

Module AD

What does it mean if there is a native title determination over the proposed dealing area?

IDENTIFICATION



Search QNTIME for determinations of native title.

This Module will help you find whether there is a determination of native title over the proposed dealing area and how it may affect your native title assessment.

Part 1 Introduction

This Module requires you to find whether there is a determination of native title that covers your proposed dealing area and how it may affect your native title assessment.

Part 2 What is a native title determination?

A **determination** of native title is a decision made either by the Federal Court or High Court of Australia that native title does or does not exist over a particular area of land or waters. A determination that native title exists identifies:

- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the nature and extent of any other interests in relation to the determination area; and
- (d) the relationship between the rights and interests in paragraphs (b) and (c); and
- (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.¹

Where the Court makes a determination upon the parties having reached an agreement after mediation of a claim, the determination is known as a **consent determination**.² Where the parties have not been able to reach agreement and the application proceeds by litigation in the Courts it is known as a **litigated determination**.

Another type of native title determination is one which is based upon a non-claimant application, where a party with a non-native title interest in land has filed an application in the Federal Court for a determination that native title does or does not exist.

¹ s225, NTA

² National Native Title Tribunal. 2000. "List of Terms". *Native Title Facts*. Commonwealth of Australia.

Part 3 Why do I need to identify whether there is a native title determination over the proposed dealing area at this stage in my assessment?

You should identify whether there is a determination of native title over your proposed dealing area, because where there is a determination there may be **no need to carry out a tenure or use history** for that area.

If the determination states that **native title does not exist**³ over the proposed dealing area, your dealing can proceed without further reference to native title. Therefore you can rely on the determination as the basis for your native title assessment as the Court has determined that native title does not exist over the proposed dealing area.⁴

If the determination states that native title is recognised to **exist** over the proposed dealing area, then you may be able to proceed straight to the future act provisions in **Chapter 5** of these Procedures. However, keep in mind that there may have been subsequent extinguishment of native title post determination, eg. compulsory acquisition of native title, the construction of public works on a reserve, etc.

IMPORTANT

You need to read the determination very carefully as it may actually exclude certain areas from the determination area. For example, it may exclude areas covered by public works. If your proposed dealing area is within an area excluded by the determination, you will need to continue to carry out your native title assessment and proceed to **Module BA**.

Part 4 How do I find out whether there is a determination of native title?

To find out whether there is a determination of native title over the proposed dealing area, you can search QNTIME.



³ Native title will either have been extinguished or expired over particular areas of land or waters.

⁴ Section 68, NTA, states that there can only be one determination of native title per area.

If your proposed dealing area is covered by a determination of native title, you will be able to link to a copy of that determination through the textual information.

IMPORTANT

You will need to look carefully at the determination itself to assess whether your proposed dealing area is included in the determination.

Part 5 Example of how to complete the Native Title Assessment Form

The following is an *example* of how to complete the sections of the Native Title Assessment Form dealing with Module AD. The Native Title Assessment Form can be found at **Annexure 7.1**.

Native Title Assessment Form

Information about this Form -

1. This form is mainly based upon the "Path through Native Title Assessment".
2. To correctly complete this form, you will need to have read the relevant Modules and Annexures of the Native Title Work Procedures.
3. You must complete each part of the **Assessment Section** of this Form until you reach a **Go to Reason for Decision**.
4. Where there is a tick box, please make your selection either manually or by clicking on the box with your mouse. Where there is a blank section, please type or write in the relevant details.
5. All the relevant parts of the **Decision Section** of this Form must be completed.
6. Where a Module only applies to part of your proposed dealing area, tick the "Part of the proposed dealing area" box. Then proceed through the form for the balance/remaining area of your proposed dealing area. In these instances, a diagram should be attached to this Form to distinguish between the different areas.

Assessment Section

Module AA. Proposed Dealing

The grant of a permit to construct and operate a structure in a Marine Park under section 16 of the *Marine Park Regulation 2006* and *Marine Parks Act 2004*.

Location – Proposed Dealing Area

Lot(s)/Plan(s) _____

Reason for Decision

There is a determination that native title does not exist over the proposed dealing area. The Flamingo people's native title claim was determined on 20 January 2003 (attached). The Federal Court found that native title had expired over a number of areas including Lagoon Island inclusive of the intertidal area.

Therefore native title does not exist over the proposed dealing area.

NB. Extract from Native Title Assessment Form