



# fact sheet



## Comparison of Land Rights and Native Title in NSW

In NSW there are two key mechanisms by which Aboriginal peoples can have their rights recognised in land – *Land Rights* and *Native Title*. While these systems are both about recognising and providing for Aboriginal peoples’ rights, the two systems operate under two different laws and differ in the rights they can provide. Native title and land rights can sometimes exist in the same land. It is important that LALCs and Native title Claimants work together to obtain the best of both schemes.

	Land Rights	Native Title
<b>Law</b>	<i>Aboriginal Land Rights Act 1983 (NSW)</i> <sup>i</sup> ( <b>ALRA</b> )	<i>Native Title Act 1993 (Commonwealth)</i> <sup>ii</sup> ( <b>NTA</b> )
<b>How did it begin?</b>	The New South Wales Aboriginal Land Council ( <b>NSWALC</b> ) was originally established in 1977 as an independent Aboriginal organisation to advocate for the recognition of Aboriginal land rights. Following recommendations from the 1978-1981 ‘Inquiry of the NSW Select Committee of the Legislative Assembly upon Aborigines’ [sic] the NSW Parliament passed the ALRA in 1983 which, among other things, provides a process for certain Crown lands to be returned to Aboriginal peoples. <sup>iii</sup>	The <b>Mabo</b> High Court decision in 1992 was the first time that the Australian law recognised the rights and interests Aboriginal people have in land, under a traditional system of law and custom. The Commonwealth Parliament passed the NTA in 1993 which, among other things, provides a process for the determination of native title by the Federal Court of Australia ( <b>Federal Court</b> ).
<b>Aim of the law</b>	<p>The preamble of the ALRA recognises that “<i>Land is of spiritual, social, cultural, and economic importance</i>” to Aboriginal peoples, and that, “<i>as a result of past Government decisions the amount of land set aside for Aboriginal persons has been progressively reduced without compensation</i>”.</p> <p>The ALRA was principally established to return land in NSW to Aboriginal peoples through a process of lodging claims for certain Crown lands.</p> <p>The ALRA establishes a network of democratically elected Aboriginal Land Councils across the State to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.</p> <p>In 2014, amendments to the ALRA were passed that provide for a new statutory mechanism which allows for negotiation of Aboriginal Land Agreements (<b>ALAs</b>). Aboriginal Land Agreements operate as an alternative option to the land</p>	<p>Native title is the legal recognition of the traditional communal, group or individual rights and interests which Aboriginal people have in land and water, where Aboriginal people have continued to exercise their rights and interests in accordance with traditional law and custom pre-dating European settlement.</p> <p>The NTA seeks to address past injustice by providing a process to recognise and protect native title in addition to providing processes to reach agreements or provide compensation.</p> <p>The NTA also provides a process to reach agreements with the government and other parties, such as farmers and miners, to have a say about acts which affect native title and to be compensated for extinguishment of native title which occurred after 1975.</p>

	<p>claims process set out in section 36, ALRA. These agreements are voluntary and provide a broad scope for negotiating beyond whether the land is “claimable Crown land” under section 36.</p> <p>The ALRA also provides for the provision of Community Benefit Schemes and established a statutory account of compensatory monies to fund Aboriginal Land Council operations.</p>	
<b>Who can make claims?</b>	<p>Aboriginal Land Councils constituted under the ALRA can make claims. This includes NSWALC and the network of 120 autonomous Local Aboriginal Land Councils (<b>LALCs</b>) in NSW.</p> <p>NSWALC is an independent, self-funded non-government organisation that has an elected governing council. NSWALC has functions to acquire and manage land and protect Aboriginal culture and heritage.</p> <p>LALCs have similar functions in respect to their boundary area.</p>	<p>A native title claim is made on behalf of a native title claim group. The claim group is the group of Aboriginal people that claims to hold rights and interests in land and waters in accordance with traditional laws and customs. Nominated representatives, known as Applicants, are authorised by the claim group to make the application.</p>
<b>Is traditional connection required?</b>	<p>No. Traditional connection to land does not need to be established for land to be granted to Aboriginal Land Councils under the ALRA.</p>	<p>Yes. Native title will only be determined to exist where Aboriginal People have established to the Federal Court that they are the Traditional Owners for the particular area claimed. To be a Traditional Owner you must have maintained a continuing connection with the area through the acknowledgement and observance of traditional laws and customs and ongoing practice of rights and interests since before European settlement.</p>
<b>Who are the claims lodged with?</b>	<p>The Registrar of the ALRA.</p>	<p>The Federal Court.</p>
<b>Who are claims determined by?</b>	<p>The NSW Minister administering the <i>Crown Land Management Act</i> is responsible for granting or refusing an Aboriginal Land Claims or entering into an Aboriginal Land Agreement. For Aboriginal Land Claims, where the Minister is satisfied that the lands are “<i>claimable Crown land</i>” as defined in section 36 of the ALRA the land must be granted to an Aboriginal Land Council.</p>	<p>The Federal Court determines whether native title exists and whether any native title has been wholly or partially extinguished. If all the parties to a native title claim agree, they can ask the Federal Court to make a determination by consent. In that case, there does not need to be a full Court hearing.</p>
<b>Who holds the rights?</b>	<p>In most cases the land is held by one of the 120 autonomous Local Aboriginal Land Councils (<b>LALCs</b>) across NSW. In some cases the land is held by the New South Wales Aboriginal Land Council.</p>	<p><b>Traditional Owners</b> who have been recognised as native title holders by the Federal Court of Australia. Native Title holders are required to form a corporation, called a Prescribed Body Corporate (<b>PBC</b>), to represent them as a group and to manage their native title rights and interests.</p>

<p><b>Rights</b></p>	<p>A successful determination of a land claim generally delivers <b>freehold title to land</b> which includes rights to certain minerals in the freehold land. This freehold can be dealt with via sale, lease, etc and the owner of the freehold land (the Aboriginal Land Council) has the same rights as other freehold owners, subject to compliance with the ALRA.</p> <p>LALCs can be granted lands that are to be managed as national parks or other form of reserve via a ‘lease back’ arrangement with the NSW Government, sometimes known as ‘joint management’.</p> <p>Aboriginal Land Councils may also negotiate Aboriginal Land Agreements which may deal with a range of matters, including land swaps, joint management of land and compensation.</p> <p>Aboriginal Land Councils are also entitled to make agreements with other land owners or person in control of land to <b>access land for hunting, fishing and gathering</b>, and have rights to apply for access permits.<sup>iv</sup></p> <p>Aboriginal Land Councils also have <b>consultation rights</b> in relation to Aboriginal culture and heritage, and have functions to protect and promote Aboriginal culture heritage.</p>	<p>A successful native title determination provides legal recognition of the traditional rights and interests Aboriginal people have in relation to land and water. Native Title is a <b>property right</b>, and may include rights to:</p> <ul style="list-style-type: none"> <li>• access and camp on an area,</li> <li>• visit and protect important places,</li> <li>• hunt, fish and gather food and bush medicine, and</li> <li>• in some cases, the right to possess, occupy, use and enjoy the area.</li> </ul> <p>A native title claim can also be successfully resolved through the negotiation of an agreement, such as an Indigenous Land Use Agreement (<b>ILUA</b>) or a <b>Section 31 Deed</b>. Agreements such as these are legally binding and may include rights in relation to employment, economic development, freehold land transfer and compensation.</p> <p>Where a native title claim has not yet been determined, but has passed the registration test applied by the National Native Title Tribunal, native title parties are entitled to certain “<b>procedural rights</b>”, including the right to be notified and to negotiate about certain activities such as mining, mineral exploration and some developments.</p>
<p><b>What areas of land may be granted?</b></p>	<p>Crown land that is not lawfully used or occupied, not needed or likely to be needed for residential purposes or an essential public purposes and is not the subject of a registered native title claim or determination can be granted.<sup>v</sup> Land that is privately owned cannot be claimed or granted.</p> <p>Native title and land rights can exist in the same land.</p>	<p>Native Title can be recognised in Vacant Crown land, National Parks, State Forests, Crown reserves, some types of non-exclusive leases, land covered by permissive occupancies and licences, inland waters and the sea.</p> <p>With some minor exceptions, land that is privately owned cannot be subject to native title rights and interests because the exclusive interest in land extinguishes native title.</p>
<p><b>How many claims have been successful in NSW?</b></p>	<p>As at 1 December 2016, 41,986 Aboriginal Land Claims had been lodged since 1983. 30,265 of these are yet to be resolved. Approximately 2,846 land claims have been granted.</p>	<p>In NSW to date eight successful native title determinations have been made that native title exists and 11 ILUAs have been registered. A number of s31 Deeds in relation to exploration, mining and development have also been reached. There are currently 21 native title claimant applications yet to be determined in NSW.</p>
<p><b>Can the land be sold or otherwise dealt with?</b></p>	<p>Land rights land can generally be dealt with (ie sold, leased, subdivided etc) just like any other parcel of freehold land.</p>	<p>If a PBC has consulted with native title holders and obtained their consent, a PBC can enter agreements to surrender, affect or otherwise deal with native title rights</p>

	Any dealing with land (ie a sale, lease, mortgage etc) by a LALC requires NSWALC approval. In some cases a dealing may also require a native title determination from the Federal Court before the land dealing can proceed.	and interests, including on commercial terms.
<b>More information</b>	<p><u><i>NSW Aboriginal Land Council</i></u>  Phone: 02 9689 4444 (Policy and Programs Unit)  Website: <a href="http://www.alc.org.au">www.alc.org.au</a>  NSWALC has developed a series of Fact Sheets and resources available on the NSWALC website.</p> <p><u><i>Local Aboriginal Land Councils</i></u>: Visit the 'Land Councils' page of the NSWALC website to find out about your Local Aboriginal Land Council.</p> <p><u><i>Registrar of the ALRA</i></u>  Phone: 02 9562 6327  Email: <a href="mailto:adminofficer@oralra.nsw.gov.au">adminofficer@oralra.nsw.gov.au</a>  Website: <a href="http://www.oralra.nsw.gov.au">www.oralra.nsw.gov.au</a></p>	<p><u><i>NTSCORP Limited</i></u>  Phone: 02 9310 3188  Freecall: 1800 111 844  Email: <a href="mailto:ntscorp@ntscorp.com.au">ntscorp@ntscorp.com.au</a>  Website: <a href="http://www.ntscorp.com.au">www.ntscorp.com.au</a>  NTSCORP is the native title service provider for NSW and the ACT. NTSCORP has produced a range of Fact Sheets on native title available on their website.</p> <p><u><i>National Native Title Tribunal</i></u>  Telephone: (02) 9227 4000  Freecall: 1800 640 501  Email: <a href="mailto:nswenquiries@nntt.gov.au">nswenquiries@nntt.gov.au</a>  Website: <a href="http://www.nntt.gov.au">www.nntt.gov.au</a></p>

This document has been prepared by the New South Wales Aboriginal Land Council (**NSWALC**) for Local Aboriginal Land Councils (**LALCs**) and Aboriginal communities in NSW and provides general information only. NSWALC acknowledges the assistance of NTSCORP Limited (**NTSCORP**) in the development of this Fact Sheet. **Please Note:** While all care has been taken in the preparation of this document, the advice it contains should not be seen as a substitute for independent consideration of the issues and/or legal advice on this subject. This document is current as of January 2017.

<sup>i</sup> The *Aboriginal Land Rights Act 1983* (NSW) can be accessed on the NSW Legislation website at: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au) under 'Browse' then 'A'.

<sup>ii</sup> The *Native Title Act* (Cth) can be accessed on the ComLaw website at: <http://www.comlaw.gov.au/Details/C2012C00273>

<sup>iii</sup> The NSWALC website provides a detailed history of the land rights movement in NSW: <http://www.alc.org.au/about-nswalc/our-history.aspx>

<sup>iv</sup> Sections 46 and 47 of the *Aboriginal Land Rights Act* outlines provisions to access lands for hunting, fishing and gathering.

<sup>v</sup> Section 36 of the *Aboriginal Land Rights Act* outlines the criteria for claimable Crown land.