

Queensland Government Native Title Work Procedures

Introduction

What are the Native Title Work Procedures?

August 2017

Version history

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Introduction

1. What are the Native Title Work Procedures?

The Native Title Work Procedures ('Procedures') are a policy document to aid decision making and allow the business of government to proceed while appropriately considering native title and satisfying the requirements of the Commonwealth *Native Title Act 1993* (NTA). They reflect current law and policy and apply across all State departments and agencies.

The Procedures help you carry out a native title assessment for your proposed dealing. Following the **Path through Native Title Assessment**¹, the Procedures lead you through the steps of a native title assessment (beginning with **Module AA, Chapter 1**) to ensure native title issues are properly addressed *prior to each and every land and resource dealing*, eg. the grant of a lease, the grant of a commercial fishing licence, the construction of a public work on a reserve, the creation of a national park management plan, etc.

Carrying out a native title assessment for a proposed dealing involves researching and identifying to establish -

- whether native title may still exist over particular areas of land or waters, ie. has native title been extinguished?
- where native title has not been extinguished, the provision of the NTA which applies and the procedural rights (if any) to be provided to the relevant native title parties.

Until you carry out a native title assessment, you will not know how to address native title for your proposed dealing. By following the Procedures, you ensure that your proposed dealing is valid in relation to native title.

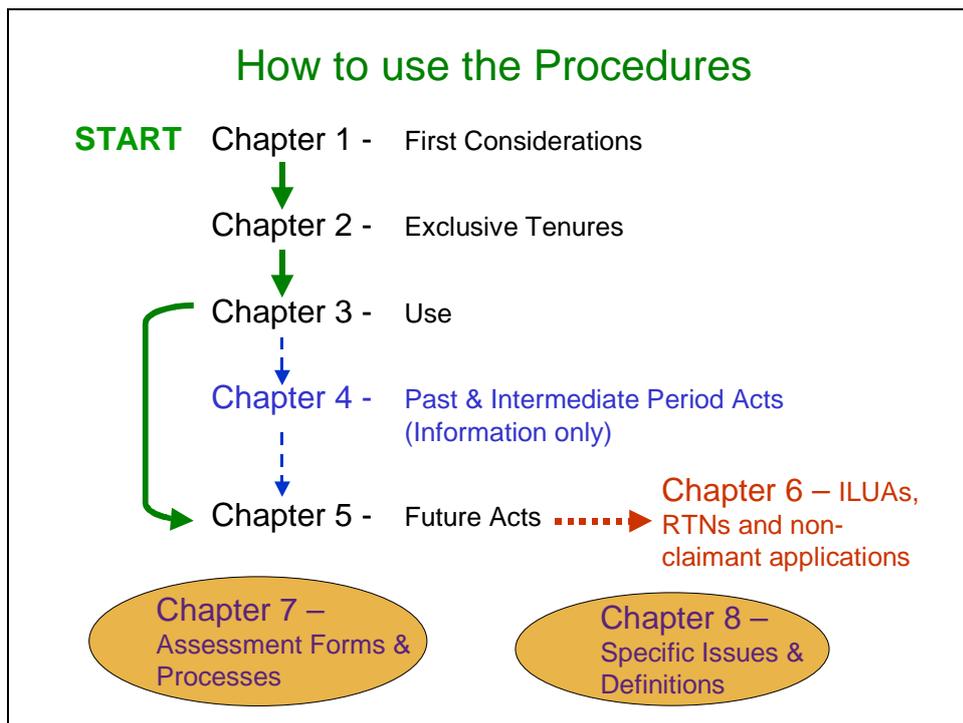
Contact your **Native Title Contact Officer** ('NTCO') for any queries you have in relation to these Procedures or other native title issues. If your NTCO is unable to help you, then your NTCO will seek advice from Aboriginal and Torres Strait Islander Land Services.

Using the Procedures

The Procedures are divided into Chapters, with each Chapter then divided into Modules or Annexures.

It is essential that you consider the Modules in Chapters 1 to 5 in alphabetical order. Once you have found a Module that applies to your proposed dealing ... **STOP**. There is no need to consider a further Module (unless the Module requests you to do so). Let's have a quick preview of the Procedures.

¹ Located at the end of this Introduction



First Considerations

Chapter 1 is about important considerations for starting your native title assessment. It requests you to properly identify your dealing and proposed dealing area as the type of dealing and land tenure are the key ingredients for your native title assessment. You are then asked to consider whether your proposed dealing-

- can proceed without further reference to native title
- is covered by a registered Indigenous Land Use Agreement (ILUA)
- is covered by a determination of native title.

Exclusive Tenures & Use

Chapters 2 and 3 set out how to undertake a tenure history and usage investigation and then assess whether any tenures or works identified have extinguished native title.

Past & Intermediate Period Acts

Chapter 4 is an information Module only and is not part of the assessment process. You may choose to skip it and go directly to Chapter 5.

Chapter 4 explains the concepts of past acts and intermediate period acts to increase your understanding of the NTA.

Future Acts

Chapter 5 deals with future acts, i.e. acts that affect native title. You only reach this Chapter if previous Chapters did not apply to your proposed dealing. Each Module in this Chapter addresses different subject matter, eg, primary production, water, reserves, etc. and **must** be considered in alphabetical order.

RTNs, ILUAs and Non-claimant applications

Chapter 6 covers the right to negotiate process, ILUAs and non-claimant applications.

The right to negotiate process **only** applies if you pass through Module IC or Module M in Chapter 5.

An ILUA or a non-claimant application (if certain requirements are satisfied) are other options to progress your proposed dealing where Chapter 5 does not apply.

Native Title Assessment Forms and Processes

Chapter 7 provides you with pro formas, templates and steps to help you with your native title assessment.

Specific Issues and Definitions

Chapter 8 deals with specific issues, eg. how to address native title in relation to dealings done under the *Sustainable Planning Act 2009*.

Help is only a click away...with QNTIME

The Queensland Native Title Information Management Environment (QNTIME) is only a click away to help you with your native title assessment.

QNTIME provides textual and spatial information on the following native title datasets -

- (a) native title applications (claimant, non-claimant, compensation)
- (b) native title determinations
- (c) acquisitions of native title
- (d) registered indigenous land use agreements
- (e) tenure and usage research
- (f) native title extinguishment conclusions
- (g) native title representative body areas.

One of the significant benefits of QNTIME is that assigned users can input their tenure and use research findings so that all QNTIME users can view research done by others.

For further information on QNTIME, go to Chapter 7 of these Procedures.

QNTIME does not replace the Native Title Work Procedures. It is an important tool to add to your toolbox for native title assessments.

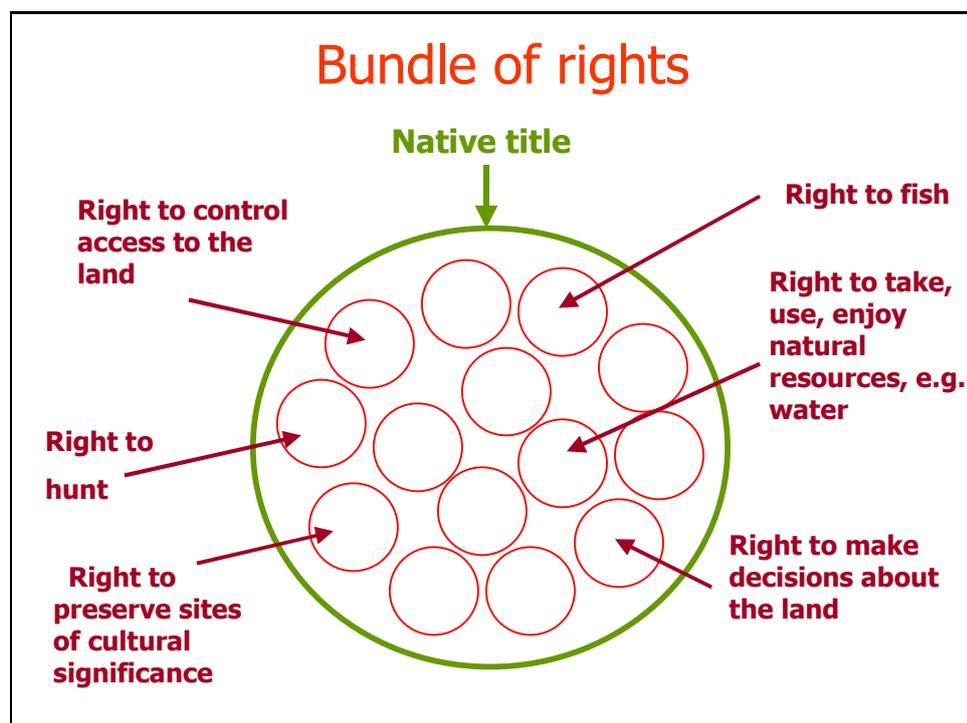
2. What is native title?

Native title describes the bundle of rights and interests held by Aboriginal peoples or Torres Strait Islanders.

Native title rights and interests are either -

- exclusive, eg. the right to speak for country
or
- non-exclusive, eg.. the right to traverse.

The following diagram shows what the bundle of rights might be for a particular native title group.



However, native title rights and interests will cease to exist through -

- acts of the Crown inconsistent with the continued exercise and enjoyment of native title, i.e. extinguishment of native title
- expiry of native title, i.e. loss of connection to the land or waters by the native title holders
- surrender of native title rights and interests, eg.. the native title parties may agree to surrender their rights and interests to the Crown under an ILUA.

Where native title rights and interests have not been extinguished, surrendered or expired, they are able to be recognised through a determination of native title. (Refer to **Annexure 8.5** for an explanation of the determination process.) There are many requirements that must be satisfied for that recognition to occur, including -

- the native title rights and interests must be in relation to land and waters and be possessed under the native title group's traditional laws and customs

- through those laws and customs, the group must have a connection with the land or waters
- the group, laws and customs and therefore the native title rights and interests must have been in existence since sovereignty without any substantial interruption to their continuation.

3. Significant dates

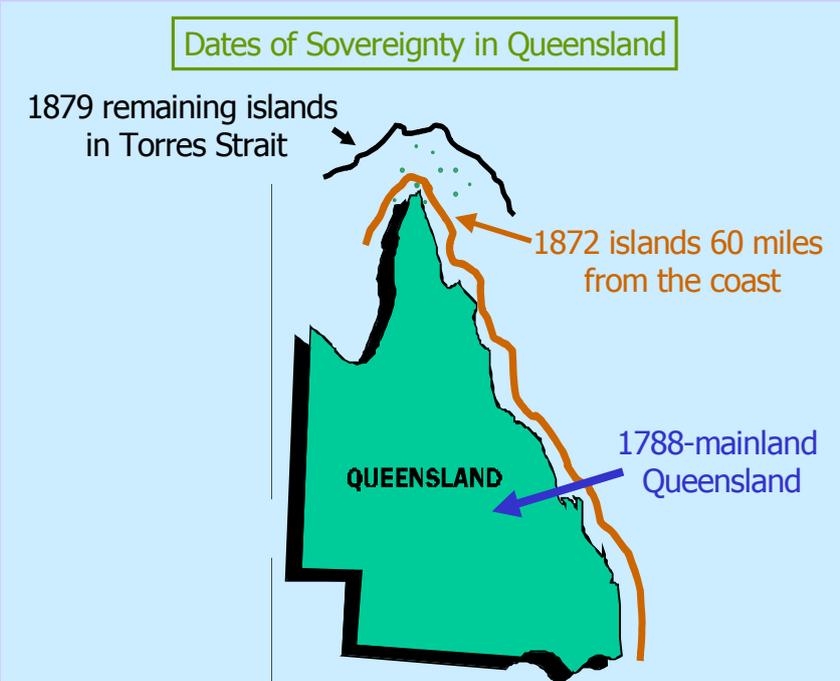
To help in your understanding of these Procedures, there are some key dates that you should be aware of.

1788

Sovereignty

The British acquired sovereignty (ie. asserted legal control) over -

- (a) mainland Queensland in 1788
- (b) the islands 60 miles off the Queensland Coast in 1872
- (c) the remaining islands in the Torres Strait in 1879.



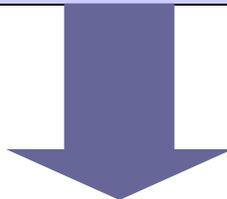
Dates of Sovereignty in Queensland

1879 remaining islands in Torres Strait

1872 islands 60 miles from the coast

1788-mainland Queensland

QUEENSLAND



31 October 1975

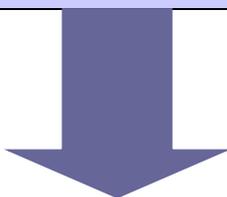
Racial Discrimination Act 1975 commenced

The RDA operates to -

- make it unlawful for a person to do any act involving a distinction based upon race which has the effect of impairing the enjoyment of any human right or fundamental freedom
- ensure that there is equal enjoyment of rights across all races.

Past act period

Beginning of **past act** period².



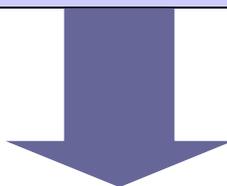
3 June 1992

High Court *Mabo (No.2)* decision³

The Court rejected the doctrine of *terra nullius* (land belonging to no-one) and recognised the existence of native title in Australia where that native title had not been extinguished by acts of the Crown and the



Indigenous people had maintained their connection with the land in accordance with their laws and customs.

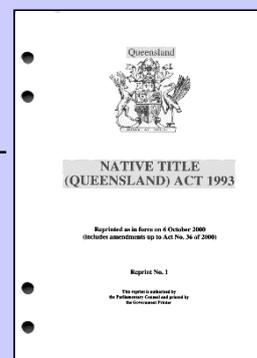


1 January 1994

Commencement of the *Commonwealth Native Title Act 1993 (NTA)* & *Native Title (Queensland) Act 1993 (NTQA)*

The Commonwealth Parliament enacted the NTA in response to the *Mabo* decision to -

- recognise and protect native title
- establish ways in which future dealings affecting native title can proceed
- establish a mechanism for determining native title claims
- validate certain acts.



² See Chapter 4

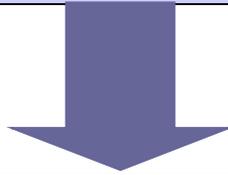
³ <http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html>

The Queensland Parliament enacted the NTQA to confirm the effect on native title of certain acts done by the State.

Past act, intermediate and future act periods

End of the **past act** period, i.e. this period ended on 31 December 1993. (N.B. Legislative acts and prior commitments must have been done before the earlier date of **1 July 1993** to fall within the past act period.)

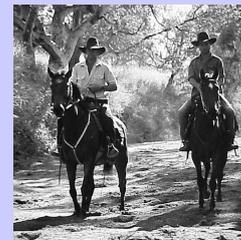
Beginning of **intermediate** and **future act** period.



23 December 1996

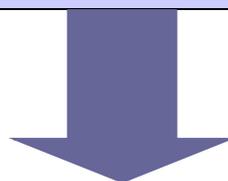
High Court Wik decision

- The High Court found that pastoral leases did not
- necessarily extinguish native title. Where a pastoral lease
- was non-exclusive (i.e. it did not confer a right of
- exclusive possession on the lessee), the native title rights and
- interests could co-exist with the pastoral interests but where
- there was an inconsistency the pastoralist's interests prevailed.



Intermediate period

End of **intermediate** period.

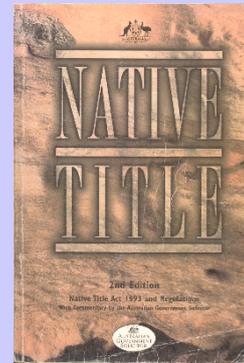


30 September 1998

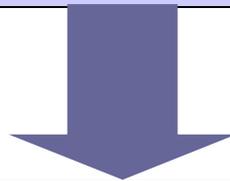
Amendment of NTA and NTQA

The Commonwealth Parliament amended the NTA in response to the *Wik* decision and the Commonwealth government's 10 Point Plan to include, amongst other provisions-

- previous exclusive possession act provisions confirming extinguishment of native title by certain acts
- the intermediate act provisions to validate certain acts done in the period 1 January 1994 to 23 December 1996
- a new regime for dealing with future acts, i.e. acts done on or after 1 January 1994 that affect native title.



The Queensland Parliament also amended the NTQA to confirm the effect of the State's previous exclusive possession acts on native title and to validate certain acts done by the State in the intermediate period.



7 September 2005

The Commonwealth Attorney-General announced a package of coordinated measures to improve the performance of the native title system. The six inter-connected elements of reform were:

- an independent review of native title claims resolution processes
- technical amendments to the NTA
- consultation on measures to encourage the effective functioning of Prescribed Bodies Corporate (PBCs)
- reform of the native title non-claimants (respondents) financial assistance program to encourage agreement-making rather than litigation
- measures to improve the effectiveness of Native Title Representative Bodies (NTRBs), and
- increased dialogue and consultation with State and Territory governments to promote and encourage more transparent practices in the resolution of native title issues.

Legislation to amend the Native Title Act

15 April 2007

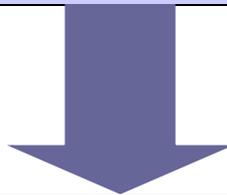
The *Native Title Amendment Act 2007* included measures to:

- improve the effectiveness of NTRBs
- implement the former Government's response to the Claims Resolution Review
- implement two of the recommendations from the Report on the Structures and Processes of Prescribed Bodies Corporate, and
- amend the scope of the respondent funding scheme.

22 July 2007

The *Native Title Amendment (Technical Amendments) Act 2007* included measures to:

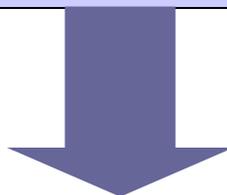
- improve the workability of the NTA by making a series of minor and technical amendments
- make minor amendments to provisions applying to NTRBs to complement measures in the *Native Title Amendment Act 2007*, and
- partially implement two of the recommendations from the Report on the Structures and Processes of Prescribed Bodies Corporate.



17 October 2008

To facilitate negotiated settlements, the Attorney-General announced that the Government would in 2009 introduce amendments to give the Federal Court a central role in managing all native title claims. The Court has significant alternative dispute resolution experience and has achieved strong negotiated results in past native title matters by taking an active role in the mediation process. This change would give the Court control over all native title claims brought before it from start to end. Having one body control the direction of each case would mean that the opportunities for resolution would be more readily identified. This reform had the potential to significantly improve the operation of the native title system.

The Attorney-General subsequently released a discussion paper in December 2008.



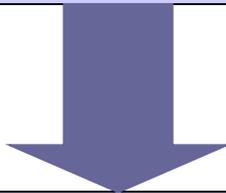
18 September 2009

Native Title Amendment Act 2009

The *Native Title Amendment Act 2009* was given Royal Assent on 17 September 2009 and commenced on 18 September 2009. The measures in the Act introduce a number of improvements to the native title system including the institutional change the Attorney-General announced on 17 October 2008 and minor native title amendments.

Institutional reform

The institutional change gave the Federal Court of Australia the central role in managing all claims, including determining whether claims will be mediated by the Court, the National Native Title Tribunal or another individual or body. The Court has significant alternative dispute resolution experience and has achieved strong mediated results in the past. Having one body control the direction of each case means that the opportunities for resolution can be more readily identified and the efforts of the parties best focussed.



16 December 2010

Native Title Amendment Act (No.1) 2010

The *Native Title Amendment Act (No.1) 2010* was given Royal Assent on 15 December and commenced on 16 December 2010. The amendments in the Act create a new native title process for the timely construction of public housing and infrastructure in communities on Indigenous held land which is, or may be, subject to native title.

The new process provides for consultation with native title parties about the delivery of housing and infrastructure, and ensures native title is not extinguished by these projects.

It also provides for compensation where native title is affected. By facilitating the construction of housing and infrastructure in Indigenous communities, these reforms are intended to assist the Government's Closing the Gap agenda.