

Queensland Government Native Title Work Procedures

Module JAA: Public housing and certain government infrastructure on Indigenous land

Commonwealth Native Title Act 1993: s.24JAA

December 2020

Version history

Version	Comments	Date published
1		August 2017
2	Due to 2020 amendments to extend the implementation period from 2020 to 2030	December 2020

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Introduction

Before using this module you must first advise the remote indigenous land and infrastructure program office, department of communities

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Annexed to this module is the template and a completed sample template.

For this Module to apply, your proposed future act must not fall within an earlier Module.

This Module helps you assess whether your proposed future act -

- is being done on Indigenous land
- and**
- consists or permits the construction of public housing or certain government facilities that are for the benefit of the Indigenous community, or staff housing provided in connection with public housing or certain government facilities.

If your future act does not fall within this Module, proceed to Module J.

NB. Module J only applies to certain Indigenous land, eg. shire lease land and Aboriginal and Torres Strait Islander reserves.

Part 1: What is section 24JAA?

Section 24JAA deals with certain future acts done on Indigenous land tenures, eg. Aboriginal or Torres Strait Islander Deed of Grant in Trust land.

The future act must consist of or permit the construction of -

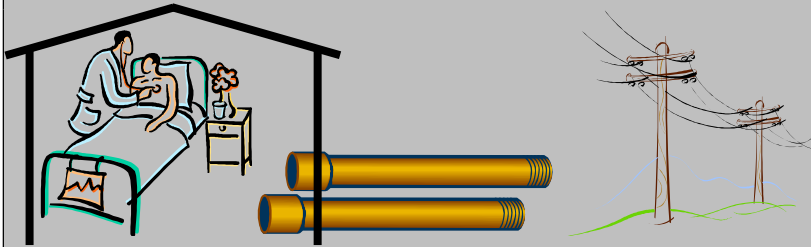
- (a) public housing for Aboriginal people or Torres Strait Islanders living in or in the vicinity of the area
- (b) certain government facilities (public education, public health, police or emergency facilities) provided it is for the benefit of the Aboriginal people or Torres Strait Islanders living in or in the vicinity of the area
- (c) staff housing provided in connection with public housing or certain government facilities covered by paragraphs (a) or (b) above.

The future act may also include a sewerage treatment facility, facilities listed under section 24KA of the *Native Title Act 1993* (NTA) (refer to **Module K**) and those listed by regulation, provided they are linked to the public housing, certain government facilities, or staff housing mentioned in paragraphs (a), (b) or (c) above.

However, for the future act to be valid the State must comply with the procedural requirements set out in **Division B**. Failure to do so will render the dealing invalid as against native title.

Example of a future act that falls under this Module

The registration of a trustee lease on an Aboriginal Deed of Grant in Trust that permits the lessee (ie. the State) to construct a new health clinic. As part of this project a sewerage pipeline, water pipeline and electricity line (facilities under section 24KA) are required to be constructed.



Not all dealings on Indigenous land are covered by this Module

Just because a proposed dealing is to occur on Indigenous land, does not mean it will be covered by this Module. Examples of dealings not covered are 99 year home ownership leases, water treatment facilities and dams.

Module has limited lifespan

This Module will only apply until **and including 15 December 2030**. Any future acts to be done under this Module must commence prior to that date.

Part 2: What is the purpose of section 24JAA?

Section 24JAA allows certain dealings to proceed on Indigenous land where previously they could only proceed via a registered Indigenous land use agreement (ILUA). Whilst an ILUA is always an option, this section allows the State to deliver vital infrastructure in a timely manner, where required, whilst still meaningfully engaging with the relevant native title parties.

This Module is set out in 3 divisions -

- A. Initial requirements
- B. Procedural rights and validity
- C. Effect on native title, compensation and decision-making.

A. Initial requirements

Part 3: Introduction

This Division is titled 'initial' requirements as it is not until you complete the procedural rights process at **Division B** that your future act is valid in relation to native title.

Part 4: Does my future act satisfy the requirements of section 24JAA?

Your proposed future act will fall within section 24JAA if it satisfies **all** of the following requirements -

Requirement 1

The proposed future act is at least partly onshore.

What is an onshore place?

The NTA makes a distinction between future acts done on an onshore place and an offshore place.

As a general rule, an onshore area for the State of Queensland extends down to the low water mark and includes internal bodies of waters such as rivers, canals and heavily enclosed bays. It would also include islands off the coast of Queensland, such as Fitzroy Island down to the low water mark.

However, what constitutes 'onshore' and what constitutes 'offshore' can be a difficult question, particularly in relation to bays. For example, coastal waters in the form of bays enclosed within the jaws of the land forming part of the inland waters are considered onshore. However, what is the criteria for such waters to be considered sufficiently landlocked - is it the open mouth or jaws of a man or of a crocodile?¹ The Australian Courts continue to struggle with this question.

Therefore, you satisfy this requirement if your proposed dealing area is at least in part either:

- (a) on land - mainland Queensland or an island off the coast of Queensland
- (b) in onshore waters - waters extending down to the low water mark, or within a watercourse or within a heavily enclosed bay.

and

Requirement 2

Your proposed future act relates to an area of Indigenous land.

Definition - Indigenous land

- Freehold granted under the *Aboriginal Land Act 1991* or *Torres Strait Islander Land Act 1991*.
- Deed of grant in trust for Aboriginal or Torres Strait Islander purposes under the *Land Act 1962* or *Land Act 1994*.
- Aurukun and Mornington Shire leases under the *Local Government (Aboriginal Lands) Act 1978*.
- Reserves for Aboriginal or Torres Strait Islander purposes gazetted under various land legislation.

and

¹ Justice Hill in *The Fagernes* ([1926] P.185 at p.189 as noted in *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FCA (6 July 1998)

Requirement 3

The proposed future act:

- **permits or requires** the construction, operation, use, maintenance or repair of
- **consists of** the construction, operation, use, maintenance or repair of,

Examples

'permits or requires'

The grant of a 40 year trustee lease for the construction and operation of social housing under the *Aboriginal Land Act 1991*.

The grant of a sales permit for the construction of a road for new public housing on an Aboriginal Deed of Grant in Trust under the *Forestry Act 1959*.

When issuing a lease or other interest, it must be strictly limited to the facilities as listed and defined in this requirement.

'consists of'

The construction of a sewerage treatment facility by the Torres Strait Island Regional Council on a Torres Strait Islander Deed of Grant in Trust.

- (a) public housing provided for Aboriginal people or Torres Strait Islanders living in, or in the vicinity of, the area

Definition

Public housing means housing operated by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities.

This does not cover housing for private ownership.² It also does not cover public housing where it is operated by a private trustee, where the private trustee is **not** doing it on behalf of the Commonwealth, State, statutory authority of the Commonwealth/State or local government body.

- (b) any of the following facilities that benefit Aboriginal people or Torres Strait Islanders living in, or in the vicinity of, the area:
- (i) public education facilities
 - (ii) public health facilities
 - (iii) police facilities
 - (iv) emergency facilities.

² Paragraph 1.6 (first dot point), Explanatory Memorandum - Native Title Amendment Bill (No.2) 2009

Definitions

Facilities that benefit Aboriginal people or Torres Strait Islanders

The facility must principally or primarily benefit Aboriginal people or Torres Strait Islanders living in the area. The facility can provide an incidental benefit to others, such as a public health facility that could be used by non-Indigenous community staff or a fire station which serviced the surrounding region as well. However, the facility cannot be one that is intended primarily to service a nearby non-Indigenous community.³

Public education facilities means education facilities operated by or on behalf of the Commonwealth, the State, a local government body or other statutory authority of the Commonwealth or State, in any of its capacities. This does not include private schools or other private education facilities.

Public health facilities means health facilities operated by or on behalf of the Commonwealth, the State, a local government body or other statutory authority of the Crown, in any of its capacities.

Emergency facilities includes a fire station, ambulance station, child safety house.

Police facilities includes a police station, court house, police citizens youth club centre.

- (c) Staff housing provided in connection with public housing or certain government facilities covered by paragraphs (a) or (b).

Definition

Staff housing means housing provided in connection with housing described at (a) or facilities described at (b) above.

- (d) any of the following provided in connection with the facilities at (a), (b) or (c):
- (i) facilities listed in **Module K** - refer to **Module K**
 - (ii) sewerage treatment facilities
 - (iii) facilities prescribed by regulation.

and

Requirement 4

The proposed future act will permit or consist of the construction, operation, use, maintenance or repair by or on behalf of -

- the Commonwealth
- the State
- a local government body
- a statutory authority of the Commonwealth or State.

³ Paragraph 1.6 (second dot point), Explanatory Memorandum - Native Title Amendment Bill (No.2) 2009

Definitions

What is 'on behalf of'?

This means that the facility does not need to be constructed etc by the Commonwealth, State, local government body or statutory authority of the Commonwealth or State. In some cases, a tendering and contractor process may be used. In this case, the State etc will authorise and pay for the facility, it just chooses not to physically construct the facility.

Where funding is provided through a grant to a private community group or an individual for the construction of a facility, it is not done 'on behalf of' the State, etc.

'**statutory authority**' - in relation to the Commonwealth or State, means any authority or body (including a corporation sole) established by a law of the Commonwealth or State other than a general law allowing incorporation as a company or body corporate.⁴

NB. Government Owned Corporations ('GOCs') are not included in this definition⁵.

and

Requirement 5

The proposed future act is not the compulsory acquisition of native title rights and interests.

Example

The compulsory acquisition of native title rights and interests under the *Acquisition of Land Act 1967* for a state educational institution, eg. a state school.

If your proposed future act satisfies **all** of the above 5 requirements, you must now complete the procedural requirements set out in **Division B**.

If your proposed future act does not satisfy ALL of the above requirements in Division A, you must consider whether your proposed future act falls within **Module J**.

B. Procedural rights and validity

Part 5: How to apply procedural rights

The best way to follow through the procedural rights process is to work through the flowchart.

The Parts in this Division provide guidance on what is required to meet the different type of procedural rights.

⁴ Section 253, NTA

⁵ All statutory GOCs have been converted to company GOCs - see *Government Owned Corporations Amendment Act 2007* which amended the *Government Owned Corporations Act 1993*.

Part 6: Notification and opportunity to comment

The first step in the procedural rights process is providing a notification and an opportunity to comment to the following native title parties -

- (a) any registered native title claimants
- (b) any registered native title bodies corporate (can only exist where there is a determination that native title exists)
- (c) the native title representative body.

Notification

Complete the notification template for this Module. Do not use any other templates as the template for this Module contains information specifically required for section 24JAA of the NTA.

The notification should be sent by registered post.

A number of future acts for the one project

If, for a particular project, there are a number of future acts falling under section 24JAA involving a number of different departments then one notification can be used. This allows a more centralised approach to the procedural rights process.

Opportunity to comment

An opportunity to comment is not a right of veto. It is an opportunity for the native title parties to advise the decision-maker as to how they see the proposed future act/s impacting upon their native title rights and interests.

The notification must include a statement that any registered native title claimants or registered native title bodies corporate may request to be consulted about the proposed future acts. See **Part 7**.

The notification period is for 2 months from the notification day. You must build in enough time for postage so you will need to post date the notification day by 5 calendar days.

You cannot commence the proposed future act until -

- (a) the 2 month notification period has ended
- (b) a report has been provided to the Commonwealth Minister about the notification process. See **Part 8**.

However, if a request to be consulted is made within the two month notification period, then there is a further consultation period before you can commence the proposed future act. See **Part 7**.

Part 7: Consultation

If the registered native title claimants or registered native title bodies corporate request to be consulted about the proposed future acts then you must consult with them about -

- (a) ways of minimising the impact of the future act/s on their registered native title rights and interests in relation to the land and waters
- (b) if relevant, any access to the land or waters or the way in which anything authorised by the future act/s might be done.

Consultation

Consultation on the proposed future act must also comply with any requirements determined by way of legislative instrument. Currently, there is no relevant legislative instrument.

- Where the proposed future act is for public housing - use **Attachment A**.
- Where the proposed future act is for other government infrastructure, an enhanced consultation process applies - use **Attachment B**.

The consultation period is for a further 2 months. This means that the consultation period does not end until 4 months from the notification day, unless it was shortened (see the paragraph below). As soon as the native title party requests to be consulted you may commence the consultation process.

You cannot commence the proposed future act until -

- (a) the 4 month notification and consultation period has ended, or earlier provided each registered native title claimant and registered native title body corporate who requested to be consulted advise in writing that they have been consulted
- (b) a report has been provided to the Commonwealth Minister about the notification and consultation process. See **Part 8**.

Part 8: Report to the Commonwealth Minister

Before the proposed future act can commence a written report must be provided to the Commonwealth Minister about the notification and consultation process. This Report may be published by the Commonwealth Minister.

The report must include -

- (a) whether or not there were comments on the proposed future act/s
- (b) whether or not there were requests to be consulted about the proposed future act/s
- (c) a copy of the notification
- (d) any responses to the notification.

Report

Complete the report template for this Module. Do not use any other templates as the template for this Module contains information specifically required for section 24JAA of the NTA.

The report must also comply with any requirements determined by way of legislative instrument. Currently, there is no relevant legislative instrument.

Where an Infrastructure Agreement is reached under the enhanced consultation process, note that as a fact in the Report.

How to provide the report

The report must be sent by registered mail.

The report can be taken as having been provided to the Commonwealth Minister two working days after it was sent by registered post.

You may now commence the proposed future act/s.

C. Effect on native title, compensation and decision-making

Part 9: What is the effect of an act done under section 24JAA on native title rights and interests?

The non-extinguishment principle applies to a future act done under section 24JAA of the NTA.

Non-extinguishment principle

This means that native title rights and interests affected by the doing of the future act continue to exist and are not extinguished. However, while the future act exists, those native title rights and interests inconsistent with the future act are not able to be exercised or enjoyed.

Example

Native title is suppressed for the term of the registered trustee lease for a health clinic on an Aboriginal Deed of Grant in Trust.

Part 10: Is compensation payable for the doing of the future act?

Compensation for the effect of the future act on native title rights and interests is payable under this section if there is a successful claim for compensation. Compensation is payable by the State where the act is attributable to the State, unless a law of the State provides that another person is liable to pay the compensation.

Part 11: Who makes the decision whether this Module applies?

There are no actual delegations to make decisions in relation to native title under the Native Title Work Procedures, the NTA or the NTQA.

The native title assessment process is just one part of your decision-making process when making your decision under your legislation, eg. a decision to grant a lease. By carrying out a native title assessment, you are ensuring your decision complies with the NTA.

If the decision-maker is unsure how to proceed, your Native Title Contact Officer (NTCO) must be contacted for advice. If the NTCO is unsure how to proceed, the NTCO must contact Aboriginal and Torres Strait Islander Land Services for advice.

If this Module does not apply to the proposed future act,
please proceed to the next Module.

