal and are current up to 18 October 2016.

2. Other native title decisions and judgements of interest
Although there have been 369 formal native title determinations since 1992, meaning that a final decision has been made by the court as to whether native title exists or does not exist in a particular area, there are many other well publicised and well known native title judgments that do not include a final determination regarding the existence of native title. These are shown on Image 2.

For example, in the Wongatha decision (in the Goldfields region of WA), the judge did not determine whether the applicants had native title or not, rather the claim was dismissed on the basis that it was not properly authorised. In the appeal decision of Bennell v Western Australia (the Single Noongar Claim), the Full Court of the Federal Court found that the trial judge had misapplied the test for continuity and connection under NTA s.223 (1)(a) and (b). However the Court did not go on to make a final decision about continuity and connection but sent the matter back to be decided by another single judge. This case has since been subject to negotiation with the State and an extensive comprehensive agreement is being implemented as previously described in Section 4-5 – the Noongar Native Title Settlement. Image 2 below includes the areas involved in each of these native title judgments.

3. Indigenous Land Use Agreements (ILUAs)
Image 3 shows the locations of the 1,118 registered Indigenous Land Use Agreements (ILUAs). There are three types of ILUAs: Area, Body Corporate and Alternative Procedure Agreements. There are currently no registered Alternative Procedure Agreements. Green indicates registered Area Agreements (843 according to NNTT data), with the pink indicating those pending registration. Purple indicates the registered Body Corporate Agreements (275), with light green indicating those yet to be registered.

4. Locations of currently registered claimant applications
Image 4 shows the areas in which the 245 claimant applications are still to be resolved. NTRBs represent the applicants in 80-90% of these claims. However, as at 18 October 2016, there are over 30 additional unregistered claimant applications, and a further 36 non-claimant applications, 5 compensation application and 1 revised native title determination application.
Chapter 1: An overview of native title

Image 1b: Determinations of native title since 1992 - the figures

354 Determinations that Native Title exist

74 Determinations that Native Title does not exist

438 Determinations (49 by litigation, 346 by consent)

Source: National Native Title Tribunal. Information accurate as at 18 October 2016
Chapter 1: An overview of native title

Image 1a: Determinations of native title since 1992

Native Title Determinations
As at 30 June 2018

<table>
<thead>
<tr>
<th>Determination Outcome</th>
<th>Total Area (sq km)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Native title exists (exclusive)</td>
<td>360,145</td>
</tr>
<tr>
<td>Native title exists (non-exclusive)</td>
<td>1,217,503</td>
</tr>
<tr>
<td>Native title does not exist</td>
<td>3,000,110</td>
</tr>
<tr>
<td>Native title extinguished</td>
<td>223,774</td>
</tr>
<tr>
<td>Total</td>
<td>6,531,458</td>
</tr>
</tbody>
</table>

Note: The National Native Title Tribunal (NNTT) and other native title registrars are committed to providing the public with access to the full range of information about native title determinations. This information is intended for use by authorized users for the purposes of policy development, research, and for any other purpose for which this information is appropriate. The information provided is intended to be used in conjunction with other reliable sources. Readers are advised to consult the relevant native title determinations to verify the accuracy of the information presented. This map is not intended to be used for navigation. The National Native Title Tribunal Information Service is available at: 1300 877 520.
Chapter 1: An overview of native title

Image 2: Other native title decisions and judgements of interest

Register of Native Title Claims
As at 30 June 2018

Claimant applications that have complied with the registration test

<table>
<thead>
<tr>
<th>Claimant applications</th>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>VIC</th>
<th>WA</th>
<th>Total</th>
</tr>
</thead>
</table>

Source: National Native Title Tribunal. Information accurate as October 2018
Chapter 1: An overview of native title

Image 3: Locations of Indigenous Land Use Agreements (ILUAs)

Table: Indigenous Land Use Agreements

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Total Area of Land covered</th>
<th>% of Land covered</th>
<th>Total Area of Sea covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>2,255,007</td>
<td>33.3%</td>
<td>2,734</td>
</tr>
<tr>
<td>NSW</td>
<td>920</td>
<td>1.4%</td>
<td>5</td>
</tr>
<tr>
<td>NT</td>
<td>1,977</td>
<td>3.2%</td>
<td>121</td>
</tr>
<tr>
<td>QLD</td>
<td>945,093</td>
<td>14.6%</td>
<td>5,244</td>
</tr>
<tr>
<td>SA</td>
<td>915,360</td>
<td>14.6%</td>
<td>160</td>
</tr>
<tr>
<td>VIC</td>
<td>105,255</td>
<td>1.7%</td>
<td>106</td>
</tr>
<tr>
<td>WA</td>
<td>641,400</td>
<td>1.0%</td>
<td>10,205</td>
</tr>
<tr>
<td>T.A.S.</td>
<td>15</td>
<td>0.0%</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>2,255,007</td>
<td>33.3%</td>
<td>29,756</td>
</tr>
</tbody>
</table>

Source: National Native Title Tribunal. Information accurate as October 2018
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Image 4: Locations of currently registered claimant applications

<table>
<thead>
<tr>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>Qld</th>
<th>SA</th>
<th>VIC</th>
<th>WA</th>
<th>Total</th>
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<tr>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>3</td>
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<td>7</td>
</tr>
<tr>
<td>0</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>3</td>
<td>1</td>
<td>7</td>
</tr>
</tbody>
</table>

Source: National Native Title Tribunal. Information accurate as at October 2018
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Native Title Act 1993

Act No. 110 of 1993 as amended

This compilation was prepared on 20 December 2010 taking into account amendments up to Act No. 144 of 2010

[Note: Part 12 ceased to have effect on 23 March 2006, see section 207]

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing, Attorney-General’s Department, Canberra
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An Act about native title in relation to land or waters, and for related purposes

Preamble
This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through:

(a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and
(b) the acceptance of the Universal Declaration of Human Rights; and
(c) the enactment of legislation such as the Racial Discrimination Act 1975 and the Australian Human Rights Commission Act 1986.

The High Court has:
(a) rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement; and
(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia,
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in accordance with their laws and customs, to their traditional lands; and
(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:
(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:
(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and

Native Title Act 1993
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(b) proposals for the use of such land for economic purposes.

It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

The Parliament of Australia therefore enacts:

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Fact Sheets for PBCs

In 2012 Aurora presented two pilot Programs to representatives from Prescribed Bodies Corporate (PBCs) to assist them in managing their native title rights and interests. The following Fact Sheets were developed to explain the fundamental legal rights and responsibilities of PBCs and native title holders to those without legal training. We include them here to assist you in understanding the obligations on native title holders once their native title has been recognised by Australian law. The four Fact Sheets are:

1. Future acts for PBCs
2. Indigenous land use agreements (ILUAs) for PBCs
3. The Right to Negotiate (RTN) for PBCs
4. Legal context for PBC decision making.
Future acts for PBCs

A future act is an act done now which extinguishes or otherwise ‘affects’ native title rights and interests. An ‘act’ can be something that is done on native title land or water, or it can be the authorising of these kinds of activities. An act ‘affects’ native title if it is at least partly inconsistent with its existence, enjoyment or exercise. State or Territory governments are responsible for most future acts because of their responsibility for land management.

Future acts are only valid (can legally be done) if they follow the future act regime in the Native Title Act 1993 (NTA). This means that, in some cases, certain procedures must be followed by those seeking to do the future act.

They might include:
- making legislation
- granting a licence, permit or authority
- creating any right which is recognised by the law
- other government acts, such as making proclamations or regulations.

They do not include:
- acts that are ‘past acts’
- acts on land where native title has already been extinguished.

The non-extinguishment principle

Future acts don’t always extinguish native title. Most future acts just suppress it so that the native title rights can’t be exercised or used for the duration of the future act – this is called the non-extinguishment principle. Once the future act has finished then the native title returns with all its original rights and interests.

However, some future acts do extinguish native title. These include building public works on land reserved for a public purpose and the compulsory acquisition of native title by the government.
Categories of future acts

The NTA sets out the categories of future acts in a particular order.

The order for the different types of future acts in the NTA is:

- Indigenous land use agreements (ILUAs) (s 24EB) – see ILUAs Fact Sheet
- Procedures indicating absence of native title (s 24FA) – non-claimant applications
- Primary production on pastoral leases (s 24GB) – includes cattle farming, agriculture, aquaculture
- Off-farm activities directly connected to primary production (s 24GD) – includes grazing and taking water on areas adjacent to pastoral leases
- Third party rights on pastoral leases (s 24GE) – includes taking timber or sand, gravel, rocks etc
- Management of water and airspace (s 24HA) – includes licences to take water or fish
- Renewals and extensions (s 24ID) – includes exercising rights that existed before 23/12/1996, and extending some leases
- Public housing etc (s 24JAA) – includes the construction of public housing on Aboriginal or Torres Strait Islander land
- Acts under reservations and leases etc (s 24JA) – includes the creation of national park management plans and the grant of forestry licences
- Facilities for services to the public (s 24KA) – includes building roads, power lines, water and gas pipelines
- Low impact future acts (s 24LA) – does not include things done on land subject to determined native title (not relevant for PBCs)
- Some acts that pass the freehold test (s 24MD) - (including acts subject to the right to negotiate – see Right to Negotiate Fact Sheet). The freehold test means that it would be possible to do the act on land held under freehold title
- Offshore acts (s 24NA) – includes oil rigs, fishing rights.

The order is important because the future act must be dealt with under the first provision that applies to it, even if a later provision is also relevant.

For example, if an ILUA deals with a future act, then the terms of the ILUA apply, not any other later provision in the NTA.

Another example is the construction of a road under a law governing the management of a national park. In that case, Subdivision J (dealing with acts done under a reserve) would apply, not Subdivision K (dealing with the construction of things that service the public), and the procedural rights and the effect on native title would be different.
Future acts for PBCs
(continued)

Chapter 1: An overview of native title

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Procedural rights

Native title holders have certain rights when someone wants to do a future act. They do not have a right of veto (the right to say ‘no’ to a future act). They can have ‘procedural rights’ where a future act will impact on their native title. These include the:

1. right to comment
2. right to be consulted
3. rights of ordinary title holder
4. right to have an objection heard
5. right to negotiate - see Right to Negotiate Fact Sheet.

Not all categories of future acts have the same procedural rights. Also, the government can go ahead with some future acts without following the procedures in the Future Act Regime.

The government must comply with the requirements for building public housing etc (24JAA) and with the right to negotiate in order for those future acts to be valid.

1. Right to comment

Native title holders (through their PBC) usually have a right to comment for future acts that involve:

- Primary production on pastoral leases [s 24GB] – includes cattle farming, agriculture, aquaculture
- Off-farm activities directly connected to primary production [s 24GD] – includes grazing and taking water on areas adjacent to pastoral leases
- Management of water and airspace [s 24HA] – includes licences to take water or fish
- Renewals and extensions [s 24ID] – includes exercising rights that existed before 23/12/1996, that grant freehold or other exclusive rights
- Some acts under reservations and leases etc [s 24JA] – includes the creation of national park management plans.

These future acts are valid (they can be done), even if the government doesn’t give the native title holders (through their PBC) the chance to make comments about them.

Native title holders always have a right to comment for future acts that involve:

- Public housing etc [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land.
- Third party rights on pastoral leases [s 24GE] – includes taking timber or sand, gravel, rocks etc
Chapter 1: An overview of native title

Future acts for PBCs

(continued)

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2. Right to be consulted

Native title holders (through their PBC) have a right to be consulted for certain types of future acts that involve:

- some renewals of non-exclusive agricultural and pastoral leases [s 24ID], where the term of the renewed lease is longer than that of the original lease
- public housing etc. [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land
- acts that pass the freehold test [s 24MD] – includes acts that could be done on land held under freehold.

This is a right to be consulted about ways of minimising the future act’s impact on native title, access to the land, and the way in which the future act might be done. It is not a right of veto (the right to say ‘no’ to a future act).

3. Rights of ordinary title holder

Native title holders (through their PBC) have the same procedural rights as any other title holder for future acts that involve:

- facilities for services to the public [s 24KA] – includes building roads, power lines, water and gas pipelines etc
- some Acts that pass the freehold test [s 24MD] – includes acts that could be done on land held under freehold (including acts subject to the right to negotiate)
- offshore acts [s 24NA] – includes oil rigs, fishing rights.

The nature of these rights depends on the Federal, State or Territory law under which the government is doing the future act. There might be rights to comment, rights to be consulted, rights to have an objection heard, or maybe no rights at all.
Future acts for PBCs
(continued)

Chapter 1: An overview of native title

4. Right to have an objection heard

Native title holders (through their PBC) have a right to object to the future act, and to have that objection heard by an independent body, for future acts that involve:

- some renewals of non-exclusive agricultural and pastoral leases [s 24ID], where the term of the renewed lease is longer than that of the original lease
- some acts that pass the freehold test [s 24MD].

5. Right to Negotiate

Please see the separate Right to Negotiate Fact Sheet for more information about this more complicated process.

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Chapter 1: An overview of native title

Indigenous land use agreements (ILUAs) for PBCs

What is an ILUA?

An ILUA is an agreement between the PBC and those who want to do a future act that has been registered by the National Native Title Tribunal (NNTT). It can also cover things other than future acts. It binds all the parties, and all native title holders for the area covered by it, whether they were involved in making the ILUA or not. Before it can be registered by the NNTT, certain processes have to be followed. The NNTT can help parties negotiate an ILUA. PBCs should get legal advice before making an ILUA.

A registered ILUA:

- works as a contract between the parties to the ILUA
- can validate (make it legal to do) future acts
- legally binds all the native title holders for the area covered by the ILUA (even if they weren’t involved in making the ILUA)
- usually provides for the non-extinguishment principle to apply (if the ILUA does extinguish native title by surrendering it to a government, that government must be a party to the ILUA)
- can provide compensation for future acts, but usually compensation is limited to what is in the ILUA (you can’t ask for more in the future)
- can provide other benefits to the native title holders and the PBC (eg freehold grants, cultural heritage protection, positions on committees, employment, training etc.).
Chapter 1: An overview of native title

Indigenous land use agreements (ILUAs) for PBCs

(continued)

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Consent of the native title holders

Before a PBC can make an ILUA, it must consult with the native title holders whose native title will be affected by the future act and get their consent (see PBC Decision Making Factsheet).

Features of ILUAs

• An ILUA can only be made if the PBC and native title holders want one – they cannot be forced to sign
• Third parties are not involved (unless you want them to be)

Statutory (legal) requirements

The law says that ILUAs must properly describe the future act(s) and the area covered by the ILUA (with a map and description). If the ILUA replaces the right to negotiate, it must say so.

• The terms of an ILUA are negotiated, they cannot legally be imposed by government, the NNTT, a court, or by anyone else (though in practice, people’s choices might be limited)
• Flexibility – an ILUA can include any benefits the parties agree on
• Relationship building – an ILUA can help build a relationship between the parties which can be useful in the future (eg with government or companies)
• An ILUA binds all the native title holders even if they didn’t help make the ILUA
• ILUAs take time to negotiate and register.

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### Indigenous land use agreements (ILUAs) for PBCs

#### Types of ILUAs

There are three types of ILUAs: Body Corporate, Area and Alternative Procedure ILUAs.

The different types of ILUAs have different rules about when they can be used and how they must be made. Usually (but not always) PBCs make Body Corporate ILUAs.

Native title holders must be consulted and give their consent before a PBC can make any of these types of ILUA (see PBC Decision Making Fact Sheet).

**Body Corporate ILUAs** (‘Subdivision B’) are used where the whole ILUA area is covered by registered PBCs. All of these PBCs must be parties. They can be registered relatively quickly once the parties have completed the negotiations (although the negotiations can take time).

**Area ILUAs** (‘Subdivision C’) are used where parts of the ILUA area are not covered by registered PBCs. All the PBCs and registered claimants for the area covered by the future act must be parties to the ILUA. These can take longer to negotiate and register, especially if someone claiming to be a native title holder objects to something about the ILUA.

**Alternative Procedures ILUAs** (‘Subdivision D’) are used where parts of the ILUA area are not covered by registered PBCs. At least one PBC or Native Title Representative Body/Native Title Service Provider (NTRB) for the area must also be a party to the ILUA. No-one has registered an Alternative Procedures ILUA so far.

For all ILUAs, the Government must be a party if the ILUA extinguishes native title. Remember, an ILUA can only be made if the PBC and native title holders want one, so native title can only be extinguished in an ILUA if the native title holders choose to surrender it – usually in return for compensation or another benefit.

Other parties to ILUAs can include:
- people who claim to hold native title (but don’t have a registered claim or a determination)
- NTRBs
- anyone who wishes to do a future act on native title land or waters.
Chapter 1: An overview of native title

Indigenous land use agreements (ILUAs) for PBCs

(continued)

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Important questions to ask before making an ILUA

- Do you have the advice of a lawyer?
- What type of ILUA should it be?
- Who should be parties to it?
- What do you want to include in it?
- Are the right parties involved?
- Have the statutory (legal) requirements been complied with?
- Has the ILUA been properly notified?
- Have any objections to registration been dealt with?

Body Corporate ILUAs (‘Subdivision B’)

Registration

1. Any party may apply to the NNTT Registrar to register the ILUA
2. The Registrar must notify the parties, the relevant NTRB, governments, and any other appropriate person of the ILUA
3. Any party to the ILUA may tell the Registrar within one month that it doesn’t want the ILUA registered (like a cooling off period)
4. The relevant NTRB may tell the Registrar within one month that it wasn’t told about the ILUA before it was made
5. Otherwise, the ILUA must be registered.
Chapter 1: An overview of native title

Indigenous land use agreements (ILUAs) for PBCs

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Area ILUAs (‘Subdivision C’)

Authorisation

Before it can be registered, the making of an Area ILUA must be authorised by the native title group. The native title group might include:

• all PBCs and registered claimants for the area;
• anyone claiming to hold native title in the area;
• the NTRB for any other part of the area.

Authorisation must be proved to the NNTT by:

• a certificate issued by the NTRB; OR
• evidence provided by the native title group.

The NNTT Registrar must be satisfied that

1. all reasonable efforts have been made to identify native title holders in the area; AND
2. all of those identified native title holders have authorised the making of the agreement.

This is easy for the part of the area for which there is a PBC that has provided evidence that it has followed the consultation and consent requirements necessary before it can make an ILUA (see PBC Decision Making Factsheet).

It can be difficult for any part of the area which has not yet received a native title determination, especially if no native title claim has yet been registered.

Registration

1. Any party may apply to the NNTT Registrar for registration, showing evidence of authorisation, that the PBC has consulted the native title holders whose native title is affected by the future act and obtained their consent to making the ILUA

2. The Registrar must notify the parties, the NTRB, governments, any other appropriate person, and the public of the ILUA (using letters and public notices)

3. If no-one objects within three months, the ILUA can be registered.

BUT

1. A person who claims to hold native title has three months to:
   a. object if the ILUA has been certified by the NTRB and they believe that native title holders were not identified in the process or did not authorise the agreement, OR
   b. make a native title application that is later registered, if the ILUA hasn’t been certified by the NTRB.

2. These issues are resolved by:
   a. negotiating with the person who made the objection so they withdraw their objection (eg there might be part of the ILUA they want changed), OR
   b. making sure all registered native title claimants are party to the ILUA.

3. Once all issues are resolved the ILUA can be registered.

4. Registration usually takes six months, but can take longer.
Chapter 1: An overview of native title

Right to Negotiate (RTN) for PBCs

The RTN process

The RTN process means that the native title holders have:
1. a Future Act Notice sent by the government to the PBC and the relevant NTRB/NTSP (s 29 NTA)
2. four months from the date of the notice to object to an expedited procedure notice
3. six months (or longer if agreed) from the date of the notice to negotiate in good faith.

During these six months, or longer if agreed, the parties must negotiate in good faith with the aim of reaching an agreement about whether the future act should be done or not. The National Native Title Tribunal (NNTT) can mediate.

After six months from the date of the notice, an application can be made to the NNTT for a determination that the future act can be done.

In a future act determination, the NNTT can decide that the future act must not be done, or that it can be done with or without conditions. The Commonwealth Minister can overrule the NNTT’s determination.

The NNTT can take into account any agreement between the parties, and make a determination by consent. If the parties don’t agree, in making its determination, the NNTT must consider the effect of the future act on matters including:
- the enjoyment by the native title holders of their registered native title rights and interests
- the way of life, culture and traditions of the native title holders

Native title holders should think about getting legal advice if they wish to exercise their right to negotiate, or if they wish to object to the government applying the expedited procedure.
Right to Negotiate (RTN) for PBCs (continued)

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- the development of the social, cultural and economic structures of the native title holders
- any area or site of particular significance to the native title holders
- the wishes of the native title holders in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests
- the economic or other significance of the future act to Australia, the state or territory, or the region.

When do native title holders have the RTN?

Native title holders (through their PBC) have a right to negotiate for future acts that involve:
- mining (including exploration and extraction of minerals, petroleum and gas), OR
- the compulsory acquisition of native title rights and interests for the benefit of third parties, (but not for the purpose of providing an infrastructure facility like a port or a power station).

They don’t have the right to negotiate where the future act involves:
- the creation of a right to mine for the sole purpose of the construction of an infrastructure facility located with mining (native title holders have the rights to be consulted and have an objection heard – see Future Act Fact Sheet), OR
- compulsory purchase of native title by the government for government use, OR
- future acts dealt with by ILUAs that exclude the right to negotiate, OR
- some gold, tin or gem mining, OR
- land within a town or city, OR
- acts subject to the expedited procedure (the future act notice must state that the government thinks that the expedited procedure applies) – see page 3.
Chapter 1: An overview of native title

Right to Negotiate (RTN) for PBCs (continued)

Right to Negotiate (RTN) for PBCs

A future act notice may include a statement that the government thinks that the act attracts the expedited procedure. If the expedited procedure does apply, the future act can be done without going through the right to negotiate. A PBC can object, to the inclusion of a statement that the expedited procedure applies. If you are considering an objection it would be good to get a lawyer involved. If the PBC objects the NNTT makes a decision about whether the expedited procedure applies. To find that the expedited procedure doesn't apply, the NNTT will need to be convinced that the act will be likely to:

(a) interfere directly with the carrying on of the community or social activities of the native title holders; OR

(b) interfere with areas or sites of particular significance to the native title holders; OR

(c) involve major disturbance or create a right to do something which is likely to involve major disturbance to any land or waters concerned.

In making its decision, the NNTT:

• takes into account constraints already imposed on the native title holders, e.g. pastoralists exercising their legal rights, AND

• assumes that those who propose to do the future act (the ‘grantee party’) will comply with the relevant laws, regulations and conditions, unless there is evidence that they will not.

Expedited procedure

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Legal context for PBC decision making

Legislation

There are two pieces of legislation which talk about PBC decision making about native title:

- the Native Title Act 1993 (Cth)
- the Native Title (Prescribed Body Corporate) Regulations 1999 (Cth), (PBC Regs) which were made under the Native Title Act.

These apply whether a PBC is:

- a trustee PBC – holding native title on behalf of the native title holders, or
- an agent PBC – managing the native title on behalf of the native title holders, who hold the native title.

PBC legal responsibilities

The Native Title Act and the PBC Regs say that the PBC needs to:

- consult with the native title holders about surrendering or doing things (acts) that will affect their native title; AND
- make sure the native title holders understand the purpose and nature of the proposed decision (PBC Regs 8(2)); AND
- obtain their consent before they go ahead with the acts (PBC Regs 8(1)).

Plus the PBC Regs say that the PBC must:

- consult with the relevant Native Title Representative Bodies/ Native Title Service Provider (NTRB), consider its views and, if appropriate and practical, tell the native title holders about these (PBC Regs 8(2)).

What is a decision that affects native title?

A ‘native title decision’ is a decision to give up native title rights and interests, or to do (or agree to do) something that would affect the native title rights or interests of the native title holders.

For example:

- decisions about future acts (responding to future act notices)
- making right to negotiate agreements
- signing Indigenous land use agreements (ILUAs).

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Chapter 1: An overview of native title

Legal context for PBC decision making

(continued)

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What sorts of decisions can a PBC make?

PBCs have to make three kinds of decisions. This fact sheet focuses more on native title decisions (which are covered in points 2 and 3 on this page):

1. Those made by the PBC directors with their own thinking about the internal governance of the PBC. These decisions come under Australian law, for example the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act) and the common law. Breaching some of the requirements of that law can be a criminal offence. These kind of decisions cover for example:
   • how the PBC is to be run
   • the powers of the CEO and the board in running the PBC
   • rules for PBC members’ meetings (e.g. annual general meetings) and special general meetings
   • financial management.

2. Decisions that directors can make where they have to follow any rules made by the native title holders, for example:
   a. alternative consultation processes (see page 3)
   b. standing consents (see page 4).

3. Decisions that have a large effect on native title must be made by the native title holders. They include making ILUAs and agreements under the right to negotiate. The PBC directors then pass on these decisions to government. These decisions are NOT the directors’ own thinking.

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Chapter 1: An overview of native title

Legal context for PBC decision making

(continued)

Deciding how native title decisions will be made

The way that PBCs make decisions is controlled by the CATSI Act, the PBC Regs, and their Rulebook.

PBC Regs 8(3) & (4) and section 251 of the Native Title Act talk about the PBC having to use particular decision making processes for making ILUAs and other native title decisions:

1. a decision making process that must be followed under traditional laws and customs, for example:
   - elders make the decision; or
   - native title holders particularly affected make the decision.

OR:

2. if there is no traditional process, a process agreed to by native title holders, for example:
   - everyone has one vote at a meeting;
   - one person makes the decision
   - PBC directors make the decision; OR
   - some other process

There are two other kinds of decision making processes where the directors of the PBC can make the decision but they have to follow the rules made by the native title holders:

a. alternative consultation processes
b. standing consents.

These are explained below.

a. Alternative consultation processes (PBC Regs 8(1)(d) & BA)

The native title holders can agree to one or more alternative consultation processes for making decisions about their native title which:

- they have been consulted about and have consented to; AND
- are set out in the PBC’s Rulebook.

An alternative consultation process:

- can be about whatever the native title holders decide, except when:
  - making ILUAs, OR
  - making agreements under the right to negotiate, OR
  - allowing non-native title holders to be members, OR
  - setting up an alternative consultation process (PBC Regs 8(1)); AND

- must be followed before the PBC can make a decision that is covered by it.

Any ‘alternative consultation process’ must be in the PBC’s Rulebook which must set out:

- the types of decisions which can be made by the alternative process; and
- the details of the process.
Legal context for PBC decision making (continued)

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b. Standing consents (PBC Regs 9(1)(a)(ii))

Under a standing consent given by the native title holders to the PBC Directors, the PBC makes decisions about certain kinds of native title matters and doesn’t have to consult the native title holders every time. This can save both the native title holders and the PBC Directors lots of time and effort.

For example decisions about:

- the right to comment on low level Future Acts (e.g. granting grazing licences near pastoral leases or water licences)
- the right to comment on a National Park Management Plan.

The native title determination and the PBC’s decision making process

Your native title determination sets out who the native title holders are in general terms. It doesn’t talk about who has specific rights to particular areas and has no effect on decision making. It just identifies the group, the native title (and other) rights and interests, and the area.

This means it is up to the PBC to make the decision making process work on the ground. It will need to take into account a range of particular native title rights and interests within the group.

Native title holders often know, under traditional law and custom:

- which people can exercise what native title rights where (i.e. who can speak for what parts of the native title area)
- which people can make decisions about which future acts.

If the PBC is uncertain about which people to consult, or there is a dispute about this, it may seek assistance from the NTRB to undertake further anthropological work or some form of mediation or community facilitation, or it may consult and obtain consent from the whole native title group.

How to consult native title holders

Although the Native Title Act and the PBC Regs say that PBCs need to consult with their native title holders and obtain their consent, they do not actually say how to do this. That is up to PBCs themselves.
Chapter 1: An overview of native title

Legal context for PBC decision making

(continued)

Documents to prove consultation

To show that the consultation processes have been properly followed, the PBC needs to produce three certificates:

1. a certificate of the native title holders that they have been consulted and have consented (PBC Regs 9(1))
2. a PBC certificate about NTRB consultation (PBC Regs 9(6)(a))
3. an NTRB certificate about NTRB consultation (PBC Regs 9(6)(b)).

The native title holders’ certificate (PBC Regs 9(1)):
- must state that the native title holders have been consulted about and have consented to the proposed decision under:
  i. the process set out in the PBC Regs; OR
  ii. the alternative consultation process set out in the PBC’s Constitution/Rulebook; OR
  iii. a standing consent, and there is a statement about the process of consultation and consent for the standing consent.
- must be signed by at least five PBC members whose native title rights and interests are affected by the decision (PBC Regs 9(4)).

The PBC Certificate about NTRB consultation (PBC Regs 9(6)(a)):
- must state that the NTRB has been consulted and its views have been considered; AND
- must be signed by at least five PBC members whose native title rights and interests are affected by the decision.

The NTRB Certificate about NTRB consultation (PBC Regs 9(6)(b)):
- must state that the NTRB has been consulted about the decision; AND
- must be signed by at least one authorised NTRB member.

In practice, these certificates might be in one document, which should be kept in the PBC’s records.

Charging for services

The PBC Regs also say when and how a PBC can charge a ‘fee for service’. PBCs can charge those who are proposing future acts that may impact on the native title. The fee includes the cost of consulting with the native title holders to get their consent, where the PBC is required by law to do this (e.g. the cost of consulting and obtaining native title holders’ consent about a proposed future act).
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<th>Term</th>
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<td>ACAA</td>
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<td>Australian Institute of Aboriginal and Torres Strait Islander Studies</td>
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<td>ATSIC</td>
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<td>Native Title Service Provider</td>
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### Chapter 1: An overview of native title

#### Glossary of terms and abbreviations used in native title

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<th>Definition</th>
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</tr>
<tr>
<td>ORIC</td>
<td>Office of the Registrar of Indigenous Corporations which oversees the CATSI Act</td>
</tr>
<tr>
<td>PBC</td>
<td>Prescribed Body Corporate (when registered these are also called RNTBCs)</td>
</tr>
<tr>
<td>PLO</td>
<td>Principal Legal Officer (at an NTRB)</td>
</tr>
<tr>
<td>PM&amp;C</td>
<td>Department of the Prime Minister and Cabinet.</td>
</tr>
<tr>
<td>RTN</td>
<td>Right to negotiate</td>
</tr>
<tr>
<td>RNTBC</td>
<td>Registered Native Title Body Corporate (a registered PBC)</td>
</tr>
<tr>
<td>RO</td>
<td>Research Officer</td>
</tr>
<tr>
<td>SPO</td>
<td>Senior Professional Officer (at an NTRB)</td>
</tr>
<tr>
<td>TOs</td>
<td>Traditional Owners</td>
</tr>
<tr>
<td>UN DRIP</td>
<td>United Nations Declaration of the Rights of Indigenous People</td>
</tr>
<tr>
<td>WGM</td>
<td>Working group Meeting (for native title claim group)</td>
</tr>
</tbody>
</table>

2. Glossary of terms used in the native title context

- **Alternative dispute resolution**: refers to processes for reaching a legal decision which happen outside of court. They include arbitration, conciliation.

- **Alternative procedure agreement**: a type of Indigenous land use agreement (ILUA). No ILUAs of this type have been registered so far.

- **Applicant**: the party(ies) in a legal action that made the application. In a native title application the applicant is people or peoples authorised by the native title claim group to make the application.

- **Area agreement**: a type of Indigenous land use agreement (ILUA) over a defined area which can be made by any native title group but which requires authorisation. More information is available in the Fact Sheet: Indigenous land use agreements (ILUAs) for PBCs.

- **Arbitration**: a legal alternative dispute resolution process for resolving disputes outside of court, where an independent party (the arbitrator) reviews the evidence for both sides and makes a decision that is legally binding for both sides. It is different to mediation and conciliation because the decision is binding on both parties. The arbitrator is usually decided by the court, but agreed to by both parties.

- **Authorisation / authorisation meeting**: the process for a native title group to make a decision to go ahead with a native title claim or an area agreement. This is usually done at a big meeting where all native title claimants can attend. Authorisation is required before a native title claim or area agreement can be registered by the NNTT (s251B NTA).
Chapter 1: An overview of native title

Glossary of terms and abbreviations used in native title (continued)

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Body corporate agreement</td>
<td>A type of Indigenous land use agreement (ILUA) that can only be made where there is at least one registered PBC in the agreement area. (ss. 24BA – 24BI NTA). More information is available in the Fact Sheet: Indigenous land use agreements (ILUAs) for PBCs.</td>
</tr>
<tr>
<td>Certification</td>
<td>The process by which the NTRB(s)/NTSP(s) for an area sign a legal document saying that the authorisation requirements of the NTA have been met (s. 203BE) in relation to: • applications for a determination of native title and • area agreements.</td>
</tr>
<tr>
<td>Coexistence</td>
<td>The existence and exercise of native title rights alongside the rights of others over the same area of land or waters. For example, native title rights to go onto land and hold ceremonies may coexist with the rights of a pastoral leaseholder to graze cattle. Coexistence is about sharing the land and waters in a way that recognises everyone’s rights and interests in the area.</td>
</tr>
<tr>
<td>Common law</td>
<td>Judge-made law – that is, the law made by the accumulated decisions of courts as opposed to statute law – that is, the law made by Acts of Parliament.</td>
</tr>
<tr>
<td>Compensation application</td>
<td>An application to the Federal Court for a determination that compensation is payable for the impairment or extinguishment of native title, where the Native Title Act provides for compensation, and an assessment of that compensation.</td>
</tr>
<tr>
<td>Conciliation</td>
<td>A legal alternative dispute resolution process where the parties to a dispute agree to use a conciliator, who then meets with the parties separately in an attempt to resolve their differences. They do this by lowering tensions, improving communications, interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. The parties don’t usually actually face each other with the conciliator and the conciliator usually doesn’t make a decision for the parties.</td>
</tr>
<tr>
<td>Consensus</td>
<td>An opinion or position reached by the group as a whole or where everyone agrees. People often need to compromise to reach consensus.</td>
</tr>
<tr>
<td>Consent determination</td>
<td>A native title determination that is made when all parties to the native title determination application agree that a particular determination should be made.</td>
</tr>
<tr>
<td>Constituency</td>
<td>A group of people who support or who are likely to support a politician or political party; this could refer to a group of people who support, or are represented by an organisation, business or a peak body</td>
</tr>
<tr>
<td>Crown land</td>
<td>Land not held under private ownership (so a Federal/State or Territory government makes decisions about it). It might be subject to rights granted by the Crown (a government) under legislation, such as a mining tenement. It may also be subject to native title.</td>
</tr>
<tr>
<td>Department of Aboriginal Affairs (DAA)</td>
<td>“The Department of Aboriginal Affairs is part of the NSW Government. We work with Aboriginal people, government agencies, and the private and community sectors to promote the interests of Aboriginal people in NSW and reduce the inequity they continue to experience as a result of colonisation.”</td>
</tr>
</tbody>
</table>
## Glossary of terms and abbreviations used in native title (continued)

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Department of Education, Employment and Workplace Relations (DEEWR)</strong></td>
<td>The Department of Education, Employment and Workplace Relations “aim[s] to maximise the ability of unemployed Australians to find work, and we aim to support strong employment growth and improved productive performance of enterprises in Australia. We achieve these aims by developing and implementing policies and Programmes that support an effectively functioning labour market, increasing workforce participation for all Australians of working age and supporting workplaces with higher productivity and higher pay”.³</td>
</tr>
<tr>
<td><strong>Department of Premier and Cabinet (DPAC)</strong></td>
<td>All State Governments have a Department of Premier and Cabinet. They focus on the broader issues affecting their state or territory. Aboriginal affairs are part of their agenda and they often work in cooperation with their DAA.</td>
</tr>
<tr>
<td><strong>Deed of Grant In Trust (DOGIT)</strong></td>
<td>a land grant made to Indigenous people under the Land Act 1994 (Qld).</td>
</tr>
<tr>
<td><strong>Expedited Procedure</strong></td>
<td>a fast-tracking process which is allowed under the NTA for future acts that would normally have the Right to Negotiate, but are considered to have minimal impact on native title, such as the grant of some exploration and prospecting licenses. If this procedure is used, and no objection is lodged, the future act can be done without following the Right to Negotiate process. A government must say on a Future Act Notice if they think the expedited procedure applies. A PBC can object if they do not agree. More information is available in the Fact Sheet: The Right to Negotiate (RTN) for PBCs.</td>
</tr>
<tr>
<td><strong>Extinguishment</strong></td>
<td>if native title is extinguished it is no longer recognised under Australian law and so native title cannot be recognised under the NTA. Under current Australian law, once native title is extinguished it can never be recognised, except where the NTA provides that extinguishment can be disregarded - see example Adnyamathanha (No. 3).</td>
</tr>
<tr>
<td><strong>Facilitator</strong></td>
<td>someone who helps a group understand their common objectives and assists them to plan to achieve them without taking a particular position in the discussion. Some facilitator tools will try to assist the group in achieving a consensus on any disagreements that preexist or emerge in the meeting so that negotiations will go ahead more easily.</td>
</tr>
<tr>
<td><strong>Future act</strong></td>
<td>a proposal to do something (e.g. pass legislation or permit a development on a particular area) that will affect native title by extinguishing or suppressing it, or creating interests that are inconsistent with the continued existence, enjoyment or exercise of native title. Examples include the grant of mining or exploration rights and the compulsory acquisition of native title. The NTA gives native title holders and registered native title claimants procedural rights in relation to certain future acts. Depending on the type of future act these rights include being notified, given an opportunity to comment, and the right to negotiate. For some future acts there are no procedural rights (Part 2 Division 3 NTA). Where there is disagreement about whether a future act may be done, the NNIT will make a future act determination. More information is available in the Fact Sheet: Future Acts for PBCs.⁴</td>
</tr>
<tr>
<td><strong>Future act application</strong></td>
<td>under the right to negotiate, this is an application to the Tribunal to permit a proposed mining activity (and some other miscellaneous activities) when negotiation has not resulted in agreement.</td>
</tr>
</tbody>
</table>

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³ Taken from: http://en.wikipedia.org/wiki/Memorandum_of_understanding

⁴ For more information: www.nntt.gov.au/About-The-Tribunal/Pages/Tribunal.aspx

⁴ Definition courtesy Attorney-General’s Department
### Glossary of terms and abbreviations used in native title

(continued)

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Good faith</td>
<td>this term is not defined in the NTA. The NTA places an obligation on all negotiation parties to negotiate in good faith in relation to the doing of future acts to which the right to negotiate applies (s. 31(1)(b) NTA). There are international documents which are not legally binding on Australia but which can be used to place pressure to ensure that negotiations are conducted in good faith. Amendments to the NTA proposed in 2012 would define good faith, however the Bill was unsuccessful.</td>
</tr>
<tr>
<td>Governance</td>
<td>governance is about how your organisation is run - the structures and systems and understandings that enable you to make the right decisions. It is usually the responsibility of the board to oversee governance, while the CEO and staff look after management – putting governance into practice through policies and processes.</td>
</tr>
<tr>
<td>Indigenous land use agreement (ILUA)</td>
<td>a voluntary agreement about the use and management of an area of land or waters where native title exists or might exist. The agreement is made between one or more native title groups and others (such as miners, pastoralists or governments). A registered ILUA is legally binding on the people who are parties to the agreement as well as all native title holders for that area. More information is available in the Fact Sheet: Indigenous land use agreements (ILUAs) for PBCs</td>
</tr>
<tr>
<td>Inquiry hearing (future act)</td>
<td>when the National Native Title Tribunal hears evidence and submissions by parties who are in a right to negotiate inquiry (i.e. a future act determination application inquiry or an expedited procedure objection application inquiry). In some cases a determination will be made based on written evidence submitted to the Tribunal, without holding an inquiry hearing.</td>
</tr>
<tr>
<td>Mediation</td>
<td>an alternative dispute resolution process which allows parties, with the assistance of a mediator, to discuss their interests in the area, identify the issues, consider alternatives and explore ways to reach agreement about whether a future act should be done. Mediation processes are useful where negotiation is not progressing.</td>
</tr>
<tr>
<td>Member (of a PBC)</td>
<td>a native title holder who has joined their PBC and is listed on the PBC’s member register.</td>
</tr>
<tr>
<td>MOU</td>
<td>A Memorandum of Understanding “is a document describing a bilateral or multilateral agreement between parties. It expresses a convergence of will between the parties, indicating an intended common line of action.”</td>
</tr>
<tr>
<td>NAIDOC</td>
<td>National Aboriginal and Torres Strait Islander Observance Committee</td>
</tr>
<tr>
<td>National Native Title Council (NNTC)</td>
<td>peak body of NTRBs and NTSPs.</td>
</tr>
<tr>
<td>National Native Title Tribunal (NNTT)</td>
<td>an independent statutory body established under s. 107 Part 6 of the NTA to assist people to resolve native title issues. The Native Title Registrar is employed by the NNTT.</td>
</tr>
<tr>
<td>Native title determination</td>
<td>the rights and interests in land under the traditional law and custom of Indigenous people that are recognised by the common law. Some rights and interests are not recognised where ‘connection’ with land has been lost or where native title has been extinguished by government land dealing (for example, the sale of land).</td>
</tr>
<tr>
<td>Native title determination</td>
<td>a decision by the Federal Court that native title does, or does not exist for a particular area of land or waters.</td>
</tr>
</tbody>
</table>
# Chapter 1: An overview of native title

## Glossary of terms and abbreviations used in native title

(continued)

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Native title determination application</strong></td>
<td>an application in the Federal Court made by a native title group for a native title determination.</td>
</tr>
<tr>
<td><strong>Native title holder</strong></td>
<td>(see also prescribed body corporate (PBC)) a person who has native title rights and interests over a particular area of land or waters or, where there has been a determination of native title and a prescribed body corporate (PBC) is registered on the National Native Title Register as holding native title rights and interests on trust (s. 224 NTA). Often, not every native title holder will join their PBC as a member.</td>
</tr>
<tr>
<td><strong>Native title party</strong></td>
<td>this term is often used to refer to the Indigenous parties to a variety of agreements or participants in legal actions or proceedings. However, under the NTA it also has a specific definition in relation to right to negotiate applications. In that context it means the registered native title claimants and registered native title bodies corporate that meet certain statutory requirements (ss. 253, 29(2) and 30 NTA).</td>
</tr>
<tr>
<td><strong>Native Title Registrar</strong></td>
<td>a statutory office holder who:  - applies the registration to test to claimant applications  - assesses applications for the registration of ILUAs  - gives notice of all applications for a determination of native title, compensation applications, revised native title determination applications and applications for the registration of ILUAs  - provides certain forms of assistance  - maintains the National Native Title Register, the Register of Native Title Claims and the Register of Indigenous Land Use Agreements.</td>
</tr>
<tr>
<td><strong>Native title rights and interests</strong></td>
<td>the communal, group or individual rights and interests of Aboriginal and Torres Strait Islander people in relation to land and waters, possessed under traditional law and custom, by which those people have a connection with an area which is recognised under Australian law (s. 223 NTA). While native title rights and interests are held by a group for the whole native title area (the native title holders), often specific traditional rights and interests are held by sub-groups or individuals within that group. This can be reflected in a PBC’s decision making (see subsidiarity).</td>
</tr>
<tr>
<td><strong>Native Title Representative Body (NTRB)</strong></td>
<td>an organization recognised by the relevant Commonwealth Minister to carry out a range of functions as specified under the NTA to assist Indigenous people to make and pursue an application for a determination of native title.</td>
</tr>
<tr>
<td><strong>Native title registered body corporate (NTRBC)</strong></td>
<td>A prescribed body corporate (PBC) that has been registered by the Registrar of Indigenous Corporations.</td>
</tr>
<tr>
<td><strong>Native Title Service Provider (NTSP)</strong></td>
<td>An organisation established under the 2007 amendments to the NTA that enable a body to be established to carry out the functions of an NTRB, where no NTRB currently exists.</td>
</tr>
<tr>
<td><strong>Negotiation in Good Faith</strong></td>
<td>see Good faith</td>
</tr>
</tbody>
</table>
### Glossary of terms and abbreviations used in native title (continued)

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non extinguishment principle</td>
<td>Native title is not extinguished but suspended during the operation of an interest that affects the native title.</td>
</tr>
</tbody>
</table>
| Notification                            | The process by which people, organisations and/or the general public are advised that certain applications about native title have been made. It usually includes public notices (ads) in newspapers. Notifications are made by the relevant government or by the NNTT and include:  
  - A government intends to do certain future acts, such as granting a mining lease (e.g. s. 29 NTA)  
  - A native title determination application, a compensation application, or a revised native title determination application has been made and, in some cases, amendments have been made to such an application (ss. 66 and 66A NTA) and  
  - An application for the registration of an ILUA has been made (ss. 24BH, 24CH and 24DI). |
| Notification period                      | A period of time after notification during which certain persons can do certain things under the NTA: e.g. a PBC using its procedural rights after receiving a future act notice; someone lodging an objection to the registration of an uncertified area agreement (s. 24CI NTA); or notify the Federal Court of their intention to become a party to a native title application (s. 61 NTA). The length of time of the notification period varies depending on the type of application the notice is being issued in relation to:  
  - Some things can only be done after the notification period has ended such as the registration of an ILUA. |
| Objection (future act)                  | Registered native title claimants and registered native title bodies corporate (RNTBCs) can object to a tenement grant being fast-tracked using the expedited procedure. They (currently) have four months from the notification day to lodge an objection. If the objection is successful, the development cannot go ahead without the normal negotiations required by the NTA. |
| Objection (ILUA)                        | Any person claiming to hold native title can object to the registration of an:  
  - Area agreement, on the basis that the requirements in relation to the certification of the application have not been met (ss. 24CI and 203BE(5)(a) and (b)) or  
  - Alternative procedure agreement, on the grounds that it would not be fair and reasonable to register the agreement (s. 24DJ(1)). There are other potential bars to the registration of ILUAs but they are not formal ‘objections’. |
| Party/Parties                           | Parties to a native title claim are those recognised by the Federal Court as having an interest in the claim. They always include native title claimants and the relevant state or territory government. They can also include other respondents, for example the Commonwealth Government, peak bodies or individuals. Parties to a negotiation are those groups who are involved in a negotiation and would be bound by any agreement that comes out of the negotiations. Parties to an agreement are those who are bound by that agreement. If someone has properly signed an agreement for a PBC then it is a party. If someone has signed an agreement for the government or for a company, then the government or company is a party to that agreement. |
### Chapter 1: An overview of native title

#### Glossary of terms and abbreviations used in native title

(continued)

<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>Past act</td>
<td>has a very specific definition in the NTA and is quite complex. Generally speaking, a ‘past act’ is a legislative act done before 1 July 1993 or any other act done before 1 January 1994 which is invalid to any extent because of the existence of native title (s. 228 NTA). Just because something happened in the past doesn’t mean it is a past act under the NTA. Some future acts have happened in the past which is why this term is so confusing.</td>
</tr>
<tr>
<td>Peak body</td>
<td>organisations which represent people with common interests in relation to native title e.g. native title representative bodies, farmers’ federation, industry councils (fishing, mining etc) and local government associations.</td>
</tr>
<tr>
<td>Prescribed Body Corporate (PBC)</td>
<td>a body nominated by native title holders which will represent them and manage their native title rights and interests once a determination that native title exists has been made. When registered with the NNTT, PBCs are also called registered native title bodies corporate (RNTBC).</td>
</tr>
<tr>
<td>Procedural rights</td>
<td>the right to be notified, to object, be consulted, to comment or the right to negotiate as part of the procedures to be followed under the NTA when certain future acts are proposed (s. 253 NTA). More information is available in the Fact Sheet: Future Acts for PBCs.</td>
</tr>
<tr>
<td>Proponents</td>
<td>those who want to do something (eg those who propose to do a future act).</td>
</tr>
<tr>
<td>Regime</td>
<td>a form of government, or a system of management with rules and regulations.</td>
</tr>
<tr>
<td>Registrar</td>
<td>National Native Title Tribunal registrar</td>
</tr>
<tr>
<td>Register of Indigenous Land Use Agreements</td>
<td>a register established under Part 8A of the NTA which contains information about all ILUAs that have been registered. The Register is kept by the NNTT.</td>
</tr>
<tr>
<td>Registered native title body corporate (RNTBC)</td>
<td>a prescribed body corporate (PBC) nominated by native title holders to represent them and manage their native title rights and interests once a determination that native title exists has been made. Once the court determines that the corporation is to be the PBC, it is entered onto the National Native Title Register as a registered native title body corporate (ss. 193(2)(e) and 253 NTA).</td>
</tr>
<tr>
<td>Registration test</td>
<td>is applied by the NNTT to determine whether a native title claim can be registered. Once a native title claim has been registered, the native title claim group have certain rights, including procedural rights regarding future acts in the native title area.</td>
</tr>
<tr>
<td>Representative Aboriginal/ Torres Strait Islander Body</td>
<td>also known as Native Title Representative Bodies (NTRBs) or representative bodies (rep bodies). These organisations are recognised and funded by the Commonwealth Government to perform a wide variety of functions under the NTA. These functions include assisting and facilitating native title holders to access and exercise their rights under the NTA, certifying applications for determinations of native title and area agreements (ILUA), resolving intra-indigenous disputes, agreement making and ensuring that notices given under the NTA are bought to the attention of the relevant people. The Government can also fund other people or organisations to perform some or all of the functions of a representative body (see Part 11 NTA).</td>
</tr>
<tr>
<td>Respondent</td>
<td>the party(ies) in a legal action that did not make the application. In a native title application the first respondent is usually the state or territory government. There can be any number of other respondents. The party which makes the application is called the applicant.</td>
</tr>
</tbody>
</table>
# Chapter 1: An overview of native title

## Glossary of terms and abbreviations used in native title

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</tr>
</thead>
<tbody>
<tr>
<td>Right to negotiate (RTN)</td>
<td>The right of registered native title claimants or registered native title bodies corporate to be involved in discussions about—but not veto—certain types of future acts (usually the grant of a mining tenement but occasionally an act of compulsory acquisition). Where the right to negotiate applies, negotiations in good faith must occur before the future act can be done. If no agreement is reached an application can be made to the National Native Title Tribunal to determine whether the act can be done and if so under what, if any, conditions (Subdivision P Division 3 Part 2 NTA). More information is available in the Fact Sheet: The Right to Negotiate (RTN) for PBCs.</td>
</tr>
<tr>
<td>Rule Book</td>
<td>The Rule Book governs how an organization incorporated under the Commonwealth Aboriginal and Torres Strait Islander Act 2006 should be run. This includes how to elect directors and hold meetings that meet legal requirements.</td>
</tr>
<tr>
<td>Statutory</td>
<td>Means according to legislation (statute). A statutory requirement is something that is required by law.</td>
</tr>
<tr>
<td>Statutory body</td>
<td>A corporation or entity created by legislation for public purposes, distinct from a private business corporation or an individual.</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>The idea that a decision should be handled by the smallest, lowest, or least centralised authority able to address that matter effectively. In PBC decisions, it can mean that the whole group doesn't weigh in on a native title decisions if it will impact on areas which only some people have traditional custodianship of. Whether this is how a PBC makes its decisions is up to its members, and can be included in its Rule Book.</td>
</tr>
<tr>
<td>Suppression</td>
<td>If native title is suppressed for the duration of a future act, then native title rights and interests cannot be enjoyed for the duration of that future act. Once the future act has finished, then native title can return.</td>
</tr>
<tr>
<td>Traditional Owners (TO's)</td>
<td>Traditional Owners, as the name suggests, are Indigenous owners of Traditional Country and they typically have their own rights and obligations under Aboriginal Traditional law and custom. Traditional Owners are not always members of the local Aboriginal communities that exist on their Traditional Country, and not all members of those local Aboriginal communities are Traditional Owners.</td>
</tr>
<tr>
<td>Unallocated crown/state land</td>
<td>This is land that is held by the Crown (ie the government). This land may be able to be claimed under the NTA.</td>
</tr>
<tr>
<td>United Nations Declaration of the Rights of Indigenous People (UN DRIP)</td>
<td>United Nations Declaration of the Rights of Indigenous People “is a comprehensive statement addressing the rights of indigenous peoples. It was drafted and formally debated for over twenty years prior to being adopted on 29 June 2006 during the inaugural session of the Human Rights Council. The document emphasizes the rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations”.</td>
</tr>
<tr>
<td>Vacant crown land</td>
<td>This generally means land that is not held under private ownership (ie it is held by the government). It might be subject to rights granted by the Crown under legislation, such as a mining tenement. It may also claimed under native title.</td>
</tr>
</tbody>
</table>
Chapter 1: An overview of native title

Glossary of terms and abbreviations used in native title (continued)

<table>
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<tr>
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</thead>
<tbody>
<tr>
<td>Valid/validate</td>
<td>If an act or an agreement is valid, this means that it is legal — or it ‘can be legally done’. To validate something means to make it legal to do (eg by registering an ILUA, or having a future act approved through all the proper procedures).</td>
</tr>
<tr>
<td>Without prejudice privilege</td>
<td>if discussions are held or documents produced ‘without prejudice’ then they cannot be later used as evidence. This is privilege is often claimed during mediation or negotiations aimed at resolving a claim or matter by agreement. Mediation conferences under the NTA are ‘without prejudice’ but only in relation to proceedings before the Federal Court unless the parties agree otherwise (s. 136A(4) NTA).</td>
</tr>
</tbody>
</table>
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

Introduction

This chapter is designed to give you a clear understanding of the roles, functions and responsibilities of Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Registered Native Title Bodies Corporate (RNTBCs).

Section 1 on the roles and functions of NTRBs, will answer the questions:
(a) What is an NTRB?
(b) What is a NTSP?
(c) What do these corporate bodies do?

This section will explore each of the 7 main functions performed by NTRBs, as required under the Native Title Act. These functions include:

i) Facilitation and assistance
ii) Certification
iii) Dispute resolution
iv) Notification
v) Agreement making
vi) Internal review
vii) Other Native Title Act functions

Section 2 will look at the responsibilities of NTRBs. This section will look at the different organisations or groups of people that NTRBs are answerable to. These are:
a) Accountability to clients
b) Accountability to funding bodies
c) Accountability to regulators
d) Accountability to members

Section 3 on the roles and functions of RNTBCs will address the questions:
a) what is a RNTBC?
b) what does a RNTBC do?

Section 4 will look at the responsibilities of RNTBCs and the people and organisations to which they are accountable. This will include:
a) accountability to native title holders
b) accountability to funding bodies
c) accountability to regulators
d) accountability to members.
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

Section 1: The roles and functions of NTRBs

(a) What is an NTRB?

NTRBs are the organisations recognised under the Native Title Act to assist Indigenous people with all aspects of their native title claims. For example, NTRBs assist with the making of native title claims, negotiating those claims with other parties and appearing in court on behalf of native title claimants.

The NTRBs were based on the land councils under the 1976 ALR Act. For a particular geographic region, the NTRB is a single publicly funded organisation that can be appointed to help native title claimants prepare, file and progress their native title claims and do other things necessary to protect their native title interests.

There were major amendments to the NTA concerning NTRBs in 2007, which removed two recognition criteria that required that the NTRB satisfactorily represent native title holders and consult effectively with Aboriginal and Torres Strait Islander peoples living in its area.

NTRBs, when performing the functions given to them by the Native Title Act, are not political institutions. Rather, they are bodies exercising statutory powers and functions in the best interests of the native title holders of a region. NTRBs are appointed by the Minister for Indigenous Affairs through a process called ‘recognition’ – recognition is the decision of the Minister to give the NTRB role to a body that has made an application for a certain area. There are also methods under the Native Title Act for changing the area that an NTRB is responsible for (making it larger or smaller) and for withdrawing government recognition.

(b) What is a NTSP?

The 2007 amendments to the NTA also included new provisions, which allowed NTSPs to be established in an area where there was no recognised NTRB. As noted, NTRBs are appointed under a statutory recognition process in the NTA. Under the new provisions a NTSP may be funded by the Department of Prime Minister and Cabinet (PM&C) to provide the same functions as a NTRB.

The current NTSPs are First Nations Legal & Research Services, NSW Native Title Services Ltd (NTSCORP), Central Desert Native Title Services Ltd (WA), South Australian Native Title Services Ltd (SANTS) and Queensland South Native Title Services Ltd (QSNTS). NTSPs have the same native title functions as NTRBs except the period they have those functions (and funding) is determined by negotiation with PM & C rather than the recognition process of the NTA.

It is now common to refer to Native Title Representative Bodies and Native Title Service Providers as NTRBs, and we do so here for the sake of convenience, except where otherwise specified.

(b) What do these corporate bodies do?

The basic role of a NTRB in the native title system is set out in the Native Title Act. NTSPs may be funded to perform some or all of these functions. These functions include:

i) Facilitation and assistance
ii) Certification
iii) Dispute resolution
iv) Notification
v) Agreement making
vi) Internal review
vii) Other Native Title Act functions
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

i) Facilitation and assistance functions

- The facilitation and assistance functions of an NTRB are all about directly representing native title holders and claimants in native title related proceedings, or assisting with that representation (for example, by funding an external service provider).

- These native title proceedings include native title claims, responding to ‘future act’ applications (such as proposed mining on native title land or land subject to a registered native title claim) and negotiations for Indigenous Land Use Agreements (ILUAs). These proceedings are the primary business of most NTRBs and certainly the most resource-intensive. They involve researching and preparing claims, attending court and tribunal hearings, mediation sessions and making direct contact with respondents to native title claims.

ii) Certification functions

- NTRBs may ‘certify’ native title applications and ILUAs when each is undergoing the Tribunal registration process. Certification means that an NTRB is of the opinion that a proper process of authorisation has been undertaken by the native title claimants. This means that the NTRB is satisfied that all reasonable efforts have been made to identify native title holders in the area and those persons have authorised the native title claim or ILUA. This assists during the Tribunal registration process.

- Native title applications are subject to a registration test administered by the Tribunal Registrar. When the test is met, the applicants of the registered application have access to the ‘right to negotiate’ for proposed mining activities and any compulsory acquisition.

- Most ILUAs are subject to a registration process administered by the Tribunal Registrar – which aims to ensure that each ILUA has been entered into with the involvement and consent of the native title holders who will be bound under the ILUA. Once registered, an ILUA binds all native title holders represented under it, even if they did not all individually sign the ILUA document.

- The process for registering native title applications and ILUAs that have been certified, is different from registering those that have not been certified. A certified native title application or ILUA does not have to include information about the process by which a particular native title group authorised the making of the application or ILUA. So certification means that an NTRB is satisfied that a proper process of authorisation has been undertaken. This often helps the registration process.

iii) Dispute resolution functions

- NTRBs can try to resolve disputes between various native title holders and claimants and may facilitate agreements between these persons. For example, where different native title groups disagree about the boundary of their respective native title claim areas, a NTRB can attempt to solve such a disagreement.

iv) Notification functions

- NTRBs must make sure that future act notices made under the Native Title Act are brought to the attention of native title holders and claimants affected by the subject matter of those notices. For example, a notice may relate to a mining proposal in a particular area.

- The notification functions require the NTRB for that area to bring the notice to the attention of the native title claimants (or potential native title claimants) for the area. Typically, an NTRB will do this by notifying those traditional owners that it knows have a connection with the affected area, or by making inquiries to find out who they are.

v) Agreement making functions

- Under the agreement making function, an NTRB may itself be a party to an ILUA.
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

vi) Internal review functions

• Each NTRB must have an internal process for reviewing decisions made as an NTRB, where clients are dissatisfied with an NTRB decision. For example, a decision not to fund a claim. These are administrative decisions that are reviewable.

vii) Other Native Title Act functions

Officially known as ‘section 203BJ functions’ under the Native Title Act, these are a range of miscellaneous functions conferred upon NTRBs. They are:

• making agreements with neighbouring NTRBs to deal with overlapping claims
• identifying potential native title holders in the NTRB’s specific area of responsibility
• promoting an understanding of the Native Title Act amongst clients
• informing native title holders, claimants and potential claimants about matters which may impact upon their native title
• consulting with Aboriginal or Torres Strait Islander communities about matters related to the functions of an NTRB
• co-operating with other NTRBs to ensure the effective and efficient performance of NTRB functions.

Functions of NTRBs other than native title

Some NTRBs have functions other than those under the Native Title Act. The clearest example of this is the role of the land councils in the Northern Territory. Both the Northern Land Council and the Central Land Council are NTRBs. However, they both have a wide variety of land rights functions under the 1976 ALR Act. Other NTRBs have non-native title functions under their constitutions. For example, some NTRBs have constitutional objectives to facilitate the return of land to traditional owners (outside the native title process). Furthermore, many NTRBs have responsibilities to deal with issues affecting Indigenous cultural heritage, whether or not those issues arise from the native title process.

Section 2: The accountabilities of NTRBs

(a) Accountability to clients

• When an NTRB represents a native title group, it has particular obligations to that client group. These obligations are additional to the professional obligations of the lawyers.

• As with any service provider, an NTRB has a duty of care. A breach of that duty of care can lead to legal liability for negligence.

• An NTRB acting for a native title group must act in the best interests of the group, rather than in its own (the NTRB’s) interest. Furthermore, it must not make any financial gain from the performance of its functions. These obligations are commonly described as the duty to avoid a conflict of interest, and the duty not to make an unauthorised profit.

(b) Accountability to funding bodies

• NTRBs must meet a wide variety of financial and performance related obligations and accountabilities under the NTA. These obligations and accountabilities are enforceable requirements about the way NTRBs undertake their functions, report to government about their performance and expenditure of money and report to their constituents (native title holders and claimants) about their activities.

• They are stricter than the normal accountabilities that apply when an organisation receives government funding. In some respects, they are closer to the obligations of government agencies. The Department of Prime Minister and Cabinet supervises NTRBs’ performance of their accountability requirements.
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(c) Accountability to regulators

• Most NTRBs are Aboriginal corporations under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (the CATSI Act.) As such, they are supervised by the Registrar of Indigenous Corporations (Registrar) and must provide annual reports and audited accounts to the Registrar.

• Some NTRBs are statutory bodies in their own right – these are the Central Land Council, Northern Land Council and the Torres Strait Regional Authority. Each of these NTRBs is established under legislation that sets out a particular accountability regime. For example, the Central Land Council and the Northern Land Council have financial reporting obligations, in addition to those under the Native Title Act, which are set out in the 1976 ALR Act.

• At present, each NTSP is a company under the Corporations Act 2001 (Cth) and is regulated by the Australian Securities and Investment Commission (ASIC).

d) Accountability to members

• NTRBs (not NTSPs) are membership-driven organisations. This means they have rules for who can belong to the organisation (membership) and that they must hold annual and special general meetings to elect officer bearers and Directors and to make significant decisions. The management of an NTRB is accountable to its members. NTSPs are not membership driven organisations but are not-for-profit public companies limited by guarantee, and have shareholders who own the company.

Reforms and reviews of NTRBs

• In 2012, the Australian Government commissioned an independent review into the role and functions of NTRBs, releasing the Review of the roles and functions of Native Title Organisations in May 2014. (footnote: See Review of the Roles and Functions of Native Title Organisations, Deloitte Access Economics, March 2014, available at https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-review-roles-functions-native-title-organisations-010314.pdf). As at the date of updating this Handbook in October 2018, the Commonwealth Department of Prime Minister and Cabinet is conducting further limited reviews of some NTRBs around the country.

Section 3: The roles and functions of RNTBCs

(a) What is a RNTBC?

• Registered native title bodies corporate (RNTBCs) are the organisations (corporations) nominated by the native title holders to hold their native title once it has been recognised in a determination under the NTA. It is a requirement of the NTA that native title be held by a corporate entity and that it be an Aboriginal Corporation under the CATSI Act. The benefit of requiring that the native title be held by a corporation is that it protects individual native title holders from being sued and from responsibility for debts of the group.

• Once the Federal Court has approved the PBC it is placed on a register maintained by the National Native Title Tribunal. Once it is registered, a PBC is known as a registered native title body corporate (RNTBC).
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What does a RNTBC do?

The basic role of a RNTBC in the native title system is set out in the Native Title (Prescribed Bodies Corporate) Regulations 1999. Generally, there are five main functions given to RNTBCs. These include:

• to manage the native title rights and interests of the common law holders
• to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust
• to invest or otherwise apply money held in trust as directed by the common law holders
• to consult with the common law holders
• to perform any other function relating to the native title rights and interests as directed by the common law holders.

A RNTBC can also hold other property apart from native title and perform other roles and functions if the objects of the Corporation are broader than solely native title functions.

(c) Review of support for RNTBCs

On 2 November 2016, the Australian Government released a ‘PBC Support Strategy’ Discussion Paper, inviting submissions on:

1. better engagement between PBCs and governments;
2. more effective, transparent and coordinated funding for PBCs;
3. additional support for PBCs (other than providing direct funding); and,

As at the date of updating this Handbook in October 2018, the Australian Government had received submissions and conducted consultations with stakeholders in response to the Discussion Paper, but no changes to current processes had been proposed.

Section 4: The responsibilities of RNTBCs

(a) Accountability to native title holders

RNTBCs hold native title either as an agent or trustee. The functions may be similar but the legal relationship between the native title holders and the RNTBC is different depending on whether the RNTBC is acting as a trustee or an agent.

Where the RNTBC is appointed as a trustee of the common law native title holders:

• the RNTBC holds the native title and manages it
• when making decisions in relation to the trust property the RNTBC has a higher standard to apply being one of prudence and risk avoidance. In general terms a trustee’s duties are of a higher standard “than that required of company directors”.1
• the trustee RNTBC must not carry out directions if they are not reasonable, or oppress or operate unfairly in relation to a certain section of the native title group.2

1 Mantziaris C, and Martin D, Guide to the design of native title corporations, National Native Title Tribunal 1999,18.
2 Ibid 17.
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- In a RNTBC trust relationship the RNTBC itself is liable for any debts not the beneficiaries, that is not the native title holders.³

Where the RNTBC is appointed as an agent of the common law native title holders:

- the RNTBC only manages the title in accordance with the functions described above and in accordance with the specific directions of the native title holders at any particular time.⁴ An agent is bound to implement “an unwise investment decision” if directed to do so.
- it must “distribute benefits according to the Native Title holder’s wishes at the time” of any particular decision,⁵ unless the rules of the corporation require otherwise
- the native title holders are liable for the actions of the agent, that is the RNTBC acting as an agent.

A RNTBC must consult with, and obtain the consent of the common law holders before making a native title decision, and must do this by consulting, and considering the views of a representative body for the area, and if the RNTBC considers it to be appropriate and practicable - giving notice of those views to the common law holders.

As a service provider, like an NTRB, a RNTBC has a duty of care. A breach of that duty of care can lead to legal liability for negligence.

(b) Accountability to funding bodies

There is a limited basic support funding program to RNTBCs from the Department of the Prime Minister and Cabinet (Commonwealth DPMC). That basic support funding program is largely administered by the relevant NTRB for the region. It is likely that, if funding continues to be made available by the Commonwealth DPMC in the future, the Commonwealth DPMC will seek to fund RNTBCs directly rather than through the relevant NTRB (see Section 3, ‘review of support for RNTBCs above). Monies obviously must be spent in accordance with grant conditions from that or any other source. There are no statutory requirements as with NTRBs in the NTA.

(c) Accountability to regulators

The Native Title (Prescribed Bodies Corporate) Regulations 1999 prescribe that a RNTBC must be an Aboriginal and Torres Strait Islander Corporation incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 - the CATSI Act. This means that NTRBs are supervised by the Registrar of Aboriginal Corporations. This means that PBCs are supervised by the Registrar of Aboriginal Corporations.

The CATSI Act guides how all Indigenous corporations are run, including native title corporations. It requires a Corporation to establish a Rule Book, which sets out things like its objectives, how membership is defined, how meetings are to be run, decisions to be made, and disputes to be managed. It includes the responsibilities of directors and when and how conflicts of interest are to be declared. It also includes requirements for annual reports and audited accounts to be provided to the Registrar.

The CATSI Act includes specific provisions for RNTBCs. These provisions take into account some of the special circumstances facing RNTBCs as corporations. For example, a native title holder whom is a Director does not have to declare a conflict of interest for that reason alone. The Registrar may exempt any Aboriginal Corporation including a RNTBC from a range of requirements including reporting and meetings. This can be of assistance to RNTBCs that have no or little financial resources.

³ Ibid 17,18.
⁴ Ibid 16.
⁵ Ibid 18
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(d) Accountability to members

As noted, Aboriginal organisations incorporated under the CATSI Act are membership-driven. Annual and special general meetings are held to elect Directors and to make significant decisions. The management of an Aboriginal corporation is accountable to its members. The rules as to the election of the board are often based to some extent on customary rules and vary between corporations. Members of a RNTBC are generally native title holders only, although there are exceptions. Not all native title holders are necessarily members.

The Roles in NTRB staff

Introduction

The following section provides an overview of the typical staff roles you might find in an NTRB. It is not intended to be comprehensive but to give you a broad understanding of the various roles that you might encounter, and consider where your role as an intern, with its particular functions, responsibilities and accountabilities, fits into the general picture. It is important to remember of course that just as NTRBs differ in their functions and structures, there is also variability in staff roles, and the particular responsibilities of each role.

The roles are divided into the following very broad sections:

a) Community Liaison/Field Officer section
b) Legal section
c) Research/Anthropology section
d) Administrative/Support section
e) Executive section

a) Community Liaison section

This role has a range of position titles (Area Officer/Community Liaison Officer/Field Officer/Native Title Officer/Project Officer) but staff in these roles at NTRBs can have the following responsibilities:

• working closely with the various sections of the NTRB involved in preparing land claims, native title claims, mining consultations and agreements, land trust management, royalty management, sacred site protection, ILUAs, permits and work area clearances. The Officer has a particularly important role to play in facilitating effective communication between other sections of the NTRB and the Aboriginal community. In some instances the person may be able to assist in communicating (for example speaking Aboriginal creole or other Indigenous languages).

• providing a general advocacy and support role for the Indigenous communities in the region. The specific nature of this work varies for each NTRB but typically includes involvement in community development, grant administration, the management of incorporated bodies, and liaising with government and other service providers. The Officer is also expected to interact with various external organisations and persons on behalf of the local community.

• advising other NTRB staff on any pertinent social or cultural issues of which the staff should be aware in their performance of NTRB functions, as well as providing general administrative support where necessary.

• playing an important role in facilitating the participation of regional members and delegates at periodic NTRB meetings, Executive meetings and regular regional meetings (where applicable).
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

• co-ordinating and facilitating the delivery of the NTRB’s statutory functions and services within the area serviced by the particular NTRB.

b) Legal section

Principal Legal Officer and legal team

The PLO and legal team are required to have detailed knowledge of the NTA so as to be able to effectively advise and support native title claimants on all aspects of the claim process. In the performance of their functions, legal staff may be required to liaise with relevant Federal and State Government bodies, undertake legal research, engage barristers to represent claimants in court, and interact with and provide legal support to other staff in the NTRB. Their roles include:

• providing legal advice to native title groups for the lodging and progressing of their claims
• appearing in court
• drafting documents
• providing legal advice regarding future acts and supporting native title holders and claimants in the development and implementation of negotiation and mediation strategies in future act matters
• briefing barristers as appropriate.

Legal Secretary

The Legal Secretary performs an administrative support role to the Principal Legal Officer. The Legal Secretary may be required to:

• file legal documents
• liaise with external parties on behalf of the Principal Legal Officer
• type correspondence and court documents on behalf of the Principal Legal Officer
• undertake administrative functions for the legal section.

Future Acts/Mining Officers

These staff are responsible for the handling of all future acts by external parties on native title land. Future act negotiation can be a long and arduous process for all parties involved, and the Future Acts Officer helps to alleviate the potential difficulties faced by native title holders in the negotiation process. This position is sometimes held by lawyers, and in other cases is performed by non-lawyers. The responsibilities of the Future Acts Officer may include:

• assisting and advising native title holders in their negotiations with the developer or the government.
• handling the administrative details involved in a future acts claim, such as sending out future act notices to native title holders and claimants, documenting and filing relevant information, lodging necessary documents with the Tribunal, and arranging and attending meetings between the native title holders of land, future act claimants, and government representatives.
• designing and implementing a smooth future acts application process to be followed by external parties.

Where a future act has been either consented to by the native title land holders or approved by the Tribunal, the Future Acts Officer may still be involved in ensuring that the future act developers limit their operations to the extent permissible by law, and ensuring that relations between the native title group and the developers remain amicable.
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

c) Research section

Anthropologist

Anthropologists working in the native title sector play a central role in researching the traditional laws and customs of native title claimants so that claimants are able to substantiate their claims to country under the NTA. This role requires the anthropologist to undertake fieldwork with Indigenous communities. In addition to research into the traditional ownership and cultural heritage patterns of prospective native title land, information essential to the Court’s inquiry into whether the relevant native title claimant group has a sufficient connection to the land to establish native title, the anthropologist’s work may include:

- providing social and cultural advice to the NTRB regarding native title claimants and their claims
- providing support for land management functions, including identification of traditional owners and native title holders
- overseeing cultural heritage issues such as work in site protection and possibly sacred object repatriation (reclaiming ownership of sacred objects)
- contributing to policy development.

Research Officer (commonly anthropologists, archaeologists or historians)

The Research Officer may be involved in:

- designing and implementing an appropriate research system in the areas of traditional land ownership, cultural heritage, and environmental issues to assist the NTRB to achieve its aims.
- implementing means to ensure protection of culturally sensitive material, and providing advice on anthropological, land claim and cultural protection matters. Advice may be sought by fellow NTRBs, government representatives, or other interested persons. Due to the sensitive nature of much of the information gathered by NTRBs in the performance of their functions, the Research Officer must be discriminating in the provision of his or her advice.
- informing other NTRB staff of document retention policies and information retention and storage ‘best practices’
- engaging anthropological or other external consultants to assist with the preparation of land claims and cultural protection matters
- establishing and maintaining effective reporting procedures and liaising with all other units within the NTRB.

d) Corporate services /administration

General Administrative Staff

The administrative staff at an NTRB may be required to perform various tasks as the need arises, however in general the responsibilities falling upon administrative staff incorporate:

- document retention, including filing and photocopying
- entry of information into databases
- word processing, including drafting correspondence
- organising conference participation, travel and accommodation for other NTRB staff.

Receptionist/Front Desk

The Receptionist may be required to undertake general administrative duties, however their primary role is to
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

act as a first point of contact for all parties wishing to deal with the NTRB. This entails:

• responding to queries from external parties on the phone, by email, and in person
• organising meetings on behalf of other NTRB staff
• facilitating communication between members of the NTRB and members of the public, including taking messages for absent staff.

Chief Financial Officer (CFO)
The Chief Financial Officer is responsible for the preparation and maintenance of the financial records of the NTRB in accordance with various legislative requirements. The financial obligations imposed on NTRBs by legislation include:

• the effective and accurate documentation of all operations and transactions by the NTRB involving money, including records of payroll, any commercial activity of the NTRB, and any insurance policies held by the NTRB, as well as any claims made under such insurance policies. These records must be kept for a period of at least 7 years.
• the preparation and submission of an annual financial statement detailing the financial operations of the NTRB in the previous financial year
• the preparation of budget estimates for each financial year
• keeping the directors of the NTRB informed of the operations of the NTRB, and submitting required reports.

Finance Support Staff/Corporate Services
The CFO may be assisted in his/her various functions by a team. These staff will commonly be involved in the maintenance of the NTRB database of all day to day financial transactions, including payroll, as well as in the preparation of reports to funding agencies.

Human Resources Staff
The responsibilities of Human Resources staff of an NTRB may include:

• the maintenance and upkeep of records relating to the employment of all NTRB staff, including payroll, leave, and contractual issues
• the organisation and implementation of training Programs for staff, including induction Programs for new staff and continuing education Programs for existing staff
• ensuring that the NTRB is compliant with various statutory occupational health and safety considerations, including promoting awareness of these considerations amongst all staff.

Information Technology Officer (IT Officer)
The Information Technology Officer will be responsible for the provision of technical assistance to NTRB staff. This may include:

• engaging the services of an outside contractor to fix a technological problem where the IT Officer is unable to do so
• aiding the development and maintenance of NTRB databases
• developing and overseeing the operation of the NTRB website, including the maintenance of links with external websites.
Chapter 2: The roles of NTRBs, NTSPs and RNTBCs

e) Executive section

All Officers and Directors of NTRBs must carry out their functions in accordance with various legislative
requirements, imposed cumulatively by the Commonwealth Authorities and Companies Act 1997, the Native
Title Act 1993, and the Corporations (Aboriginal and Torres Strait Islander) Act 2006. In summary, these
obligations require Officers and Directors of NTRBs to avoid and/or disclose conflicts of interest, to exercise
all due care and skill in the performance of their functions, and to use information provided to the NTRB by
external parties in an honest and responsible manner, keeping it confidential where required to do so.

Chief Executive Officer/Executive Director

The CEO or Executive Director of an NTRB is responsible to the Directors (Board) for the general and overall
management of the organisation. The exact role of the CEO or Executive Director will necessarily depend on
the size, structure and focus of the particular NTRB. Broadly, however, the CEO’s functions include:

• ensuring that the NTRB is working towards its organisational goals and objectives by continuously
  monitoring and evaluating the operations of the NTRB
• representing the NTRB at various regional, national and international conferences concerning native title
  and Indigenous rights and welfare
• representing the NTRB at various meetings with external parties, for instance in the negotiation of
  Indigenous Land Use Agreements
• overseeing the day to day operations of the NTRB, including staff employment matters and financial
  operations

Policy Officer

Some NTRBs employ one or several Policy Officers as part of their staff. This position can be located in
the Executive section of the organisation, or perhaps elsewhere such as legal or research. Briefly, the role
of a Policy Officer is to develop, coordinate, and promote policy on a wide range of Indigenous issues,
but especially those which pertain to the holders of native title. Under this broad rubric, the specific
responsibilities of a Policy Officer may include:

• researching and preparing policy papers and submissions to government
• drafting speeches for the CEO/Director and Chairperson of the Board on a range of policy issues
• advocating and promoting a wide range of Indigenous issues at a regional and national level – for
  example, liaising with NTRB clients, relevant government agencies, and other interested persons
• attending and participating in meetings, conferences, and seminars
• co-ordinating and facilitating meetings, workshops and conferences.
Chapter 3: State-based land rights systems

Statutory land rights

Land rights involve statutory grants of land to Indigenous people through a land trust, Land Council or corporate entity. Commonwealth, State and Territory land rights legislation operates separately to the native title system. Land Rights legislation involves the grant from government of a crown title – generally freehold to an Indigenous group. Whereas native title involves the recognition of a pre-existing native title based upon the traditional laws and customs of the relevant Indigenous society.

Generally speaking native title co-exists with land titles granted under land rights legislation. Many Indigenous groups have not sought native title outcomes as they hold stronger legal rights under land rights legislation. Most land rights schemes pre-date Mabo (No.2) decided in 1992 and the Native Title Act 1993.

The Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA) was the first legislation in Australia creating a mechanism for claims to ‘Crown land’ on the basis of traditional connection but it was not the first legislation returning land to Indigenous people. That honour goes to the Aboriginal Land Trusts Act 1966 (SA). Between them, these two statutes establish two different paradigms for returning land to Indigenous ownership – by claim and by direct grant. All subsequent legislation in Australia adopts either, or both, of these pathways.

In many cases, Indigenous people have been dispossessed and removed from their traditional lands. Consequently, they are unable to demonstrate a continuous connection to that land, leading to an inability to establish native title. The land rights system can provide for the return of traditional lands to Indigenous peoples, in recognition of the importance of those lands to the social, economic and cultural rights and development of the traditional owners. It also provides for the control of land in recognition of historical attachment by Indigenous people such as former missions. Not all land rights legislation is based on traditional ownership.

At present, Aboriginal and Torres Strait Islander peoples (who are less than three per cent of the Australian population) own or have legally recognised interests over approximately 31 per cent of the Australian continent as a result of statutory land rights schemes and the recognition of native title. This percentage may give a misleading impression of a uniform return of land to Indigenous peoples. This figure includes non-exclusive possession native title, which does not include control over access to the lands concerned and it should be noted that there are wide disparities between the State and Territories as to the amount of land returned.

During the 1980’s it was the policy of the Hawke Labor government to enact National Land Rights legislation but this was abandoned after significant opposition by the mining industry and certain State Governments.

Northern Territory

ALRA is the best known example of a statutory land rights scheme. It has resulted in almost 50 per cent of land in the Northern Territory being owned collectively by Indigenous people. It is Commonwealth legislation that only applies in the Northern Territory. It essentially involves the grant of an inalienable freehold title to an Aboriginal Land Trust that holds title for the benefit of traditional owners. The consent of traditional owners is required to any development proposals on their land including mining. Statutory land councils are established under the Act to administer the statutory scheme. Leases may be issued with traditional owners consent to provide for community, social and economic purposes.

The way to familiarise yourself with the ALRA is to look at its key provisions. Here are some of the main ones:
Chapter 3: State-based land rights systems

Grants of Aboriginal land

- Land trusts: sections 4 and 5.
- Land claims and grants: sections 10, 11, 12, 67, 67A, 67B.
- Uses of Aboriginal land: sections 18, 18A, 18B.
- Uses and leases of Aboriginal land: sections 12C, 14, 15, 19, 19A (also note section 20A).
- Mining: Part IV.
- Resumption and other uses of Aboriginal land: sections 67, 68, 70 and 71.
- Sacred sites: s69 (Note: This is a general provision, not specific to Aboriginal land).
- Consent of traditional owners: s77A.

Please note that there were extensive changes to the ALRA in 2007, particularly regarding the ‘permit’ system, leases over certain townships, and a range of policy changes, required by the ‘emergency intervention’. Those of you heading to the Northern Territory should look into these changes prior to going on placement. Specific details for each community will differ. Generally a permit is required to visit Aboriginal land under the Act. Entry and permits to Aboriginal land are governed by Part II of the Aboriginal Land Act (NT).

The claims process under ALRA has now ceased and new Aboriginal land can only be created under the Act through legislative amendment by the addition of areas to Schedule 1 of the Act. ALRA is commonly used to assist in the settlement of native title claims by also providing for the grant of Aboriginal land as well as native title recognition. For more detailed information see the Central Land Council website at: http://www.clc.org.au/articles/cat/land-rights-act/.

Western Australia

There is no statutory land rights scheme, in Western Australia. Despite the positive recommendation from Commissioner Paul Seaman, who conducted the Aboriginal Land Inquiry in 1983-84, the Western Australian Government at the time decided against introducing a statutory land rights scheme.

There are an extensive number of Aboriginal reserves established under the Land Administration Act 1997. Many of these reserves date back to the native welfare era. Most are controlled by an Aboriginal Land Trust (ALT) established under the Aboriginal Affairs Planning Authority Act 1972 (WA). Some reserves are controlled directly by local Aboriginal Corporations and not the ALT. Some reserves are also proclaimed under the Aboriginal Affairs Planning Authority Act 1972 (Part III), and a permit system then applies concerning access to those particular reserves.

The ALT also holds a portfolio of leasehold and freehold land much of which is occupied by Aboriginal people. Some of the ALT reserve land is leased to Aboriginal organisations or individuals under long term leases. Generally speaking native title co-exists on an Aboriginal reserve.

Queensland

Both the Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld) create a scheme for grant of, and claims to, Crown land. Grants of land are for ‘transferable land’ which includes former reserve and Deed of Grant in Trust (DOGIT) land but also the discretionary category of ‘available Crown land’ declared by government to be transferable. There is a statutory imperative to grant transferable land. Claimable land is the other category of land. Claims for this land are heard by a land tribunal under each statute. Such claims can be established on a number of grounds (including traditional affiliation, historical association and economic or cultural viability).

1 Note also the schedules to the Act – e.g. Schedule 1 contains land that was never claimed, but just transferred reserves or land that was the subject of legislative amendment of Schedule 1 by negotiated arrangement. This can be important where you are looking for information such as who the traditional owners were, as they would not be identified by a Commissioner’s Report on schedule land.
Chapter 3: State-based land rights systems

If a claim is successful, the relevant land tribunal makes a recommendation to the responsible Minister that the land be granted to the successful claim group. Although a number of claims are still pending in Queensland, the capacity to make new claims expired on 21 December 2006.

The Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld) were reviewed by the government, and then amended in 2008 by the Aboriginal and Torres Strait Islander Land Amendment Act 2008 (Qld).

The amending Act made changes to arrangements for long term leases, ‘non-transferability’ provisions and compulsory acquisition powers of the State. Please check the new Act and any updates carefully, as certain areas where interns may be working have specific arrangements applicable.

Another important category of land in Queensland is DOGIT land, the acronym given to land granted as Deed of Grant in Trust for Aboriginal or Torres Strait Islander purposes under the Land Act 1994 (Qld). Grants of DOGIT land were the response of the Bjelke-Petersen Government to Indigenous agitation for land rights in the early 1980s. These grants were made to the Aboriginal and Island councils of former reserves. Aboriginal and Island councils have since become conventional local governments as shire councils under the Local Government Act 2009 (Qld). They do, however, retain their ownership of council land as DOGIT at least unless and until those areas are transferred.

For the Shires of Mornington and Aurukun, a different arrangement exists. Land in these shires is leased to the shire council under the Aurukun and Mornington Shire Leases Act 1978 (Qld).

The Aboriginal Land Act 1991 is commonly used to assist in the settlement of native title claims by also providing for the grant of Aboriginal land as well as native title recognition.

New South Wales

The Aboriginal Land Rights Act 1983 (NSW) provided for the direct grant of former reserve land and for claims to be made for ‘claimable Crown lands’. Importantly, the Act also provided for the creation of a variety of local Aboriginal land councils and the New South Wales Aboriginal Land Council. The claims mechanism under the Act is unique, in that it proceeds by a claim to the responsible Minister who exercises a very limited discretion and is not only based on traditional ownership. Review is available in the Land and Environment Court. There is a significant backlog in land claims with 26,000 outstanding as of 30 June 2012.

Important amendments to the Aboriginal Land Rights Act 1983 (NSW) were made by the Aboriginal Land Rights Amendment Act 2006 (NSW) and these have important consequences for the governance of local Aboriginal land councils and the New South Wales Aboriginal land council and for the administration of the assets of these entities. Significantly the Act also provided for financial independence by the requirement of the State to pay 7.5% of state land tax for 15 years upon commencement of the Act. Further it is required that half this money be invested for the future. As of 30 June 2012 the NSW Aboriginal Land Council had total assets of $624 million.

Victoria

Victoria has enacted a limited range of legislation authorising the grant of specified land for the benefit of Victorian Aboriginal people – e.g. the Aboriginal Land (Northcote Land) Act 1989 (Vic); Aboriginal Land (Manatunga Land) Act 1992 (Vic) and Aboriginal Lands Act 1991 (Vic). In some cases, Commonwealth legislation provides for the grant of land in Victoria for similar purposes – see Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth).

Victoria has introduced an alternative system for resolving native title claims. The Traditional Owners Settlement Act 2010 (Vic) came into operation on 23 September 2010. It allows the Victorian Government to make agreements with traditional owners to recognise their rights to public land in return for agreement to withdraw current native title claims, or settle all existing claims (whether by determination or withdrawal). The Act aims to deliver a more efficient and economical way of settling native title claims by negotiation, rather than litigation. Grants of freehold title for cultural and economic purposes can be made pursuant to these settlements.
South Australia

The Aboriginal Land Trusts Act 1966 (SA) was mentioned above. South Australia has also legislated for the return of large areas of the State under the Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA) and the Maralinga Tjarutja Land Rights Act 1984 (SA). Both of the latter pieces of legislation provide for an inalienable freehold title and governance by a statutory Aboriginal Corporation.

Tasmania

The Aboriginal Lands Act 1995 (Tas) created an elected Aboriginal Land Council of Tasmania and vested in it ownership of certain land of significance to Tasmanian Aboriginal people. Since the vesting of land in 1995, a number of additional properties have been added to the stock of the land council by amending legislation. The land vested in the Council in perpetuity unusually includes mineral rights except for oil, atomic and geothermal substances.

Suggested additional reading

General:
- Ritter D. The native title market (Crawley: University of Western Australia Press, 2009).

Land title:
- Permit system: http://www.nlc.org.au/articles/info/frequently-asked-questions
Chapter 3: State-based land rights systems
Chapter 3: State-based land rights systems
Chapter 4: General legal resources

The Native Title Resource Guide

The Native Title Resource Guide, published by AIATSIS, is an online research resource for accessing information about native title. It includes information about and links relating to:

• native title legislation and case law
• Federal, State and Territory Governments’ native title policies and procedures
• NTRBs, registered native title bodies corporate, government agencies and other organisations involved in native title
• native title applications and determinations
• Indigenous Land Use Agreements (ILUAs), future acts and other native title related agreements
• land rights legislation
• Indigenous Land Corporation land acquisitions, Indigenous land management and Indigenous Protected Areas
• Indigenous population profiles
• related research resources.


The Native Title Representative Body website

This website is a useful resource directory with links to many other sites as well as positions vacant at NTRBs and NTSPs. It also has NTRB/NSTP contact details and a map of NTRB areas. www.ntrb.net

The National Native Title Tribunal (NNTT) website

The NNTT website contains information about native title applications and determinations, ILUAs and future acts processes. It contains up-to-date information on recent resolutions concerning native title lands and waters, as well as information on the role played by the NNTT in those resolutions. www.nntt.gov.au

The site also has an excellent collection of regularly updated maps on native title determinations across Australia. It is strongly recommended you take a moment to view the maps that give a good illustration of where native title exists across Australia, and where the major cases and determinations are located.


The site also allows for people to search by representative organisation (i.e. NTRB) to find out what claims are currently ongoing. Students placed with an NTRB would find this useful to explore before their placement begins.

The Federal Court of Australia website

The Federal Court’s website also contains information about native title, including the role played by the Court in determining native title claims.

Chapter 4: General legal resources

Publications on law firm websites

Many law firms publish native title related articles and updates in the ‘Publications’ sections of their websites as developments occur. These will include references to new or amended legislation, relevant case law, and commentaries on the potential impact of any major changes. Here are a couple of the more extensive ones:

- Allens Linklaters: www.allens.com.au/pubs (then go to ‘native title’)
- Herbert Smith Freehills: www.herbertsmithfreehills.com/insights
- Chalk & Behrendt: www.chalkbehrendt.com.au

WorldLII subject indexes

WorldLII includes subject-matter based guides, and the Aboriginal and Torres Strait Islanders Guide is extremely useful: www.worldlii.org/catalog/101.html.

The Indigenous Law Resource Guide, found within the WorldLII category is particularly useful:

- www.worldlii.org
  then go to: ‘Catalog’ and click on ‘Subjects’
  then: click on ‘Indigenous Law’
  then: click on ‘Australian Aboriginals and Torres Strait Islanders’
  then: select from a range of resources and links

Other websites

The Agreements, Treaties and Negotiated Settlements (ATNS) project is an Australian Research Council (ARC) Linkage project examining treaty and agreement-making with Indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. www.atns.net.au

The Office of the Registrar of Indigenous Corporations (ORIC) website contains useful information on the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (known as the CATSI Act) including fact sheets on popular topics. Also included are comprehensive FAQs and access to the public Register of Aboriginal and Torres Strait Islander corporations which enables you to search by corporation name, suburb, postcode or state and view public documents lodged with the Registrar e.g. Certificate of Incorporation, Corporation’s Rule Book etc. www.oric.gov.au

AIATSIS has an online native title law resources guide, which includes useful links to those organisations involved in native title see: www.aiatsis.gov.au/ntru/resources.html

The Parliamentary Library has an Aboriginal and Torres Strait Islander affairs resources page: www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic

News publications

Various news publications such as:

- IndigOz
- National Native Title News
- Koori Mail
- National Indigenous Times
- The Australian
Chapter 4: General legal resources

- The Australian Financial Review
- The Sydney Morning Herald
- The Age
- The West Australian
- Alice Springs News.

Lead texts

General texts
- Ritter D (2009), Contesting Native Title From controversy to consensus in the struggle over Indigenous land rights, Allen & Unwin.

Journal articles
Chapter 4: General legal resources


Articles are available in the usual legal databases and resources. These 2 journals would be the first ‘port of call:

Other resources

You may also want to read the following literary works:
- Behrendt L, Indigenous Australia for Dummies
- Lowe P, (1997), Jimmy and Pat Meet the Queen, Blackroom Press, Broome. A quick read that uses plain language to explain complex ideas.
- Rowse T, (2012), Rethinking Social Justice: From ‘peoples’ to ‘populations’

Suggestions from past interns

- The articles on native title in Noel Pearson’s “Up from the Mission” (2009)... I found it incredibly useful to read through his writings chronologically, to gain an impassioned perspective on the progress (and otherwise) of Native Title since MABO.
- C Sumner, ‘Getting the most out of the Future Act process’, posted on the NNTT website is an interesting discussion of the future acts process, relevant to all interns (placed at NTRBs or policy organisations). See: www.nttt.gov.au/News-and-Communications/Speeches-and-Papers/Pages/Getting_the_most_out_of_the_future_act_process.aspx
- Re-evaluating Mabo, the case for Native Title Reform to remove Discrimination and promote Economic Opportunity, Shireen Morris. This paper is available on the AIATSIS at http://www.aiatsis.gov.au/ntru/issuеспapers.html.
Chapter 4: General legal resources

• There is a great resource for writing case notes available on the ANU website, which legal interns may find useful at https://academicskills.anu.edu.au/node/125

• The state government in Queensland has a procedure manual that outlines the steps that government officers (responsible for assessing licenses/permits, applications etc) must do to ensure that a licensee or permit holder (involved in a future act) has taken into account the rights of native title holders. You can find it at http://www.derm.qld.gov.au/nativetitle/policy/procedures_toc.html.

• Here is a link to National Association of Community Legal Centres http://clcvolunteers.net.au/faqs.php about what to expect as a CLC volunteer.

• Suggest reading: “Why warriors lay down and die” by Richard Trudgen about problems of Aboriginal education and health since colonisation to modern day interactions.

• Understanding native title: Young, Simon ‘The Trouble with Tradition: Native Title and Cultural Change’.

• Throwing off the Cloak: Reclaiming Self-Reliance in the Torres Strait by Elizabeth Osborne (2009, Aboriginal Studies Press) has a couple of good chapters that focus specifically on the regional sea claim, which gives a good background to the political as well as the legal issues. It also explains the TSRA and its development.

• I stumbled upon the above information sheet in my first week, and it crystallised the fairly complex scheme in the Torres Strait, but I would recommend any future intern reading that before they arrive http://www.tsra.gov.au/__data/assets/pdf_file/0017/2492/Information-Sheet-Native-Title,-ILLUs,-NTRBs-and-PDOC11-204694.pdf.

Chapter 4: General legal resources
Chapter 5: General anthropology and social science resources

Research

It is important for you as an anthropology intern to be aware of some of the more critical assessments of the role of native title in resolving land disputes which recognise the deep colonial undertones of this legal process, and the demands on traditional owners to conform to artificial structures that determine Aboriginality, and the potential for traditional attachments to land.

It is also essential that you recognise the double bind often generated by native title and other land rights legislation (refer to Chapters 3, 4 and 6 for more information about these different schemes). These processes are viewed by some as flawed and for this very reason they do not always appeal to traditional owners.

Maps of Aboriginal Australia

You may find it helpful to refer to an Aboriginal Australia language area map such as that produced by AIATSIS. This map can be helpful in carrying out native title work and many Indigenous people have used it to support their own evidence regarding their affiliations. It has been included at the end of this Handbook for your easy reference, but can also be purchased from AIATSIS. www.aiatsis.gov.au

However, in referring to this and other maps, use caution and be aware of the inherent limitations as some maps can be cultural artefacts in themselves.

General anthropological web resources

• AusAnthrop site is dedicated to research and resources in anthropology, for academics as well as for laypeople. Special accent is on Aboriginal Australia, and more specifically on the Aborigines of the Western Desert cultural bloc. However, other resources are, and future resources will be, of interest to a wider public, whether anthropologists or not. www.ausanthrop.net

• Agreements, Treaties and Negotiated Settlements (ATNS) project is an Australian Research Council (ARC) Linkage project examining treaty and agreement-making with Indigenous Australians and the nature of the cultural, social and legal rights encompassed by past, present and potential agreements and treaties. www.atns.net.au

• Australian Anthropological Society (AAS) represents the anthropologists of Australia. The goals of the Society are to promote the advancement of anthropology as a professional discipline grounded in the systematic pursuit of knowledge, to promote its responsible use in the service of humankind, and to promote professional training and practice in anthropology. www.aas.asn.au

The Native Title Representative Bodies (NTRBs) website

This website is a useful resource directory with links to many other sites as well as positions vacant at NTRBs and NTSPs. It also has NTRB/NSTP contact details and a map of NTRB areas. www.ntrb.net
Suggested Reading

Critical issues in native title anthropology

- Bauman, T (ed) ’Dilemmas in Applied Native Title Anthropology in Australia’, Canberra: AIATSIS, University House, ANU, Canberra.
Anthropology, connection reports and customary rights

- *Australian Anthropological Society Newsletter*, (September 2003), Number 91.

Native title cases with relevance to anthropological work

- The following case is a good one to read on the role of the applicant in Native Title given that this is a key aspect of running a native title claim particularly as the role of the applicant has changed following recent decisions: FEDERAL COURT OF AUSTRALIA Roe v Kimberley Land Council Aboriginal Corporation [2010] FCA 809 [http://www.austlii.edu.au/au/cases/cth/FCA/2010/809.html](http://www.austlii.edu.au/au/cases/cth/FCA/2010/809.html)
Chapter 5: General anthropology and social science resources


Gender, kinship and genealogies


Age and Gender

Suggested readings on age and gender issues


Chapter 5: General anthropology and social science resources


