Native Title Rights

Native title is the recognition in Australian law that Indigenous people had a system of law and ownership of their lands before European settlement. Where that traditional connection has been maintained and where acts have not extinguished it, native title can be recognised by the law.

Native title is a pre-existing right or interest that may be present over land and water even if there is no court determination or native title claim. Native title can also exist offshore.

Offshore Native Title

In 2001, the High Court of Australia handed down its decision in *Commonwealth v Yarmirr* (the Croker Island Sea Case). The High Court held that native title can exist offshore within the limits of Australia's territorial sea. It is unclear whether native title can exist in waters seaward of Australia's territorial sea.

The High Court held that offshore native title can only be non-exclusive. This means that native titleholders will not have the right to exclude others from accessing the sea or sea bed in the waters where native title exists. The future act regime (explained below) also applies to acts done offshore e.g. the grant of a licence to produce petroleum.

Consistent with the High Court's decision in the Croker Island Sea Case, in July 2008 the Attorney-General announced that in the determination of native title rights and interests, the Commonwealth was willing to recognise that non-exclusive native title rights can exist in territorial waters up to 12 nautical miles. However, such recognition does not affect or amend obligations arising under the future acts regime.

The Commonwealth Native Title Act 1993

In summary, the Commonwealth *Native Title Act 1993* (NTA):

- Recognises and protects native title.
- Validates some acts done in the past that may have been invalid because of the existence of native title.
- Confirms the extinguishment of native title in some circumstances.
- Creates a 'future act' regime which sets out conditions for the doing of 'future acts', which are acts that affect native title lands or waters e.g. the grant of a licence to produce petroleum.
- Enables the relevant parties to enter 'Indigenous Land Use Agreements' to settle any native title issues.
- Provides a process by which claims for native title and compensation can be determined.

Complying with the NTA

The NTA allows future acts to be done offshore, as long as the procedural requirements of the future act regime are complied with. In most cases, native title parties must be provided with the same procedural rights as other parties who hold non-native title interests in the offshore area. In some cases, this will amount to a right to be notified about the proposed grant of a mining or petroleum tenure. However, it is important to note that the 'right to negotiate' provisions in the NTA do not apply offshore.

Where a future act cannot be validly done within the future act regime, the act can only be done if it is covered by an Indigenous Land Use Agreement (ILUA). This requires the native title parties' agreement to the act being done.

Where an act that affects native title has been done, the native titleholders for the relevant area may be entitled to compensation. Based on the current state of the law, it is not possible to predict the likely quantum of any compensation.

Native Title and the Commonwealth Offshore Petroleum and Greenhouse Gas Storage Act 2006

The Commonwealth *Offshore Petroleum and Greenhouse Gas Storage Act 2006* requires that offshore petroleum operations be carried out in a manner that does not unduly interfere with other rights and interests, including native title rights and interests. To this end, the Australian Government consults with Land Councils and the National Native Title Tribunal as part of the annual acreage release. It is recommended that companies initiate their own consultative processes to develop good working relationships with the Indigenous people in the area.

For further information about the NTA please contact:

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