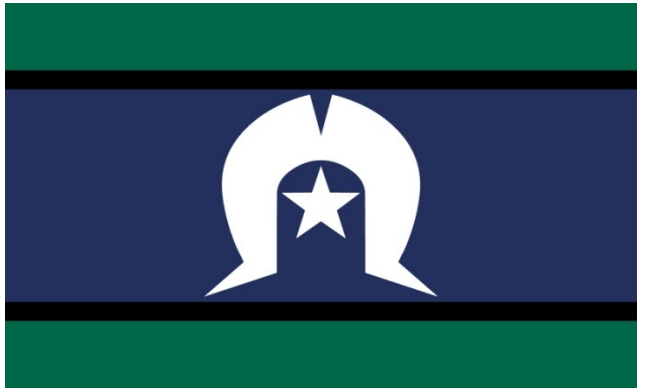
10861NAT Diploma of Aboriginal and Torres Strait Islander Legal Advocacy

Acknowledgement of Country

We acknowledge the traditional owners of the land on which Tranby stands, the Gadigal people of the Eora nation. We pay our respects to their Elders both past and present, who remain the traditional knowledge holders of this land.

TRANBY
NATIONAL INDIGENOUS ADULT EDUCATION & TRAINING
SINCE 1957



We proudly extend this respect to all current and emerging leaders around Australia, for they hold the memories, the traditions, the culture and the future of their people.

Custodianship concepts in Australia from pre-Colonial

- For Aboriginal and Torres Strait Islander people, the land is at the core of all spirituality, beliefs, and culture and as such is central to the issues that are important to Indigenous Australians today.
- Land is recognised by Aboriginal people as having a value far beyond its economic worth, as former Chairman of the Northern Land Council, Mr Galarrwuy Yunupingu, explains it:
- “For Aboriginal people there is literally no life without the land. The land is where our ancestors came from in the Dreamtime, and it is where we shall return. The land binds our fathers, ourselves and our children together. If we lose our land, we have literally lost our lives and spirits, and no amount of social welfare or compensation can ever make it up to us.”

Custodianship concepts in Australia from pre-Colonial

- Aboriginal knowledge of the land, water, and culture (often referred to as lore) is passed down from generation to generation, thus forming an extensive matrix of people, totemic, social and spiritual connection with land and country
- Aboriginal people have established and developed a uniquely strong connection with their land and country since time immemorial; their culture is embedded in the land.
- “We cultivated our land, but in a way different from the white man. We endeavoured to live with the land; they seemed to live off it. I was taught to preserve, never to destroy”- Tom Dystra

History of Land Ownership since Colonisation

- Upon colonisation the British Legal system was automatically adopted. This included laws relating to property ownership.

- Generally speaking the law of the colony depended on whether it was:

- A conquered colony; or
- A settled colony (*terra nullius – empty land*); or
- A cession where the colonists and the indigenous people enter into a treaty

History of Land Ownership since Colonisation

- If conquered the original indigenous laws would stay until they were changed by the new sovereign, for example in South Africa and Sri Lanka; or

- If *terra nullius* then English would bring their own laws with them (the doctrine of reception); or

- If English arrived in an occupied country they could enter into a treaty to determine which laws applied to which people and where.

History of Land Ownership since Colonisation

- Under the Doctrine of Reception the Doctrine of Tenure was adopted
- The Doctrine of Tenure has its historical origins in the English legal system (Norman Conquest 1066)
- The Doctrine of Tenure is the legal doctrine vesting ownership (title) of all land in the Crown
- Fundamental principle of the British legal system and means that a person can only have an ‘estate’ in the land

History of Land Ownership since Colonisation

- Because Australia was regarded as terra nullius, the UK doctrine of tenure was applied to all Australian land
- Therefore at the time of English settlement all Australian land became vested in the Crown and the Crown made grants of land to prospective landholders
- This doctrine ignored any existing rights that indigenous peoples had to the land

History of Land Ownership since Colonisation

➢What were relationships like with the indigenous people?

- The original instructions given to Governor Philip and the settlers was not to disturb indigenous people. This quickly became impossible. There was lots of interactions and eventually there were lots of disturbances.
- Early decisions recognised the existence of Aboriginal Law but English law was applied in disputes between the settlers and aboriginal people out of necessity and in an effort to minimise violence

History of Land Ownership since Colonisation

- However in R v Burrell and Bummaree (1836) the NSW Supreme Court changed its view and said the aboriginal people did not have laws because they were ‘not civilised’.
- Later in R v Bonjon (1841) one NSW Supreme Court judge was prepared to recognise indigenous law and property rights but his decision was ignored and forgotten until it was rediscovered in 1998.
- First step in recognition of Native title was the *Aboriginal Land Rights(Northern Territory) Act 1976* (Cth) which granted land in the Northern Territory to land trusts where traditional land ownership could be proven.
- In 1983, New South Wales enacted their version of the *Aboriginal Land Rights Act*. While legislation provided some rights to Aboriginal people, the legal myth that Australia was ‘terra nullius’ continued.

History of Land Ownership since Colonisation

- *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 was the first case on native title in Australia (*Gove Land Rights* Case).
- The Yolngu people brought an action against Nabalco Pty Ltd, claiming they enjoyed sovereign rights over lands in the Gove Peninsula in the Northern Territory, which had been obtained by Nabalco from the Federal Government (pursuant to a 42-year mining lease).
- They sought declarations permitting them to occupy the land free from interference pursuant to their native title rights, with the effect that they could prevent the mining from going ahead.
- Justice Blackburn rejected their claim, stating that while Yolngu 'customary law' included rules about land ownership, it had no legal significance, and so Australian governments were not bound by

History of Land Ownership since Colonisation

- While the Yolgnu were unsuccessful in their legal challenge, their actions resulted in the first land rights legislation in Australia, the *Aboriginal Land Rights (Northern Territory) Act 1976*. The Arnhem Land Reserve was returned to Traditional Owners, except for the land covered by the Nabalco lease.
- In 2019, Yolngu leader Galarrwuy Yunupingu lodged a native title compensation claim on behalf of his Gumatj clan. The claim seeks compensation from the Commonwealth Government for the acquisition and destruction of Gumatj land on the Gove Peninsula, acquired for bauxite mining.
- The claim argues the Commonwealth was required to compensate the Gumatj on ‘just terms’ when it compulsorily acquired their property. It also challenges the assumption that compensation cannot be sought for acts affecting native title before the start of the *Racial Discrimination Act* in 1975.

History of Land Ownership since Colonisation

- It was not until the groundbreaking case in Australia's common law history of the *Mabo* land rights case (*Mabo & Ors. v State of Queensland* (1992)175 CLR 1) that the High Court recognised the land rights of indigenous people (however this case does not recognise the sovereignty of indigenous people which requires a treaty).
- The *Mabo* case demonstrated a major development in the common law's approach to land rights when it overturned the doctrine of *terra nullius* and recognised the traditional rights of the Meriam people to their islands in the eastern Torres Strait.
- The Court also held that native title existed for all Indigenous people in Australia prior to the establishment of the British Colony of New South Wales in 1788

History of Land Ownership since Colonisation

- In recognising that Indigenous people in Australia had a prior title to land taken by the Crown since Cook's declaration of possession in 1770, the Court held that this title exists today in any portion of land where it has not legally been extinguished.
- The decision of the High Court was swiftly followed by the *Native Title Act 1993* (Cth) which attempted to codify the implications of the decision and set out a legislative regime under which Australia's Indigenous people could seek recognition of their native title rights.
- The Act allows access to land for living, traditional purposes, hunting or fishing and/or to teach laws and customs on the land

History of Land Ownership since Colonisation

- Today, native title has been recognised over more than one million square kilometres of Australian land and water (approximately 15% of Australian territorial land and waters).
- There are currently 629 registered Indigenous Land Use Agreements – a voluntary agreement between a native title group and others about the use of land and waters – in place.

History of Land Ownership since Colonisation

➢ **Indigenous Land Use**

- The Native Title Act sets out processes for native title groups to negotiate agreements with other parties in relation to the use of land and waters. A key agreement-making mechanism under the Native Title Act is an agreement known as an Indigenous Land Use Agreement (ILUA).
- ILUAs can allow for ‘future acts', such as mining or grazing, to be done on land or waters in exchange for compensation to native title groups.

Native Title Act (1993) (Cth)

- Main objectives of the Act:

1) Provides for the **recognition** and **protection** of native title (s.3)

2) Establishes **ways** in which **future dealings** affecting native title may **proceed**

3) Establish a **mechanism** for determining **claims** to native title

Native Title Act (1993) (Cth)

- To register a native title claim, a <u>registration test</u> is applied under s190B
  - The test under s190B requires identification of:
    - The **area**
    - **Claimant person** or **group**
    - Native title **rights claimed**
    - **Claimant** & any **predecessors association** with the **land**
    - Their **traditional laws & customs** observed by the claimants
    - Claimant has **continued to hold** the native title in accordance
      - with those **traditional laws & customs**
    - Claimant has had a **traditional physical connection** with
      - any part of land covered by the application

Native Title Rights

- Native title can be described as a ‘bundle of rights’ in land. For example, such rights may include the right to **camp, hunt, use water, hold meetings, perform ceremony and protect cultural sites**.
- Not all rights within the bundle are automatically granted
- Specific rights that are recognised are decided on a case-by-case basis
- Depend on the traditional laws and customs of the claimant group, as well as whether acts of government have taken place in the past (prior to the passing of the *NTA*) that extinguish (remove) native title

Native Title Rights

- In most cases, native title is found to co-exist alongside other non-Indigenous property rights, such as pastoral leases. This form of native title is referred to as non-exclusive possession
- Non-exclusive native title rights may include the right to access, hunt and camp on traditional country, but not the right to control access to, and use of, an area.
- In some cases Native Title rights may involve exclusive possession
- Exclusive possession may be granted in relation to unallocated or vacant crown land, or certain areas already held by or for Indigenous people
- Native Title Act does not provide for the grant of freehold title
- State and Territory Acts do provide for freehold title

Native Title Rights

- S 225 of the *NTA* sets out the requirement to identify the native title holders, the extent of their rights and interests, and the rights and interests of any other party/s in a native title determination area, including whether native title is of an exclusive or non-exclusive nature
- *s 223* 'traditional laws and customs' mean the body of laws and customs observed by the native title holders that existed before British sovereignty and have been passed down from generation to generation within an Aboriginal or Torres Strait Islander society.

Native Title Rights

➢ **Where can native title be claimed?**

- Vacant (or unallocated) Crown land;
- Parks and public reserves;
- Beaches;
- Some leases (such as non-exclusive pastoral leases);
- Land held by government agencies;
- Some land held for Aboriginal and Torres Strait Islander communities;
- Oceans, seas, reefs, lakes, rivers, creeks and other waters that are not privately owned.
- Native title rights cannot be claimed in relation to minerals, gas or petroleum under Australian law. Native title in tidal and sea areas can only be of a non-exclusive nature so as not to conflict with other common law rights regarding marine access and navigation

Native Title Rights

➢ **Claimable rights and interests**

- The *NTA* recognises Aboriginal and Torres Strait Islander peoples' rights over their land and waters, according to their traditional laws and customs (s.223 NTA)
- While the native title rights recognised will be specific to each determination, they may include such rights as:
- Maintain and protect sites;
- Use the land for hunting or ceremony;
- Camp and live on the land;
- Share in money from any development on the land; and
- Have a say in the management or development of the land

Native Title Rights

➢Compensation

- S51 allows an application to the Federal Court for compensation on '*just terms'* for any loss, diminution or impairment of native title caused by past acts of government that have had the effect of extinguishing native title and thereby preventing native title holders from exercising or enjoying their native title rights
- Past acts are generally determined as having occurred prior to 1 January 1994.(prior to NTA)
- Applications based on assertion that claimants hold native title rights and interests in an area where native title has been extinguished by past acts of government.
- Compensation may be sought from the Commonwealth or relevant State or Territory depending on the type of act that had the extinguishing effect on native title.

Native Title Rights

➢Extinguishment of Native Title Rights

- In Mabo Justice Brennan held that native title survived the Crown's acquisition of sovereignty over the Australian colonies. But, if this was the case, how could the Crown grant title to settlers, or acquire land for its own purposes? And could the acknowledgment of native title put a question mark over the validity of two centuries of land grants in Australia?
- The answer offered by the High Court was similar to that put forward by the Supreme Court of the United States in the early nineteenth century: that is native title is more vulnerable than title derived from Crown grant because it is subject to the doctrine of extinguishment; and so government grants of title override native title where there are inconsistencies between the two.
- From this it seemed to follow that native title had been extinguished in most parts of Australia, and that the past two hundred years of land dealings were legitimate.

Native Title Rights

➢ Extinguishment of Native Title Rights

- The High Court in *Western Australia v Ward* (2002) 213 CLR 1 said that native title could be extinguished in whole or part. Each right (e.g. right to camp, hunt, use water, hold meetings, perform ceremony and protect cultural sites) therefore needs to be considered separately to determine whether any past acts of government are inconsistent with the continued existence of that right.
- There must not have been an event that had the effect of extinguishing the native title rights, such as a valid freehold grant, or valid extinguishing legislation appropriating land for roads, railways, post offices and other permanent public works

Native Title Rights

- Native title is inalienable, meaning it cannot be sold or transferred freely, and can only be surrendered to the Crown (or extinguished). However, there are some options for non-extinguishing leasing of native title lands.
- Recently native title rights and interests have been described in broader terms. For example, in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33 (Akiba), the High Court said that the native title claim group had the right 'to take for *any purpose* resources in the native title areas'.
- This meant that the native title holders could continue to sell and trade fish as they had done under their traditional laws. It was the first time that native title rights were found to include commercial rights.

Native Title Rights

- Later decisions including *State of Western Australia v Willis on behalf of the Pilki People* [2015] FCAFC 186 and *BP (Deceased) on behalf of the Birriliburu People v State of Western Australia* [2014] FCA 715 have continued this 'broad brush' approach.
- Nevertheless, debate continues about whether native title rights and interests have the same protections under Australian law as other interests in land, or whether native title is 'radically different' because it based on traditional laws and customs rather than the common law.
- The High Court could not agree on this issue in the 2015 decision of *Queensland v Congoo* [2015] HCA 17. Recently, however, in *Northern Territory v Griffiths* [2019] HCA 7, the High Court said that compensation for loss or damage to native title should not be reduced because native title land cannot be sold or freely transferred.
- This suggests that native title rights are just like any other right in land recognised in Australia.

Landmark Cases

- *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* [1996] HCA 40 ('Wik')
- **Background**

- The Wik decision arose out of two native title claims in Queensland, by the Wik peoples and the Thayorre people.
- The claims were over large areas which included a number of pastoral leases, and two special mining leases granted under ratified State Government agreements.
- The claimants asserted that their native title rights had survived the grant of the pastoral leases, and that the mining leases were invalid.

Landmark Cases

- ***Wick* (Cont.)**
  - The respondents to the claim asserted that, applying the principles stated by the High Court in Mabo, any native title which might have existed was necessarily extinguished by the grant of the pastoral leases.
  - Justice Drummond in the Federal Court found against the claimants on both issues. The claimants' appeal to the Full Court of the Federal Court was removed to the High Court

Landmark Cases

(Wik cont.)The High Court held that:

- native title rights could coexist on land held by pastoral leaseholders
- a pastoral lease does not necessarily confer rights of exclusive possession on the pastoralist
- the rights and obligations of the pastoralist depend on the terms of the lease and the law under which it was granted
- the mere grant of a pastoral lease does not necessarily extinguish any remaining native title rights
- if there is any inconsistency between the rights of the native title holders and the rights of the pastoralist, the rights of the native title holders must yield

Landmark Cases

(Wik Cont.)

- The decision provoked significant political and public reactions in Australia.
- Some State Premiers publicly commented that suburban backyards were under threat from native title claims.
- The Howard Government promised a response to the decision and came up with the “Wik 10 Point Plan”.
- Howard argued the decision "pushed the pendulum back too far in the Aboriginal direction (and) the 10 Point Plan will return the pendulum to the centre

Landmark Cases

- The Native Title Amendment Bill 1997 (Cth) was drawn up to implement the plan.
- The amendments to the *Native Title Act 1993* (Cth) not only made it harder to claim native title, but also took away the Indigenous peoples' rights of negotiation over the land they could claim.
- One commentator described the amendments to native title law as using a "legal sledge hammer to crack a political nut”

Landmark Cases

- The amendments allowed for the validation of some pastoral and mining leases that had been illegally issued between the *Mabo* and *Wik* decisions.
- Some leases would grant exclusive rights over the land, others would not.
- It confirmed that pastoralists could carry out the activities allowed by their lease, even if it affected native title.
- Existing access rights for Indigenous people on some lands were confirmed - but only until native title claims could be heard.
- The right to negotiate over mining was reduced to one chance only - not at each stage of exploration and mining as before

Landmark Cases

- On the issue of government and commercial development the right to negotiate in some circumstances was reduced to the right to be 'consulted'.
- The government was given the right to manage water resources and air space; this could weaken or even extinguish native title in many cases.
- The Act made it much tougher to register a native title claim; but also speeded up the process.
- The amendments also encouraged the settlement of claims by agreement rather than in the tribunals or the courts.
- The amendments to the Act also outlined that they didn't breach the *Racial Discrimination Act 1976* (Cth)

Landmark Cases

Armor v Northern Territory (2001) 208 CLR 1 (Croker Island Case)

- **Facts**
- Was an application for the determination of native title to seas, sea-bed and sub-soil.
- **Issue**
- The application was made on behalf of a number of clan groups of Aboriginal people claiming native title rights to an area of seas and sea-beds surrounding Croker Island in the Northern Territory Territory, including the right to exclusive possession.

Landmark Cases

Croker Island Case (cont.)

- **Decision**
- The High Court determined members of the Croker Island community have a **non-exclusive** native title right to have free access to the sea and sea-bed of the claimed area for all or any of the following purposes:
- to travel through or within the claimed area;
- to fish, hunt and gather for the purpose of satisfying their personal, domestic or non-commercial communal needs, including the purpose of observing traditional, cultural, ritual and spiritual laws and customs;
- to visit and protect places which are of cultural and spiritual importance; and
- to safeguard their cultural and spiritual knowledge

Landmark Cases

Members of the Yorta Aboriginal Community v Victoria (2002) 214 CLR 422 ('Yorta Yorta')

- This was a native title claim by the Yorta Yorta indigenous people of north central Victoria which was dismissed by the Federal Court of Australia in 1998
- Appeals to the Full Bench of the Federal Court of Australia in 2001 and the High Court of Australia in 2002 were also dismissed.
- The determination by Justice Olney in 1998 ruled that the 'tide of history' had 'washed away' any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants

Landmark Cases

- Thus the claim did not satisfy the definition of ‘traditional laws and customs’ in s223(1)(a) which means the body of laws and customs observed by the native title holders that existed before British sovereignty and have been passed down from generation to generation within an Aboriginal or Torres Strait Islander society
- An appeal was made to the full bench of the Federal Court on the grounds that "the trial judge erroneously adopted a ‘frozen in time’ approach" and "failed to give sufficient recognition to the capacity of traditional laws and customs to adapt to changed circumstances". The Appeal was dismissed in a majority 2 to 1 decision.
- The case was taken on appeal to the High Court of Australia but also dismissed in a 5 to 2 majority ruling in December 2002. The High Court held that native title of the Yorta Yorta was extinguished because the traditional law and customs are no longer observed and there had been no continuation or connection with the land

Landmark Cases

- In consequence of the failed native title claim, in May 2004 the Victorian Government signed an historic co-operative management agreement with the Yorta Yorta people covering public land, rivers and lakes in north-central Victoria.
- The agreement gives the Yorta Yorta people a say in the management of traditional country including the Barmah State Park, Barmah State Forest, Kow Swamp and public land along the Murray and Goulburn rivers

Landmark Cases

- The Yorta claim failed because under **s190B** for a claim to be successful the claimants must prove that there has been an unbroken chain of inheritance or succession, in accordance with traditional Aboriginal laws and customs, from the original native titleholders (pre colonisation) to the present day claimants and that the Aboriginal laws and customs giving rise to the native title rights must have been observed and recognised continuously during that period.
- This can be impossible to prove particularly for land claims in populated areas where the traditional owners were forced out of those areas long ago

Landmark Cases (Nyoongar)

- On 19 September 2006, a native title claim for nearly 194 000 square kilometres of land in Western Australia led to another landmark decision.
- The Federal court upheld part of the native title claim by the Nyoongar people, which encompasses the city of Perth.
- Justice Murray Wilcox, said that in many areas, including the metropolitan area of Perth, native title had not been extinguished.
- He said that as well as large areas of forest and parkland, there is also land in metropolitan Perth which is subject to native title.
- Justice Wilcox found that the Nyoongar people were able to prove native title existed because they had continued to observe their traditional customs on the land, despite white settlement in the 1820s

Landmark Cases

- The decision allows the Nyoongar people to use and maintain the natural resources of the area, to hunt and fish on the land, and to use the land for traditional ceremonies.
- As with all native title claims, the decision does not affect land where native title has been extinguished.
- It is the first native title judgement to uphold a claim in a metropolitan area.
- Similar claims in the Northern Territory, Victoria and New South Wales have all been rejected on the grounds that the claimants could not prove a continuous connection with the land.

Landmark Cases (Eastern Maar)

- In March 2023 in Victoria's first traditional land rights claim in a decade, the traditional owners were granted right to access land stretching from Ararat to Warrnambool, encompassing much of the Great Ocean Road and Great Otway national park.
- The federal court's decision covers land stretching from Ararat to Warrnambool and includes much of the coastline of the Great Ocean Road and the Great Otway national park.
- It recognises the traditional owners' rights to access, use and protect the land in line with their laws and customs, along with the right to be consulted on plans to develop the land and its natural resources

Native Title Rights

- The *Native Title Legislation Amendment Act 2021* (Cth) amends the *Native Title Act 1993* with the aim of "improving Native Title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes" (Attorney General's Department, 2021). It effectively streamlines the convoluted process and red tape that has developed around NT claims.

Native Title Rights

- The major changes made by the NTLAA include:
  - *changes to how Native Title applicants can act and make decisions, and their relationship to the broader Native Title claim group*
  - *allowing historical extinguishment of native title in areas of national and state parks to be disregarded where the relevant parties agree, and*
  - *improving the accountability, transparency and governance of Registered Native Title Bodies Corporate, with a particular focus on membership and improved dispute resolution pathways. (*Source: AG's Department, 2021)

Native Title Rights v Land Rights

- Land rights and native title both formally recognise Aboriginal rights in land.
- Both land rights and native title are a result of legislation (Commonwealth and State/Territory) but operate under different laws (or acts) and differ in the rights they can provide.
- There are statutory land rights schemes in all states and territories except Western Australia
- In some cases Native title and Aboriginal land rights can co-exist over the same piece of land. Groups should consider which scheme might be better for their needs

Native Title Rights v Land Rights

➢What is it?

Land Rights

- The return of certain Crown lands to Aboriginal peoples as compensation for dispossession and the resulting ongoing disadvantage suffered by Aboriginal peoples.

Native Title Rights

- The recognition of the pre-existing traditional and customary rights and interests Aboriginal peoples have in lands.

Native Title Rights v Land Rights

➢When was it introduced?

Land Rights

- The Federal Parliament passed the Aboriginal Land Rights(Northern Territory) Act 1976 (ALRA). The ALRA set out the functions and responsibilities of Aboriginal Land Councils which act as a lobby on land rights. Other states ratified similar legislation.

Native Title Rights

- Native title was first recognised by the courts in the 1992 Mabo decision. The Commonwealth then passed the Native Title Act 1993 (NTA) to put the decision into law. The Act applies to all of Australia.

Native Title Rights v Land Rights

➢Is traditional connection required?

<u>Land Rights</u>

- No. Traditional connection does not need to be established for a land claim to be successful. The ALRA also allows to return culturally significant lands to people with a connection to that place.

<u>Native Title Rights</u>

- Yes. Native title can only exist where Aboriginal people can prove to the Federal Court that they have maintained a continuing connection with an area via cultural practices, regular access and traditions.

Native Title Rights v Land Rights

➢Who can make a claim?

<u>Land Rights</u>

- Aboriginal Land Councils constituted under the ALRA.

<u>Native Title Rights</u>

- A native title claim group's nominated representatives. This will usually be a group of people, not an individual.

Native Title Rights v Land Rights

➢What land can successfully be claimed?

Land Rights

- Crown lands that are not lawfully being used or occupied (as town, pastoral or private land is), not (likely) needed for residential or essential public purposes and not the subject of a registered native title claim or determination.

Native Title Rights

- Vacant Crown land, National Parks, State Forests, Crown Reserves, some types of non-exclusive leases, land covered by permissive occupancies and licenses (e.g. towns, farms), inland waters and the sea.

Native Title Rights v Land Rights

- Does it mean ownership?

Land Rights

- Yes. Aboriginal people generally receive full or freehold title to land. This allows them to control entry to this land with permits. Sometimes land may be held in leasehold.

Native Title Rights

- No. In most cases native title is recognised to co-exist alongside other rights and interests in the same area(non-exclusive possession). This can mean Aboriginal people can legally access and use the land for e.g. camping, hunting, fishing and other cultural activities. Only in some cases do they get rights akin to full ownership (exclusive possession). There is no right to control entry to this land.

Native Title Rights v Land Rights

➢Who holds the rights?

<u>Land Rights</u>

- Aboriginal Land Councils recognised under the ALRA.

<u>Native Title Rights</u>

- Either the native title holders or a Prescribed Body Corporate (PBC) holds the title in trust or as an agent.

Native Title Rights v Land Rights

➢Who determines the claim?

<u>Land Rights</u>

- The relevant minister of the state or territory.

<u>Native Title Claim</u>

- The Federal Court of Australia.
- Alternatively, parties may reach an agreement by consent

Native Title Rights

- Note: Land rights and native title can co-exist under certain conditions on the same land.
- This can cause problems when land councils want to develop the land they hold, for example erect a building. The land council has to first clarify that native title doesn't exist on that land.
- If it does exist, the land council has to get an order extinguishing native title which can be lengthy and expensive, delaying any development.
- The two laws also mean that there can be two groups competing about who speaks for country and how to represent and advocate their interests

Native Title Rights

- Next Week:

- Making a Native Title Claim or Land Rights Claim