EXPOSURE DRAFT

NATIVE TITLE MATTERS

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Guidance Papers

Objectives

The principal objective of a Guidance Paper (*GP*) and Resource Pack (if applicable) is to clarify professional and industry processes, best practices and procedures and to discuss their use and implementation.

A *GP* is designed to be of assistance to *Members* and those who use *Members'* services. They serve as a guide and measure of acceptable professional practice and conduct of a *Member*.

The intention of a *GP* is to:

a) provide information on the characteristics of different types of assets that are relevant to the advice;

b) provide information on appropriate practices and their application;

c) provide information that assists *Members* in exercising the judgements they are required to make in specific situations'; and

d) convey elements of what is considered "competent professional practice" for Australian Property Institute (*API*) *Members*.

A *GP* is not intended to provide comprehensive training, instruction or prescriptive practices and procedures, or direct that a process, professional approach or method should or should not be used in any specific instruction or situation.

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The *Member* is responsible for choosing the most appropriate approach in a matter based upon the task and instruction. It is a matter for each *Member* to decide the appropriate practice in any situation, and if they are unclear, seek legal advice. *Members* have the responsibility of deciding when it is appropriate to depart from the guidance and practices contained in a *GP*.

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Court or Tribunal Reliance

A court or tribunal may consider the contents of this *GP* to be relevant when deciding whether a *Member* acted to a standard required by law.

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This *GP* is current at the time of publication, based on current case law and legislation.

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a) the reasons for the departure or non-compliance with this *GP*; and

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Enquiries

If any *Member* considers any information or advice in this *GP* to not be accurate or up to date, or wish to raise any issue for consideration arising from the contents of this *GP*, please refer this to

API contact: standards@api.org.au

1.0 Introduction

1.1 Scope and Acknowledgment

This *GP* recognises the deep spiritual and cultural connection that First Nations People have to their land throughout Australia.

This *GP* is designed to be used by *API Members* as well as other property professionals who may have limited experience in respect of native title matters. It focuses on *native title* from the important perspective of *native title* as a form of property rights protected by the law, which are meaningful and need to be respected.

The focus on the property law aspects of *native title* is in no way meant to minimise the importance of cultural protection, heritage protection, or the historic and ongoing spiritual connection that exists between First Nations People and their country.

By focusing on property interests for those who work in property related areas, it is hoped that proper protection will be afforded to native title rights and the respect and understanding of these rights will continue to improve.

This paper primarily deals with the native title system and the *Native Title Act 1993* (Cth) (*NTA*).

It should be noted that this *GP* does not deal with any issues under specific State or Territory Aboriginal land rights. It also does not address issues under the *Aboriginal Land Rights Act (Northern Territory) Act 1976* (Cth) which is a separate land rights system, which only applies in the Northern Territory.

This *GP* also does not deal extensively with issues related to mining on native title land. Mining operations are subject of their own specific regime and are generally outside the scope of this *GP*.

Members who are interested in reviewing information relating to Aboriginal heritage and cultural protections are encouraged to refer to the Aboriginal cultural and heritage guides and information that exist in all States and Territories as well as at a Federal level.

This *GP* should be read in conjunction with other relevant *GPs*, professional standards papers, and any other relevant professional guidelines published or adopted paper by the *API*.

1.2 Native Title – Overview

Native title is the name given to the legal recognition of the rights that First Nations People hold with respect to their traditional lands and waters under their traditional laws and customs. The common law recognition of *native title* as a form of property, which is protected by the Australian Constitution, is consistent with any other property rights in Australia. Unlike any other forms of property, however, it does not derive from the Crown and exists independently. This means that native title rights pre-date the Australian legal system but are recognised and protected by Australian law.

Native title may exist irrespective of whether it has been formally recognised, but for all intents and purposes a *native title claim* needs to be registered with the National Native Title Tribunal (*NNTT*) or have been determined by the Federal Court (*Court*) before it will significantly affect other parties.

The above is a brief summary of the technical aspects of *native title* without going into the detail of the *NTA*. The intention of this *GP* is to address *native title* in a user-friendly format.

There are many facets to *native title* and its application under the *NTA* and at law. This *GP* attempts to cover the situations that may be encountered by *Members* and other property professionals and to provide guidance to address the matters that may arise. This *GP* focuses on the needs of the property industry first, and addresses technical and legal issues as a secondary consideration.

Regardless, *native title* is complicated for many to understand because of four (4) things which make it unique:

- it is exclusively held by First Nations People, and is inalienable (meaning it cannot be bought or sold). It can only legally be interfered with or affected in accordance with the *NTA* and often only by agreement with the *native title holders*;
- it can co-exist with certain other property rights (such as Pastoral Leases, mining leases, infrastructure easements and other non-exclusive forms of tenure) and can sometimes affect the validity of already co-existing property rights and can prevent the grant of additional property rights;
- it is recognised, not created, through *Court* processes and is separate to the Land Titles Office (LTO) system; and
- when recognised by the *Court*, the *Court* recognises it as a pre-existing right that has been in existence for hundreds of years. Although there are good technical reasons for this, for many people unfamiliar with *native title*, it seems like the *Court* is retrospectively creating a property interest.

All of these factors make *native title* a very unique property right and interest which also has significant historical, social, economic, cultural and political issues connected to it. However *native title* is a real form of property right which exists now and has a significant legal framework around it.

It is important for readers to understand the limitations that a *GP* such as this has. The legislation which governs *native title* is extensive and multiple *Court* decisions already exist. The decisions of Mabo[1], Wik[2] and Ward[3] are each over 300 pages in length.

Native title is incredibly technical, and care should be taken when reporting or advising on native title matters, including recommending expert or specific legal advice.

This *GP* is intended to alert *Members* to scenarios and situations to consider in relation to native title matters. This *GP* is not intended to address every scenario and situation that may occur as a result of *native title* and does not provide a final and definitive solution to all native title matters that may be encountered by *Members* when providing professional services for their clients. More than any other form of property, *native title* will often necessitate the *Member* recommending detailed and bespoke legal advice. This *GP* should not be used as a substitute for legal advice.

[1] *Mabo v Queensland (No 2)* (1992) 175 CLR 1
[2] *Wik Peoples v Queensland* (1996) 187 CLR 1
[3] *Western Australia v Ward* (2002) 213 CLR 1

Members faced with property impacted or potentially impacted by native title matters should always understand the limits of their knowledge and expertise in relation to *native title* and seek or recommend advice from experts in the field be sourced where required.

Key Points:

- *Native title* is already determined over almost 50%[4] of Australia and further *native title claims* are progressing
- *Native title* exists overwhelmingly in regional, rural and outback Australia but can exist in certain areas in urban and suburban Australia.
- *Native title* generally does not exist on freehold land or exclusive possession leasehold land but can be encountered on most other forms of land tenure.
- *Native title* creates a property right with value.
- *Native title* is different to Aboriginal heritage.
- Certain developments cannot be built unless agreement with *native title holders* is reached.
- *Native title* is incredibly technical. *Native title* will often require detailed and bespoke legal advice.

[4] Federal Court of Australia Annual Report 2021-2022 Part 5 – Report of the National Native Title Tribunal stated that native title is determined to exist in 49.2 % of the landmass of Australia as at 30 June 2022

2.0 Definitions

The definitions below which are used in this *GP* are applicable to this *GP* and have been included to assist with the interpretation and understanding of terms used within this *GP*. Whilst a defined term may also have a common meaning or interpretation, its use in this *GP* is so limited.

Where a defined term is included in this *GP* it is shown in italics.

Court	Federal Court of Australia
Crown Land	Land that is 'owned' by the Crown (generally a State or Territory). *Crown Land* may be unalienated or leased to a third party or may be 'dedicated' or 'reserved' for a particular purpose and may be under the control of a local Council. Different management regimes exist for *Crown Land* in each State and Territory.
Extinguishment	The permanent *extinguishment* of native title rights, either in the past or in accordance with the *NTA*. *Native title* can be extinguished by a valid *grant of tenure* by the Commonwealth or a State or Territory or surrendered by agreement between the *native title holders* and the relevant Government party.
Future Act	An activity or proposal that may affect native title interests.
Grant of Tenure	In Australian law all land tenures (other than *native title*) are derived from the Crown by way of a *grant of tenure*, (see Key Concept at section 3.1)
Indigenous Land Use Agreement (ILUA)	A type of contract between *native title holders* and third parties or the Government about matters affecting native title land. There are strict requirements for *ILUAs* and they must be registered with the *NNTT*.
Member	A *Member* of the *API*.
Native Title	The recognition by Australian law of First Nations People's traditional rights and interests in land and waters held under their traditional law and custom.
Native Title Act (*NTA*)	*Native Title Act 1993* (Cth)
Native Title Claim	A legal claim made by First Nations People for recognition of *native title* through the *Court*.

Native Title Determination	A *Court* determination recognising the existence of *native title*, identifying the *native title holders*/people who hold it, setting out the exact nature of the rights and interests and the land in which they are held.
Native Title Due Diligence	Undertaking proper investigations prior to purchasing land or proceeding with any project to identify any native title issues that may arise, including in any surrounding land or waters and any required infrastructure corridors.
Native Title Holders	The group of First Nations People who collectively hold, *native title*, even if their *native title claim* has not yet been determined. Prior to a *native title determination, the native title holders* form a native title claim group represented by nominated Applicant(s) who are the individual people who make the *native title claim* on behalf of their community or group. After a *native title determination* is made the *native title holders* must form a corporation called a Prescribed Body Corporate (*PBC*) to manage their *native title* on behalf of the entire community or group.
National Native Title Tribunal (NNTT)	The National Native Title Tribunal is an independent body established under the *NTA* to oversee the administration of *native title*.
Past Act	An act that may have invalidly affected *native title* but has been validated under the provisions of the *NTA*.
Prescribed Body Corporate (PBC)	A corporation governed by the *NTA*, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) that acts as agent or trustee for the *native title holders* and manages all native title matters after a *native title determination* has been made.
Public Works	Buildings or structures (including roads, bridges, pipelines and major earthworks) that are constructed by or on behalf of the Commonwealth, a State or Territory Government or a Local Government (Council).
Unlawful Future Act	A *future act* that occurs unlawfully without following the requirements of the *NTA*.

3.0 Native Title is …

Native title is the term used to describe the rights and interests held by Aboriginal and Torres Strait Islanders to land and waters under their custom and customary law. [5]

Native title is the recognition in Australian law, under the *NTA*, that Aboriginal and Torres Strait Islander peoples had a system of law and ownership of their lands before European settlement. The historic High Court decision in Mabo [6] was the first recognition that *native title* continues to exist and is recognised by the common law of Australia.

In addition, *native title* is defined in the *NTA* as:

"the communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia."

3.1 Legal Recognition of Native Title

In order for *native title* to be recognised a *native title claim* needs to be lodged with the *Court*. This claim will then be registered by the *NNTT*, after which it will be resolved either by agreement or by a contested *Court* process (a legal trial). The parties to a *native title claim* will include the native title claim group, the State or Territory Government that the claim is located in and may also include the Commonwealth Government, any affected Councils and any land holders (such as Pastoral Lessees or mining companies) or other land users or interest groups whose rights might be impacted by the recognition of *native title*. Landowners who hold freehold title will generally not be affected by a *native title claim* and there is no need for them to be joined as parties.

Because *native title claims* can take considerable time (in many cases years or even decades) to resolve, the *NTA* creates certain protections on registered *native title claims* so that they are treated similarly to how they would be treated if their claims are successful.

If a *native title claim* is successful, the *Court* makes a *native title determination* that recognises native title rights over specific parcels or areas of land. The *Court* does not create or grant the rights. The recognition of the native title rights applies retrospectively from the acquisition of sovereignty, meaning that the *native title* is determined to have always existed. This can affect some co-existing property rights and will potentially affect the ability of new property rights to be granted over native title land.

Native title rights can be recognised only where they have not been previously extinguished by some other *grant of tenure* or other land use that was inconsistent with the existence of *native title*. Prior to the recognition of *native title* in Australia in the famous Mabo[7] decision and the subsequent enactment of the *NTA* the Commonwealth and the various State and

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[5] *Mabo v Queensland (No.2) (1992) (175 CLR 1)*
[6] *See above*
[7] *See above*

Territory governments made numerous *grants of tenure* and used land in various ways that were entirely inconsistent with *native title*, such as for schools and hospitals.

The *NTA* recognises this and ensures that such grants and land uses are valid and in most cases that they have extinguished *native title*.

In some cases, previous *grants of tenure* or land uses may not have been entirely inconsistent with *native title* and so the two things can co-exist. For example, Pastoral Leases in Australia have been held to co-exist with *native title* and do not extinguish all native title rights[8]. Similarly reserving land for use as a national park, or parklands, will not have extinguished *native title* and so it is likely that native title rights will continue to exist in such areas and the rights of the *native title holders* will co-exist with the rights of others.

The main practical impact of *native title* to property is that it affects how and in what circumstances new property interests (ie *grants of tenure*) can be made on land where there is *native title*. Since the enactment of the *NTA* in 1993, any new *grants of tenure* must be done in compliance with the *NTA*.

Key Concept – Grant of Tenure

There are many types of interest in land which give different kinds of rights to use the land (also known as tenure) ranging from a freehold estate (or fee simple) to leases, licences, and easements.

When a property interest such as a freehold estate, Crown Lease, Pastoral Lease, or easement is initially created, it is a grant from the State, Territory or Commonwealth in place of the Crown. This derived from the British legal system (which has been imported to Australia) and the concept that all property is ultimately vested in the Crown. Such a grant can be made by a Government to itself, a private person(s) or an entity(s) such as a company and results in the creation of a new property right. This 'creation' of a property interest is called a *grant of tenure*.

A *grant of tenure* normally only occurs when the Government first creates the property interest or when it significantly alters and expands the property interests in the tenure. It does not apply when the holder of a property interest sells or transfers their interest to another party. For example, if a freehold land grant is made by a State Government to person A this will be a *grant of tenure* but if person A sells their land to person B this will be a transfer and not a new *grant of tenure*. Even if person A subdivides their land and sells each new parcel to different people this will not be a new *grant of tenure*.

More than one *grant of tenure* can be created over the same parcel of land at the same or different times resulting in multiple or co-existing tenures over the same parcel of land. For example, a *grant of tenure* can occur on *Crown Land* when the Government issues an easement over portion of that land. If the Government then issues a Pastoral Lease over all of the land (including the easement area), the easement may continue to apply

[8] *Wik Peoples v Queensland* (1996) 187 CLR 1

and the Pastoral Lease will be a new *grant of tenure* that co-exists with the easement.

In respect of existing *native title*, the concept of granting tenure is very important as it is when this occurs that *native title* will be affected. A change of use whilst relying on existing tenure (without any change in the rights created by that tenure) or the transfer of tenure will not normally affect any co-existing *native title*. The grant of additional tenure, even if the use is the same or it is to the same holder of the current tenure, may however affect *native title*.

4.0 Native Title as a Form of Property

Although cultural respect and historical understanding is critical to understanding *native title*, at a property law level, *native title* is a real and substantive property interest which exists in certain parcels of land. It is however not recorded at an *LTO* level which makes the identification of recognised native title land difficult.

4.1 Native Title and Aboriginal Heritage are Different Regimes

It is important to distinguish between *native title* and Aboriginal heritage. These are two separate legal regimes and although native title rights to protect heritage often exist, resulting in an important relationship between the two regimes, they are different regimes and need to be understood separately.

Aboriginal heritage is primarily protected under State and Federal legislation, specifically set up to do this. Each State and Territory has its own Aboriginal heritage system, so there are some differences across the Country. Generally Aboriginal heritage will be protected no matter what the land tenure is, but the Aboriginal heritage system is limited to protecting Aboriginal heritage in the form of sites and objects of significance and ancestral remains and doesn't address the broader property interests of *native title*.

In contrast, *native title* is regulated by Federal legislation in the form of the *NTA* and native title rights exist only in some parcels of land, whereas Aboriginal heritage is protected by legislation everywhere no matter the legal tenure of the land it is on. *Native title* exists as a broader set of rights and therefore encompasses broader property rights and interests, than just the right to protect Aboriginal heritage and culture.

Example 1 – Application of Aboriginal heritage protection and native title rights.

A local Council may be intending to develop a tourism precinct on freehold land it owns in addition to an adjacent parcel of *Crown Land*. The parcel of *Crown Land* has *native title* over it.

The Council wants to cut down some trees on the freehold land to build a visitor information centre with a carpark on the adjacent *Crown Land*. The council further intends to issue a commercial lease or licence to a food-truck to operate in the proposed carpark on the *Crown Land*.

The location of the proposed visitor information centre has protected Aboriginal archaeological heritage located within it. Even though the land is freehold, the Aboriginal heritage is still likely protected, and cannot be disturbed depending on the specifics of applicable State legal regime.

An Aboriginal heritage survey was conducted over the adjacent *Crown Land* with *native title*, but no sites or archaeological artifacts were located on this land. The native title rights are not diminished over the *Crown Land* due to there being no evidence of Aboriginal heritage on the land. The native title property interest continues to apply and be important even though no Aboriginal heritage was identified on the *Crown Land* by the heritage survey.

4.2 Native Title is Property

Native title is a form of property which has a real and substantive use and economic value. Although *native title* cannot be bought and sold in a traditional sense, agreements can be made between *native title holders* and others who wish to use or access native title land and these agreements will include commercial terms. Questions about how to value *native title* are still being worked through by experts and the Courts. For the purpose of this *GP* it is important to understand that it is a real form of property interest with a value and an impact and is not just a social or political concept.

The effect of the native title property interest is that certain things which affect the native title property interest cannot be done unless certain conditions under the *NTA* are complied with. Some things will require notices or other procedures under the *NTA* before an activity on native title land is permitted. In other cases, certain acts will not be permitted unless the *native title holders* expressly agree to it. This is addressed further in Section 5.0.

4.3 How are Native Title Property Rights Different to Non-Native Title Property Rights?

There are a number of unique facts about *native title* that should be understood by those providing advice on native title matters or property impacted by *native title*:

- *Native title* is a recognition by the common law of continual rights and interests in land and waters which existed at the time that sovereignty was acquired by the Crown. Unlike many other forms of property in Australia, it does not come from a grant from the Crown or the Government. It exists independently.
- Native title rights are held communally by groups of First Nations People who collectively have rights under their traditional laws and customs.

- *Native title* reflects the normative system of the *native title holders*. The actual rights conferred by *native title*, and how they are dealt with, will depend on the circumstances of each native title holder group. Each *native title determination* by the *Court* sets out the specific native title rights that are recognised which are often largely consistent between groups. These often include the right to access and use the land, to use the natural resources of the land, to hunt, fish and camp on the land, and to protect Aboriginal heritage on the land. Where *native title holders* have exclusive native title rights then these rights are largely equivalent to full freehold ownership rights and will include the right to exclude other people from the land.
- *Native title* is a form of property that is exclusively held by First Nations People is inalienable, it cannot be bought, sold or transferred. Agreements between the *native title holders* and others can however be reached which permit the use of native title land by others subject to the agreement. These agreements are called Indigenous Land Use Agreements (*ILUAs*). They do not technically 'buy' or 'acquire' the native title land but permit the Government to grant interests which temporarily or permanently affect the *native title*.
- Any dealings involving native title decisions are highly regulated and require the consent of the native title holder group.
- *Native title* is not recorded on the records kept at the *LTO* (such as Certificates of Title or Crown Records) or equivalent databases.

An important concept of *native title* is that the *Court* recognises it as already existing, rather than creating it. This means that it exists prior to it being determined and recorded. This different to other forms of property interests and rights which only exist once recorded.

The *NTA* creates a system to deal with the possibility that *native title* exists on some land before a *Court* case in respect of a *native title claim* is resolved and determined.

There is a lot of regulation in the *NTA* to deal with these matters.

4.4 How Does Native Title Affect Other Property Interests in the Same Land?

Native title can exist over land which also has another property interest on it, such as a Pastoral Lease, a Council reserve or a National Park. In these instances, *native title* will co-exist with the existing land tenure. If the existing land tenure is valid, *native title* should not limit the rights that can be exercised under the existing tenure. A co-existing native title right will limit the ability of the Government to make new or additional grants of tenure over the land or to undertake certain activities or developments without the agreement of the *native title holders*.

Example 2 – A Pastoral Lease Over Native Title Land

Native title exists (has been determined) over an area of land subject to a valid Pastoral Lease.

The person or entity who holds the Pastoral Lease is permitted to rely on rights that they have under the Pastoral Lease meaning that they can continue to raise stock, erect structures and fencing for their stock and generally use the land for pastoral purposes. In addition, the *native title holders* are entitled to do various things on the Pastoral Lease (as outlined

under the *native title determination*) such as hunting, camping, etc, provided those activities do not interfere with the operation of the Pastoral Lease.

However, any new grant of a new property interest (such as a new infrastructure easement or windfarm licence) over the Pastoral Lease may not be possible without agreement from the *native title holders*.

In summary, the existing Pastoral Lease is not impacted by *native title*, but any grant of new tenure over native title land may not be possible without agreement.

4.5 How does Native Title Effect a Transfer of an Existing Property Interest?

Most existing land tenure remains valid irrespective of *native title*. Some existing tenure is validated automatically under the *NTA* as a *past act*. However, in some cases, existing tenure may have been granted invalidly under the *NTA*. This is discussed in Section 0. As a general rule, land tenure which was in existence before 1993 will be valid (even if it has since been transferred or subdivided).

Transferring existing property interests (e.g., by sale) does not affect *native title*, and as a general rule *native title due diligence* is not required, unless the transfer is for the purpose of a development that will require a new or different form of tenure, or which will require access to or across other land which has *native title* over it. Where a property interest (such as a Crown Lease) co-exists with *native title*, the *native title* will continue to co-exist after the transfer.

4.6 How Does Native Title Affect the Grant of New Tenure?

The concept of "*grant of tenure*" was discussed in Section 3.1 and previously elsewhere in this *GP*. It is the *grant of tenure* that creates new property interests and rights that can be affected by existing *native title*. Where *native title* can often have the biggest impact is in the case of future developments that are predominantly on freehold land (without any *native title*), but which require additional land tenure for access or connecting infrastructure. *Native title* can prevent the Crown from granting additional tenure over land subject to existing native title interests. The reasons for this are that:

- native title interests are property interests regulated by the *NTA*
- if the Crown grants new land tenure, and this tenure could affect existing native title interests, then this new tenure may be a "*future act*" under the *NTA*
- any "*future act*" must be done in accordance with the *NTA*. This will depend on what the activity is and can either be done by the issuing of a notice under the *NTA* and payment of compensation or may require an *ILUA*. This is addressed more in Section 5.3

Example 3 – Port development over Crown Land

A company is seeking to develop a new port and requires access over a strip of *Crown Land* which sits between the main development site, the beach and the sea. The port development company applies for a lease from the State Government to access and use this area of coastal land. The port may also

need some sort of tenure into the sea. *Native title* exists over the strip of *Crown Land* that the lease must be issued over and the adjacent sea and seabed.

A power company is extending the state power-grid into the area also and will connect the state grid to the new port as part of this expansion.

The State can grant easements for the power grid expansion over the native title land by issuing a notice under the *NTA* (and paying compensation). This does not require an *ILUA*, provided the power-grid expansion is part of the public grid infrastructure. (Note, the State may still require consent from the *native title holders* for the grant of the easement under State Crown Land legislation, depending on each State's specific Crown Land legislation).

Due to the existing *native title* over the strip of *Crown Land*, the State cannot grant the lease to the port development company without an agreement with the *native title holders*. The port development company and the State will require an *ILUA* with the *native title holders* before the lease can be granted for the port development.

The *native title holders* are under no compulsion to agree, and commercial terms will need to be negotiated between the parties.

4.7 Native Title as a Form of Property - Summary

Native title is a real and substantive form of property which is legally protected and has utility and value for the *native title holders*, which needs to be considered in relation to projects and proposals that may require new *grants of tenure*. Generally pre-existing valid tenure, under the *NTA*, can co-exist with *native title*. The grant of new land tenure, if it affects *native title*, may not be possible without agreement (an *ILUA*) or in some cases the Crown issuing a notice under the *NTA* and paying compensation.

The effect that determined *native title* has on existing property interests is outlined further in section 5.0.

It is also important to understand that obligations to deal with the *native title holders* and reach agreement can also apply prior to a *Court determination of native title*, if there is a registered *native title claim* over the land. This is dealt with in Section 5.6.

5.0 What Does it Mean if Land has Native Title Rights Over it

A feature of *native title* is that it can co-exist over land which also has some other form of existing valid land tenure. For example, a Pastoral Lease and *native title* can both co-exist on the same parcel of land. Likewise, easements, licences and some leases often co-exist with native title land. *Native title* does not generally co-exist with freehold title.[9]

Another important element of *native title* is that it permits the *native title holders* to do various things on the land, such as go onto the land and use resources on the land. If the land has no other tenure on it, then the *native title holders* can exercise all of the rights they

[9] There are some exceptions to this such as certain freehold interests created under other Aboriginal land rights legislation, however these are exceptions and are outside the scope of this *GP*

have without limitation. If there is co-existing tenure, then the *native title holders* can exercise their rights in any way, as long as it does not interfere with the existing tenure.

Native title usually becomes a consideration or issue for market participants when seeking access to land through a new *grant of tenure* which would affect the *native title holders*' rights. This section deals with the impact of *native title* on participants.

5.1 Acting Consistent with Existing Tenure

Where there is existing tenure over native title land, the person or entity who holds that tenure can continue to do the things they are permitted to do under that tenure.

If there is a change to the use of the land, but this does not require a change to the terms of any existing tenure and does not require the grant of new tenure, then this will not affect *native title*. For example, an entity has an existing Pastoral Lease, and they change the use of the land from grazing sheep to grazing cattle but there is no requirement to amend the existing lease or require a new lease then the change of use will not impact *native title*.

A person or entity can buy, sell or transfer tenure without this impacting any co-existing *native title*, subject to continuing to meet the terms of the existing tenure.

There are two (2) important factors to consider when a sale or transfer may be occurring:

- Firstly, some tenure cannot be transferred or assigned, such as some leases and licences. Rather these forms of tenure are intended to be reissued upon settlement of the transfer (this will depend on the specific terms of the lease or licence in question). This could impact *native title*, as it is technically a grant of new tenure, rather than a transfer of the existing tenure, however in most cases this can validly occur under the *future act* provisions of the *NTA* (see section 5.3). If there are any doubts about such a scenario specific legal advice should be sought.
- Secondly, some tenure only exists because there is an *ILUA* which permitted it in the first place. Normally, this tenure could only be transferred or assigned if the *ILUA* is also assigned with it. The *ILUA* may create additional financial burdens on the purchaser of the tenure.

Warning: Due Diligence for Purchasers and Members Providing Advice in Relating to Proposed Transfers

When an interest in land which has *native title* over it is offered for sale or transfer, prospective purchasers should seek confirmation that the existing tenure is valid and able to be transferred, and any limitations that might affect their future use of the land.

If the tenure is valid because of an *ILUA*, the purchaser should request a copy of that *ILUA* to see what legal obligations they may have under the *ILUA* as part of their *native title due diligence* prior to agreeing to the purchase.

5.2 Validity of Existing Tenure

Most existing tenure is valid irrespective of *native title*. Some existing tenure is validated automatically under the *NTA* as a *past act*. In some cases however, the existing tenure may have been invalidly granted over native title land without complying with the *NTA*, resulting in invalid existing tenure.

As a general rule, tenure granted by the State which

- was first granted before 31 October 1975 is valid.
- was first granted after 31 October 1975 but before 1 January 1994 is validated by the *NTA*, but the State Government may have to pay compensation to the *native title holders*. This is not an issue which will affect private owners unless they have an obligation to refund the State under some legal instrument.
- was first granted after 1 January 1994 to present day will be valid, as long as it is over land where *native title* has previously been extinguished or is replacing equivalent previous tenure which pre-dates 1993 or has been granted in accordance with the provisions of the *NTA* or under an *ILUA*.

Note: a very small amount of tenure issued on native title land after 1993, such as freehold parcels granted over previously un-extinguished *Crown Land*, may have been granted invalidly. These are called *unlawful future acts* under the *NTA*. However, these issues are almost always rectified by State Governments prior to any *native title determination*, and so it is highly unlikely that they will be encountered.

Some lesser property interests (such as easements or licences), however, may not be identified and rectified by State Governments prior to any *native title determination* by the *Court*. In some instances, this tenure – if issued after 1993 – could be invalid or *unlawful future acts*. This is a very specialised area, even within the area of *native title*. Any *Member* who encounters any reasonable suggestion that a property interest is an *unlawful future act* should seek specific legal advice.

As indicated previously in section 4.5, the transfer of existing land tenure itself will not affect *native title*. For example, the transfer or sale of a valid Pastoral Lease to another person or entity will not affect any co-existing *native title* over the land.

Aside from some minor issues with validity of historical interests, the main impact of *native title* for the property industry relates to the grant of new land tenure.

5.3 Future Acts - Granting New Tenure

Future acts are acts or activities on native title land that affect the rights and interests of the *native title holders* or are otherwise inconsistent with continuing native title rights. Granting new tenure over native title land is almost always a "*future act*".

The main impact of *native title* occurs when a person or entity requires a new *grant of tenure* over land which has *native title* over it. The new tenure might be a freehold grant but also might be some lesser interest like a lease or a licence.

This applies in cases such as:

- Where the new tenure is the only tenure which the land would have on it, such as a Crown Lease over *Crown Land* with *native title*; or
- Where the new tenure will operate in conjunction with already existing tenure, such as a new easement over an existing Pastoral Lease which co-exists with *native title*.

This is the critical matter for *native title* and where proper *native title due diligence* should occur.

Some new tenure can be granted by the State, Territory or Commonwealth Governments or appropriate instrumentality in accordance with specific provisions of the *NTA*. This usually only applies to tenure for public infrastructure, water, airspace or for certain technical circumstances where the new tenure is really an extension of existing tenure. A specific process also exists for mining and infrastructure required for mining.

- However, in most other circumstances, the new tenure will not be able to be granted to private individuals or companies, unless there is agreement with the *native title holders*, most commonly in the form of an *ILUA*. In some instances, State or Territory Governments may be able to compulsorily acquire native title land for particular purposes (such as State infrastructure like roads or railways) by following the processes set out in the *NTA* and State based land acquisition legislation, however this is generally not possible for private developments.

Warning: Due Diligence Where New Grant of Tenure is Required

Where *native title exists* over land and a new *grant of tenure* is required, then it is critical for the person or entity seeking the new *grant of tenure*, and/or their property professional(s) to immediately seek legal advice. All native title matters should be resolved prior to any party either agreeing to purchase or seeking to provide funds for a development or the purchase of property affected by *native title*.

Example

A company approaches a Pastoral Lease holder (pastoralist) because they want to develop a wind farm on the Pastoral Lease land. The pastoralist and the wind farm company then agree to transfer the Pastoral Lease to the wind farm company for an agreed sale price of $4M. The wind farm company is aware that there is co-existing *native title* over the Pastoral Lease but does not conduct any further due diligence or seek any further advice in relation to the co-existing *native title*.

The wind farm company pays the pastoralists what it considers to be the full value of the Pastoral Lease, plus a premium of $2M reflecting the fact that it believes it can now build the wind farm without any other financial obligations or liabilities.

The wind farm company, now the owner of the Pastoral Lease, applies to the State Government for licences for the proposed wind farm. The State Government advises the wind farm company that it cannot grant the licences, as the change of use is a new *grant of tenure* and the *native title holders* would need to agree and there would need to be an *ILUA*.

The wind farm company contacts the *native title holders* who advise that their financial models show they should receive $2Million in payment from the wind farm company to permit the change of use, of the native title land, to the proposed wind farm. The wind farm company financial models confirm this premium is correct. However, the wind farm company already paid the premium for the Pastoral Lease to the pastoralist when they purchased the Pastoral Lease. The wind farm company did not understand that they had other property rights holders, namely the *native title holders*, who would require payment.

After reviewing the matter, the wind farm company's board concludes that they have paid the premium to the wrong party because they misunderstood the impact of *native title* over the Pastoral Lease.

The wind farm company is still required to negotiate and agree to an *ILUA* and any payment to the *native title holders* to progress with the new *grant of tenure* and licences from the State Government for the wind farm development. These additional costs could have been averted by the wind farm company had proper *native title due diligence* been done at the time of negotiating the purchase of the Pastoral Lease.

5.4 Certain Types of Future Acts can be Done by Following the Procedures set out in the NTA

There are a number of provisions of the *NTA* known as the *future act* provisions which allow the Commonwealth, State and Territory Governments (and in some instances Councils) to undertake activities on native title land by following particular procedures, usually by providing notice to the *native title holders* and considering any responses. *Native title holders* are also entitled to compensation from the relevant Commonwealth, State or Territory government for the effect that any *future acts* have on their native title rights. The main *future act* provisions are:

- Section 24KA: This provision allows for *future acts* that consist of or permit the construction of certain "facilities for the public" on native title land. These facilities can include roads, railways, electricity transmission and distribution infrastructure, pipelines, jetties, navigational aids, sewerage infrastructure and a number of other public facilities specified in the *NTA*. *Native title holders* are entitled to the same procedural rights that they would have if they held ordinary (freehold) title to the land in question.
- Section 24HA: This provision allows for *future acts* that consist of the grant of leases or licences to undertake activities under legislation for the management of water and airspace. Notice must be provided to the *native title holders* before the *future act* can be undertaken and

- Section 24J: This provision allows for *future acts* that consist of the use of land that has been dedicated or reserved for a particular purpose, or where a lease has been granted to a Government entity for a particular purpose as long as the use of the land has no greater impact than the purpose for which it was dedicated or leased.
- Section 24IC This provision allows for the relevant Commonwealth, State or Territory government to grant new tenure in limited cases where there is already tenure co-existing with *native title* and the new tenure is a renewal of the existing tenure or is otherwise permitted under section 24IC of the *NTA*.
- Section 24M: This provision allows for the State, Territory, or instrumentality of Commonwealth to do things that they could otherwise do under legislation to freehold parcels, including compulsory acquisition.

It is important to understand that each of these provisions in the *NTA* is very technical and there are a number of exceptions and unresolved legal issues about them.

For example, section 24KA does not allow for energy generation projects. Further examples are roads, which can be covered by section 24KA, but in some States, like South Australia, it is difficult to rely on this section because roads create freehold interests, but section 24KA does not allow for *native title extinguishment*. Section 24HA applies if the legislation is for the management of water, not if the specific activity is done under general legislation. Various other technical issues also remain, and *Members* or other property professionals should seek or recommend that specialist legal advice be sought.

The *future act* provisions normally relate to infrastructure for the public that is constructed by or on behalf of the Government or the management of public resources like water. As a general rule, private developments which may require new tenure cannot be done using the *future act* provisions. There are exceptions to this, such as when the new tenure may still be covered by one the notice provisions even though the development is private. *Members* should seek or recommend specialist legal advice be sought in relation to these matters.

What can or cannot be done under the *future act* provisions is highly technical and is often unclear. Specific legal advice should be sought as part of comprehensive due diligence.

5.5 Mining

Mining is not a focus of this *GP* as it is subject of its own specific regime, however, below is a very brief overview.

Under the *NTA* mining activities on native title land enliven the 'right to negotiate' which allows the parties to negotiate agreements. If the parties are unable to reach an agreement, a party may apply to the *NNTT* for a determination by the *Court*.

There are different regimes in different States and Territories, and differences in the treatment of mining exploration activities to mining production.

The *NTA* allows *native title holders* and mining companies to enter into *ILUAs* which can cover both *future acts* (such as the proposed exploration or mining operations) or non-*future acts* (such as use and access agreements detailing existing co-existing rights).

5.6 Certain Types of New Tenure Require Agreements or ILUAs

New tenure that is not covered by one of the *future act* provisions of the *NTA* (or is not related to mining activity), will almost certainly require an *ILUA*. An *ILUA* is a specific type of agreement that can be made under the *NTA* between *native title holders* and third parties about native tile matters including allowing for *future acts* such as new *grants of tenure* that affect native title land.

Important features of *ILUAs* include:

- *ILUAs* require consent of the *native title holders*, which often requires negotiation of a legal agreement with the relevant *PBC* and one or more community meetings to enable the *PBC* to consult with and obtain the consent of the *native title holders* before executing the agreement. This legal and administrative cost is often quite high and will usually be paid by the person or entity who wants the new tenure. The *native title holders* or *PBC* will not normally contribute to these costs.
- *ILUAs* may require significant amounts to be paid to the *native title holders* as compensation/consideration for the impact that the new tenure will have on their native title rights, via lump sum or regular payments. Other benefits (such as employment opportunities) may also be included.
- *ILUAs* can also address other matters such as protection of Aboriginal heritage in conjunction with native title matters.
- The *native title holders* are not obligated to agree to any proposed *ILUA* or native title agreement. Where an *ILUA* or native title agreement is required for the grant of new land tenure there is no guarantee that an agreement will be reached in all cases which may result in the new land tenure not being able to be granted.
- *ILUAs* must be registered with the *NNTT* before they can come into effect.

6.0 Costs Associated with ILUAs – Impacts for Developments

This section is not a comprehensive discussion on *ILUAs* and is intended to outline that *native title* can have significant financial and commercial impacts on developments. Native title matters therefore need to be considered and assessed as part of any due diligence by developers and their property advisers including *Members*.

Some *grants of tenure* are able be done over native title land by use of one of the *future act* provisions in the *NTA*. This is normally limited to various public infrastructure or natural resource management requirements or projects. In other cases, there is a need for an *ILUA*.

ILUAs are formal agreements between *native title holders*, companies and often the State Government to allow new tenure to be granted over native title land that would affect *native title* and would otherwise be invalid.

ILUAs can allow for *native title* to be surrendered so that it is permanently extinguished (in this case the Commonwealth or a State or Territory government must be a party to the *ILUA*) to allow for new tenure to be granted, or can be made subject to the 'non-extinguishment principle' meaning that the native title rights will not be extinguished by any new tenure, but will be suspended or inoperative to the extent that the *native title* is inconsistent with the new tenure or project. *Native title* may then 'revive' when the project ends.

The financial impact of *ILUAs* for developers and developments where there are native title matters that need to be addressed can be divided into two categories:

- The cost of negotiating and agreeing to terms of any agreement of *ILUA*, including any administrative costs, and
- any financial payments to *native title holders* for access or use of native title land under the *ILUA*.

6.1 High Risk Native Title Considerations for Developers

A high-risk area which needs to be considered for development is when freehold land abutting or adjacent to non-freehold land (e.g., *Crown Land* or Pastoral Lease) is proposed to be developed and requires access, in some form, to or over the adjacent non-freehold land, coastal land, or other land where there is *native title* (such as a Pastoral Lease).

Even though a proposed project or intended development may be contained entirely within the boundaries of the freehold land, the adjacent land may be required for new powerlines, road access, water access or some other critical piece of infrastructure, without which the development cannot occur.

Developments on land adjoining non-freehold land where *native title* exists, or has the potential to exist, are at high risk of encountering native title matters that will need to be negotiated and resolved prior to the project or development proceeding. The failure to properly assess and take into account any native title matters as part of the due diligence for the project can have potentially serious impacts (in both time and money) on the viability of any project.

6.2 Native Title Holders do not Need to Agree

An entity or the proponent of a project is required to negotiate with the *native title holders* if they require access to or use of the native title land. These negotiations may take time and can be costly. The *native title holders* are under no compulsion to agree to *ILUAs* if they do not want to. There is no guarantee that a project can proceed as intended if it requires an *ILUA*.

The exception to this principle is, in some cases, for mining activities.

6.3 Administrative Costs

ILUAs can cost a lot of money to negotiate and traditionally the entity or proponent wanting access or use of the native title land is required to cover the *native title holders*' costs.

The costs are often based on procedural requirements, which are set out under legislation.

The *NTA* requires that when a *native title determination* is made the *Court* also determines that the *native title holders* form a corporation to manage their native title rights. The corporation is known as a Prescribed Body Corporate (*PBC*) and is registered with the *NNTT* on the National Native Title Register. Whilst the *native title holders* are the owners of the native title rights and manage them through their traditional laws of custodianship, the *PBC* is the body that is in place to deal with non-Indigenous law, such as negotiating agreements and entering into contracts such as *ILUAs*.

The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (PBC Regulations), require *PBCs* to consult with the *native title holders* on issues impacting the native title land. No agreements, native title decisions or *ILUAs* can be made unless this consultation occurs. These requirements are set under legislation (the *NTA* and PBC Regulations) and the *native title holders* cannot waive them for any ILUA or agreement to be valid.

Costs normally include community meetings, which can often cost tens of thousands of dollars due to travel and accommodation expenses for the *native title holders*. As these requirements are sent by Commonwealth legislation and regulation, they cannot be avoided, and the *native title holders* are bound to undertake this consultation for any *ILUA* to be valid.

The high compliance and administrative requirements can result in significant financial costs to an entity or proponent seeking an agreement or ILUA over native title land and is a critical consideration for due diligence on any development involving native title matters.

6.4 Financial Payments under ILUAs

In addition to the costs of negotiating an *ILUA* discussed above, *ILUAs* will usually need to provide some form of compensation and/or consideration to the *native title holders* for the impact that the *ILUA* will have on their native title rights. It is very difficult to prescribe what these costs may be as in each case, as these costs will be the outcome of individual negotiations between the parties. Some general principles to note include:

- Compensation is often calculated based on the expected profitability of the proposed project, rather than on the basis of previous land use.
- Payments might take the form of ongoing “rent” or “royalty” payments, or an upfront lump-sum, or both.
- Ultimately an *ILUA* is a form of commercial contract, and so needs to be agreed on commercial terms.

7.0 Where is Native Title Likely to Exist?

This *GP* notes that *native title* is an important form of property which needs to be respected. It outlines and discusses the rights that that *native title holders* have to access and use their native title land, how *native title* co-exists with other existing tenure and the impact that *native title* can have when a person or entity requires new tenure to be granted.

This section will address where *native title* is likely to be located, and how to determine if land has *native title* on it or not.

Native title determination details are not recorded on property titles held by the State based LTOs (such as Certificates of Title and Crown Records) which can make identification of native title land difficult.

It is important to note that every different form of tenure affects *native title* in different ways. There are over 100 different forms of tenure which exist, such as freehold title, leases under specific legislation, easements, permits, licences, and covenants to name a few. This *GP* does not provide a comprehensive list of the impact of each type of tenure has on native title land or the impact that co-existing *native title* has on each type of tenure. Only the most common/main types of tenure are addressed below.

7.1 Urban vs Regional Areas

Although the majority of native title land is located in regional and remote parts of Australia, *native title* may be encountered anywhere. For example, there are sixteen (16) parcels of native title land in the Adelaide metropolitan area. However, it is much less likely to be encountered in urban areas because *native title* does not generally exist on freehold land and the vast majority of land in urban areas is held in freehold.

Although *native title* may be encountered anywhere, for *Members* and other property professionals who work predominantly in urban areas and may not often be exposed to native title matters, it is important to understand the types of tenure which are unlikely to have extinguished *native title*.

Those who work in non-urban (regional and remote) areas are reminded to include *native title due diligence* into investigations and procedures when providing professional services as the likelihood on encountering native title matters is more likely.

7.2 Land Tenure Types That May or May Not Extinguish Native Title

Some forms of land tenure, regardless of their geographical location, are generally regarded as having resulted in native title property rights and interests been extinguished when the land tenure was made.

The table below provides a non-exhaustive list of what types of tenure will likely extinguish *native title* and what types of tenure may potentially have *native title* over it.

Tenure which will have extinguished or is likely to have extinguished native title	**Tenure which is unlikely to have extinguished native title – where native title may be located**
Freehold Exclusive Leasehold	Pastoral Lease *Crown Land* with or without a dedication *Crown Land* which only has a licence or non-exclusive lease over it Coastal land and sea National parks

7.3 Working out Where Native Title is

This section provides guidance on how you work out where *native title* is. That is, what specific parcels of land are subject to *native title*.

It needs to be clear from the outset that sometimes it is not possible to actually make this determination without specialised legal advice.

Part of the reason why it is so difficult to determine where *native title* exists, is that sometimes it is not known until after there has been a *native title determination* by the *Court*.

The *NNTT* maintains a register of all *native title claims* and *native title determinations*, including maps of the area that they cover; however, these records do not generally show precisely where *native title* has been determined to exist on a parcel by parcel basis. For that information it may be necessary to review the relevant *native title determination* by the *Court*. Where no determination has been made (either because there is no *native title claim* or because a claim has not yet been determined) it may be necessary to seek expert legal advice.

7.4 Where is Native Title - Summary

Freehold land and exclusive possession leasehold land will generally have extinguished *native title*. Other forms of property tenure including pastoral leases, *Crown Land*, licences and easements may not have extinguished *native title* and it is important for *Members* to make diligent investigations and enquires when providing professional services relating to property that may be subject to *native title* due to location and land tenure. As noted previously, *Members* may need to seek or recommend legal advice be sought.

As there may be some argument, in both the property and legal profession, about what constitutes exclusive and non-exclusive leasehold the API recommends that *Members* consider native title matters on any form (tenure) of property that does not have freehold title.

A starting point for investigations and enquiries into native title matters is for *Members* to work out whether there is or has been a *native title claim* or *native title determination* over the land.

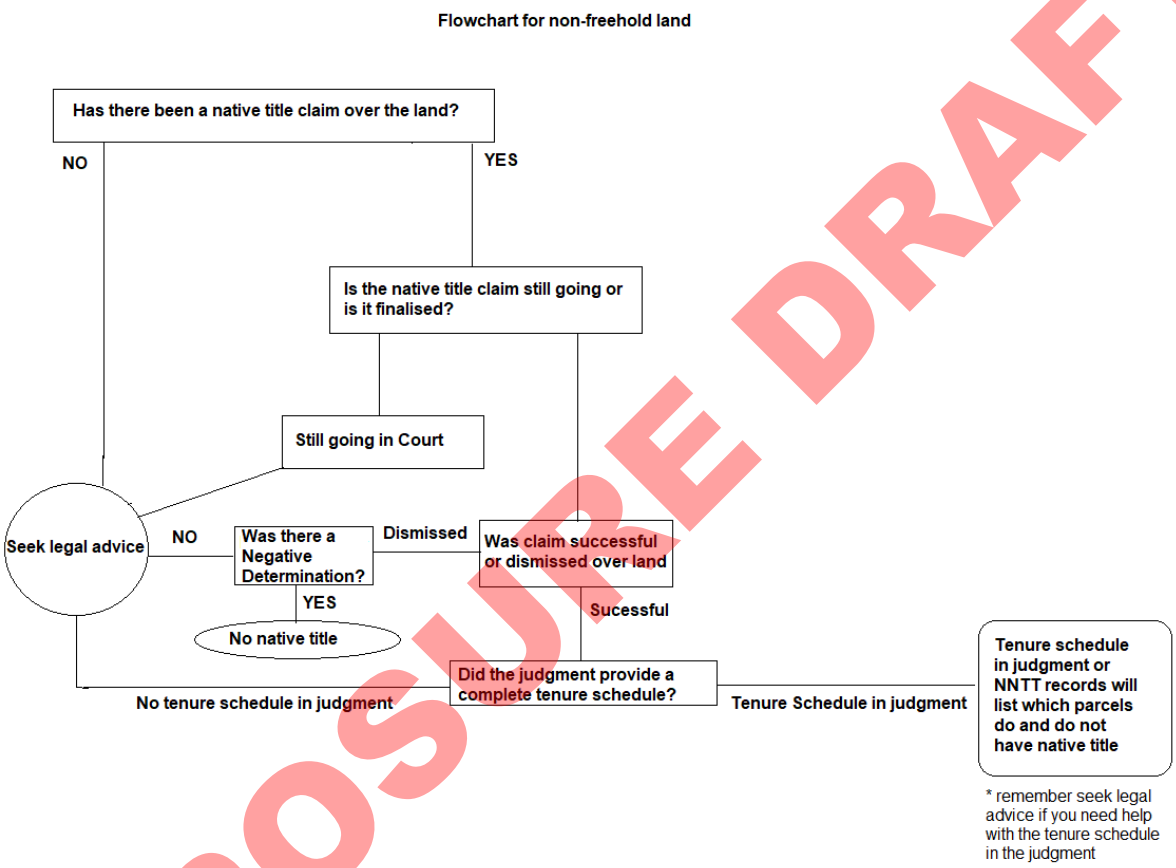
If there has not been a claim, the *Member* may want to consider legal advice.

If there is an active *native title claim* the API recommends that *Members* seek specialised legal advice in relation to the status of *native title* over the land which may impact its use or marketability. Where there has been a claim and the *Court* has made a *native title determination*, it is likely that there will be record/list of the parcels to which *native title* is recognised as existing in the *native title determination*. If so, this record can be regarded as conclusive and can be relied on as evidence. If there is no record, or it is difficult to interpret the record in the *native title determination* by the *Court*, *Members* should seek legal advice.

Members providing advice on any dealings relating to *public works* land are reminded that the *public works* extinguish *native title*, but this may not be recorded at a parcel level in all *Court* determination records, so it may appear that *native title* exists over *public works* when it does not.

Native title can be located anywhere, however the likelihood of *native title* is significantly higher in regional areas than it is in urban areas because most urban areas are predominantly covered by freehold title. Native title matters should be considered by *Members* as a matter of course, particularly for non-freehold property and non-exclusive property rights, and property outside of urban areas.

7.5 Workflow on how to Locate Native Title



8.0 Effective Date

This *GP* is applicable from DD MMMM YYYY. Earlier adoption is permitted and encouraged.

This *GP* replaces AV*GP 402 Native Title Issues* which was in effect from 30 June 2021 and was withdrawn DD MMMM YYYY.