

Queensland Government Native Title Work Procedures

Module BA

Part A: Previous exclusive possession acts (PEPAs)

Commonwealth Native Title Act 1993: s.23B, Schedule 1

Native Title (Queensland) Act 1993: s.20

Part B: Category A Intermediate period acts

Commonwealth Native Title Act 1993: s.21, s.22F & s.232B

Native Title (Queensland) Act 1993: s.13AA

Part C: Past Acts (Information Only)

Commonwealth Native Title Act 1993: s.13A & s.19

Native Title (Queensland) Act 1993: s.10 & s.12

April 2021

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Introduction

Module BA sets out the requirements for when a grant or vesting created on **or before 23 December 1996** wholly extinguishes native title. Such grants or vestings are known as previous exclusive possession acts (PEPAs).

A grant or vesting usually takes the form of a:

- Freehold grant
- Leasehold grant
- A vesting of fee-simple or exclusive possession
- Other interest.

Note: Where you assess that a grant or vesting is a previous exclusive possession act (PEPA), you cannot rely upon it until you consider Module BB as sometimes the extinguishing effect of a PEPA can be disregarded (or ignored).

Application of module

Module BA is divided into 3 Parts.

| Part | Description |
|--|---|
| A - PEPAs | <p>Identify a grant or vesting that wholly or partly covers your proposed dealing area that was granted/created on or before 23 December 1996 for the purposes of this module, past use of the proposed dealing area is irrelevant.</p> <p>You may be able to determine whether there has been a relevant grant or vesting by either one or all of the following:</p> <ul style="list-style-type: none"> • the current tenure status of your proposed dealing area • specific parcel or research layer search in QNTIME • your own tenure research or tenure history. <p>Note: If the grant or vesting does not cover the whole of your proposed dealing area, further research will be required for the balance area.</p> |
| B - Category A intermediate period acts (Crown to Crown) | <p>This Part deals with any grant or vesting being assessed as a Crown to Crown grant etc.</p> <p>If the grant or vesting is Crown and Crown and was granted in the period between 1 January 1994 and 23 December 1996 (the intermediate period), then the grant or vesting will not be a PEPA but may be a Category A intermediate period act.</p> <p>Assessments of this nature must be referred to Aboriginal and Torres Strait Islander Land Services (ATSILS) via your Native Title Contact Officer for confirmation.</p> |
| C - Past Acts | <p>This Part has been provided as an information section only. There are no requirements that need to be complied with.</p> <p>Whilst the effect of some past act tenures on native title will be that they wholly extinguish native title, being able to arrive at the decision requires a technical analysis of not only the tenure, but also the tenure history.</p> |

| Part | Description |
|------|---|
| | Assessments of this nature must be referred to ATSILS via your Native Title Contact Officer for confirmation. |

Procedural rights

There are no procedural rights under this module.

Part A: Previous exclusive possession acts (PEPAs)

Requirement 1: The grant or vesting is not listed in the tenure table

Table 1 below sets out those grants and vestings that are not considered PEPAs. If the grant or vesting you are assessing falls within the table below, use the assessment options in the table to guide you further.

If the grant or vesting you are assessing is not listed in the table below, go to Requirement 2.

Table 1 - Tenure

| Primary tenure class | Tenure type | Assessment options |
|---|--|--|
| Any tenure granted post-23 December 1996 | Any grant or vesting created post 23 December 1996. | <ul style="list-style-type: none"> Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area Go to Module CA. |
| Pastoral leases | Pastoral holding. | <ul style="list-style-type: none"> Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area Go to Part C of this Module BA Go to Module CA. |
| | Preferential pastoral holding. | |
| | Pastoral development holding. | |
| | Stud holding. | |
| | Term lease for pastoral purposes. | |
| Grazing leases | Special lease for grazing purposes. | <ul style="list-style-type: none"> Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area Go to Part C of this Module BA. Go to Module CA. |
| | Special lease for business (grazing) purposes. | |
| | Special lease for 'x' and grazing purposes. (N.B. apart from horticulture and grazing - as this would be a scheduled interest. | |
| | Special lease for primary industry (grazing) purposes. | |
| | Special lease for business (development and cattle fattening) purposes. | |

| Primary tenure class | Tenure type | Assessment options |
|--|--|---|
| Licences/permits | Occupation licence. | <ul style="list-style-type: none"> • Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area • Go to Module CA. |
| | Permit to occupy. | |
| Aboriginal or Torres Strait Islander grants | Aboriginal or Torres Strait Islander Deed of Grant in Trust. | <ul style="list-style-type: none"> • Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area • Go to Module CA. |
| | Aurukun and Mornington Shire leases. | |
| | Aboriginal or Torres Strait Islander freehold under the <i>Aboriginal Land Act 1991</i> or the <i>Torres Strait Islander Land Act 1991</i> . | |
| | A lease issued over Aboriginal or Torres Strait Islander freehold, Deed of Grant in Trust, or Shire Lease. | |
| Vesting | A vesting under the <i>Harbours Act 1955</i> done after 31 October 1975. | <ul style="list-style-type: none"> • Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area • Go to Module CA. |
| | A vesting under s.18(3) of the <i>State Housing Act 1945</i> . | |
| Reserves | Any reserve created under one of the various Land Acts. E.g. <i>Land Act 1962</i> . | <ul style="list-style-type: none"> • Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area • Go to Module CA. |

Helpful tips

Conversion of tenures

If you have an instrument of lease which is in the Table 1, check the instrument of lease to ascertain whether it has been converted to another tenure which brings it out of Table 1. Refer to example 1 below

Example 1 – Instrument of lease showing lease converted to another tenure

Lease of Subdivision of Grazing Homestead

Transfers, Mortgages, Etc., Registered

RELEASE REGISTERED

Memorandum of Mortgage

Pursuant to Section 61 of the Land Act Amendment Act 1984 converted to Grazing Homestead Perpetual Lease from 15.5.1984

Registrar of Deeds

Requirement 2: Is the grant or vesting is Crown to Crown

A grant or vesting that is 'Crown to Crown' includes a grant or vesting from:

- the State to the Commonwealth
- the Commonwealth to the State
- the State to the State
- the State to a 'statutory authority'
- the State to a local government body (a local council including an Aboriginal or Torres Strait Island council).

A 'statutory authority', 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. Please also refer to the helpful tips at the end of this requirement.

You must now select the relevant option which applies to the grant or vesting being assessed.

Option 1 - Grant or vesting is not Crown to Crown

If the grant or vesting is not Crown to Crown, go to Requirement 3.

Option 2 - Grant or vesting is Crown to Crown pre 31 October 1975

| Nature of Crown to Crown grant or vesting | Assessment options |
|---|---|
| Any freehold estate | Proceed to Requirement 3 . |
| A lease which confers a right of exclusive possession | Proceed to Requirement 3 . Note: The only PEPA category in Requirement 3 that a Crown to Crown lease will be is 'any other lease that confers a right of exclusive possession'. You must consider all lease conditions. |
| A vesting which confers a right of exclusive possession | Refer to ATSIILS via your Native Title Contact Officer. |

Option 3 - Grant or vesting is Crown to Crown between 31 October 1975 and 31 December 1993

| Nature of Crown to Crown grant or vesting | Assessment options |
|---|--|
| A freehold estate | The grant or vesting in itself will be a Category D past act. (Refer to Part C of this Module BA for more information). The non-extinguishment principle applies. Either: <ul style="list-style-type: none"> Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area Go to Module CA. |
| A lease which confers a right of exclusive possession | The grant or vesting in itself will be a Category D past act. (Refer to Part C of this Module BA for more information). The non-extinguishment principle applies. Either: <ul style="list-style-type: none"> Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area Go to Module CA. |
| A vesting which confers a right of exclusive possession | The vesting in itself will be a Category D past act. (Refer to Part C of this Module BA for more information). The non-extinguishment principle applies. <ul style="list-style-type: none"> Apply this Module BA again to another grant or vesting covering the whole or part of the proposed dealing area Go to Module CA. |

Option 4 - Grant or vesting is Crown to Crown between 1 January 1994 and 23 December 1996

| Nature of Crown to Crown grant or vesting | Assessment options |
|---|---|
| Any freehold estate, lease, or vesting | <p>The grant or vesting may be a Category A intermediate period act. (Refer to Part B for more information):</p> <ol style="list-style-type: none"> 1. Proceed to Requirement 4 2. Consider Part B. |

Helpful tips

1. A list of statutory authorities

Table 2 below sets out some examples of entities that are considered to be statutory authorities. **Note:** This is not exhaustive.

Table 2 - Examples of Entities

| Name | Legislation established/constituted under |
|--|--|
| Government owned corporations (GOCs). Check the GOC list on the Department of Treasury website. Remember you need to establish if particular entity was a GOC at the time the tenure was granted or vesting occurred. | Various |
| Local government bodies | <i>Local Government Act 1936</i> |
| Emerald-Peak Downs Saleyards Board | <i>Local Government Act 1936</i> Order in Council date 7 October 1967 |
| South West Electricity Board | <i>Electricity Act 1976</i> |
| Queensland Grain Handling Authority | <i>Queensland Grain Handling Act 1983</i> |
| Cairns Harbour Board | <i>Harbours Act 1955</i> |
| Gladstone Area Water Board | <i>Water Act 2000</i> <i>Gladstone Area Water Board Act 1984</i> |
| Gold Coast Waterways Authority | <i>Gold Coast Waterways Authority Act 1979</i> |
| Public Curator or Public Trustee | <i>Public Curator Act 1915</i> <i>Public Trustee Act 1978</i> |
| Rural Fires Board | <i>Rural Fires Act 1946</i> |
| Queensland Ambulance Transport Brigade (QATB) | <i>Ambulance Services Act 1967</i> |

If you are not sure if the grant or vesting was or is made to a statutory authority:

- (a) Undertake a search in Google for leads for further information, e.g. name of legislation; name of the body at the relevant date
- (b) Seek advice from ATSILS via your Native Title Contact Officer.

2. Consider Module CA

Whilst the grant or vesting will be excluded from being a PEPA, if the Crown to Crown entity constructed any public works over the area covered by the grant or vesting, these works may satisfy the requirements of **Module CA**.

Requirement 3: The grant or vesting falls within one of the PEPA categories listed in the PEPA Category Tables

Three classes of tenures have the potential to be assessed as a PEPA. These are:

- A freehold estate
- Leasehold
- Vestings which confer a right of exclusive possession.

If the tenure being assessed is a leasehold tenure, you may still need to consider specific attributes of that tenure, such as lease purpose, conditions or the legislation it was granted under.

If the grant or vesting falls into one of the following PEPA categories, Requirement 3 is satisfied. Go to Requirement 4.

If the grant or vesting does **not** falls into one of the following PEPA categories, Requirement 3 is not satisfied. Module BA does not apply. Go to Module CA.

Refer to helpful tips for further information.

Freehold

| PEPA category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|---|--|---|--|--|
| Freehold/grant or vesting in fee simple | The highest tenure in land. The grant of freehold estate or fee simple interest in the land. | <ul style="list-style-type: none"> • Land Purchase Deed • Town Lot • Deed of Grant • Deed of grant in trust (DOGIT) for non-Aboriginal or Torres Strait Islander purposes • Vesting in fee simple • Acquisition – Crown Law check | N/A | Yes – vesting/acquisition only |

Leasehold

| PEPA category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|--------------------|--|---|--|--|
| Scheduled Interest | <p>Leasehold interests listed in Part 3 of Schedule 1 of the NTA.</p> <p>The leases included are those which Queensland and the Commonwealth considered, on the basis of the common law, had conferred exclusive possession and extinguished native title.</p> | <ul style="list-style-type: none"> • Grazing homestead perpetual lease (N.B. In 1984, all existing grazing homestead leases and grazing farm lease were converted to grazing homestead perpetual leases). • Agricultural farm lease. • Miners homestead perpetual lease. • Special lease under the <i>Land Act 1962</i> for a dance hall. • Lease under section 64A of the <i>Harbours Act 1955</i>. | <p>Grazing only.</p> <p>Refer to helpful tips.</p> | No |

| PEPA category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|-------------------|---|---|--|--|
| | | <ul style="list-style-type: none"> • Prickly pear development selection under the <i>Land Act 1910</i>. • Trustee lease for rugby league clubhouse purposes under s.343 of the <i>Land Act 1962</i>. • Special lease for manufacturing, industrial, residential and/or business purposes. | | |
| Commercial lease | <p>A lease (other than a mining lease, pastoral lease or agricultural lease) that allows the lessee to use the land or waters covered by the lease solely or primarily for business or commercial purposes.</p> <p>A special lease for business (grazing) purposes is not a commercial lease as it is for a pastoral purpose.</p> | <ul style="list-style-type: none"> • A lease that permits the construction, operation or use of a building to be used for business or commercial purposes, or of a hotel, motel or tourist resort. • A lease that states the purpose of the lease is for business or commercial purposes. • Special lease for business purposes. • A lease under s.196 of the <i>Harbours Act 1955</i>. | Grazing only. | No |
| Residential lease | <p>A lease that allows the lessee to use the land or waters covered by the lease solely or primarily for constructing or occupying a private residence.</p> <p>A lease for the purpose of a hotel, motel, caravan or tent on land is not for the purpose of occupying a private residence and is therefore not a</p> | <ul style="list-style-type: none"> • A lease that permits the construction or use of a private residence (house/unit). • A lease that states the purpose of the lease is for residential purposes. | Grazing only. | No |

| PEPA category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|--|---|---|--|--|
| | residential lease, irrespective of the ultimate use that the area covered by the lease was put to. | | | |
| Community purposes lease | <p>A lease that:</p> <p>(a) allows the lessee to use the land or waters covered by the lease solely or primarily for community, religious, education, charitable or sporting purposes</p> <p>(b) contains a statement to the effect that it is solely or primarily a community purposes lease or that it is granted solely or primarily for community, religious, education, charitable or sporting purposes.</p> | <ul style="list-style-type: none"> • A trustee lease on a reserve to a softball association for the construction of a clubhouse. • A lease to a church for the construction of a church building. • A lease to an environmental group for an environmental education centre. | Grazing only. | No |
| Dissection of a mining tenement in force at 24 December 1996 | <p>A mining tenement that permits the holder to use the land or waters covered by the tenement solely or primarily for mining.</p> <p>However, the PEPA category only relates to that part of the mining tenement used as a private residence and certain associated buildings.</p> <p>Such use must have been permitted by the tenement and construction commenced prior to 24 December</p> | <p>A mining tenement includes:</p> <ul style="list-style-type: none"> • a mining lease • a mining development licence • an exploration permit/prospecting mining claim • a residence area? | Not applicable. | Yes |

| PEPA category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|--|---|--|--|---|
| | 1996. Mining must also have been taking place at 24 December 1996. | | | |
| Lease conferring a right of exclusive possession (other than a mining lease) | A lease that confers a right of exclusive possession is one which permits the lessee to exclude anyone from the leased land (apart from statutory exceptions, e.g. meter readers, council inspectors, conservators of forests). | <ul style="list-style-type: none"> Special lease for manufacturing, industrial, residential and business purposes (MIRB). Special lease for residential and business Refer to helpful tips | Grazing only. Public access. | No - if the lease is either of the 2 examples Yes. For all other examples. |

Vesting which confers a right of exclusive possession

| PEPA Category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|---------------------------------|--|--|--|--|
| Vesting of fee simple | To vest means to clothe with legal rights. A vesting of fee simple is the giving of a freehold right in the land. Usually done by Order in Council or Proclamation by the Governor in Council or by legislation. | <ul style="list-style-type: none"> Vesting of fee simple under s. 61 of the <i>Railways Act 1863</i>, s.16 of the <i>Railways Act 1888</i> or s.92 of the <i>Railways Act 1914</i>. A vesting in fee simple under the <i>Irrigation Act 1922</i>. A vesting under s.18(1) of the <i>State Housing Act 1945</i>. | Not applicable. | Yes |
| Vesting of exclusive possession | To vest means to clothe with legal rights. A vesting of exclusive possession is the giving of a present | <ul style="list-style-type: none"> A vesting of the land following the compulsory acquisition or resumption of land which frees and discharges the land of all interests, estates, etc. | Not applicable. | Yes |

| | | | | |
|--|---|--|--|--|
| | right in the land to exclude anyone from the vested area. | | | |
|--|---|--|--|--|

Helpful tips

| Consideration | Explanation | Examples |
|--|---|--|
| 'solely or primarily'. | <p>Most of the PEPA lease categories provide that the lease must be 'solely or primarily' for 'x' purpose.</p> <p>This means that where there are multiple purposes, all of those purposes must fall within the PEPA category, unless the purposes are joined by an 'or' or an 'and/or'.</p> <p>Note 1 - A special lease for manufacturing, industrial, residential 'and' business purposes can only be assessed against the PEPA category of a lease conferring a right of exclusive possession.</p> <p>Note 2 - Where a lease does not contain or specify a purpose, then it will be difficult to say that the lease was granted solely or primarily for a purpose. In these instances, the options would be to:</p> <ul style="list-style-type: none"> - consider whether the lease would be any other lease that confers a right of exclusive possession - refer the matter to ATSILS through your Native Title Contact Officer. | <p>1. A special lease under the <i>Land Act 1962</i> for industrial development and retail shopping would fall into both the Scheduled Interest PEPA category (with both purposes being listed at paragraph 21(9)) as well as the commercial lease PEPA category as it is solely or primarily for business or commercial purposes.</p> <p>2. A special lease for residential and grazing purposes does not fall into the Scheduled Interest PEPA category or the residential lease PEPA category as it is not solely or primarily for residential purposes. However, if the purpose was 'residential and/or grazing' then it would, as the lease could solely be used for residential purposes.</p> |
| Construing the purpose of the lease where 'general purpose (specific purpose)'. E.g. Business (piggery). | Where the purpose of the lease is done as a general purpose with a more specific purpose in brackets, it is the specific purpose which is used to construe the purpose of the lease. | <p>A special lease for business (piggery) is a lease for piggery purposes.</p> <p>A special lease for business (grazing) purposes is a lease for grazing purposes.</p> |

| Consideration | Explanation | Examples |
|--|--|--|
| | | <p>A special lease for primary industry (sugar cane growing) is a special lease for sugar cane growing.</p> <p>A special lease for recreation (girl guides) is a lease for girl guides.</p> <p>A special lease for residential (rural residential) is a lease for rural residential.</p> |
| <p>The purpose is not exactly the same as listed in paragraph 21(9) of the Schedule.</p> | <p>Where there is a slight typographical variation in relation to the listed purpose, it may still fit within the list of purposes.</p> <p>Where a different word is used in the instrument of lease for the purpose but it means the same as the purpose listed in the Schedule, then the word in the Schedule would need to be more general than the one in the instrument of lease for it to be a Scheduled Interest.</p> | <p>'Boy Scouts hall' is listed but it would also include purposes shown as 'Boy Scout hall' and 'boy scouts hall'. N.B. 'boy scouts' would not fall within this as the purpose in the schedule ('Boy Scouts hall') is not more general than the one in the instrument of lease ('boy scouts').</p> <p>'Timber storage' is listed but it could encompass a more specific purpose of hardwood timber storage.</p> <p>'Playground' is listed but it could encompass a more specific purpose of 'children's playground'.</p> <p>In contrast, 'sand blasting workshop' is listed but it would not encompass the more general purpose of 'workshop'.</p> |
| <p>Special condition - grazing only.</p> | <p>Sometimes a lease will be granted for 'x' purpose but the special conditions state the lessee can use the leased land for grazing purposes only.</p> <p>In this case, the purpose of the lease must be construed as grazing and is therefore not a PEPA.</p> | <p>A special lease under the <i>Land Act 1962</i> for business purposes with a special condition that the leased land must be used for grazing purposes only.</p> |
| <p>Special condition - public access to the leased land.</p> | <p>Sometimes a lease will contain a condition allowing the public to have access to the lease area.</p> <p>Depending upon how the access condition is worded (specific or general), it may affect the exclusivity of the lease.</p> | <p>Public access conditions that do not affect exclusivity:</p> <p>'The lessee shall at all times allow the public free and unrestricted access through the leased land along the tracks or roads in use at the commencement of the term of the lease.'</p> |

| Consideration | Explanation | Examples |
|---------------|---|--|
| | <p>Note: This is only a consideration for certain PEPA categories.</p> | <p>'The lessee shall at all times allow the miner free and unrestricted access through the leased land to and from MHPL XXX and XXX.'</p> <p>Public access conditions that do affect exclusivity:</p> <p>'The lessee shall allow the public free and unobstructed access, ingress and egress to, from and across the leased land to enable them to reach Mt Coonowrin.'</p> <p>Where the lease is granted over a reserve and contains one of the following conditions:</p> <p>'The public have the free and unrestricted access to use the lease land for the public purpose for which it was reserved by Order in Council dated .././....'</p> <p>'The lessee must hold the land so that the same may be used for the public purpose for which it was reserved by Order in Council dated .././....'</p> |

Requirement 4: The tenure is valid

A. Valid apart from native title

Unless there is evidence to the contrary, a tenure being assessed under Module BA will always be taken to be valid under State legislation. Where you identify evidence that causes doubt as to whether a tenure is valid under State legislation:-

- Apply this Module BA again to another grant or vesting covering the proposed dealing area
- Refer the matter to ATSILS via your Native Title Contact Officer.

Important: Deeds of Grant in Trust

If you are assessing a Deed of Grant in Trust (DOGITs) that was granted in the late 1800s and early 1900s, then you may notice that the DOGIT makes reference to the land concerned being a 'reserve'.

For any DOGITs in this era, you must refer the matter to ATSILS via your Native Title Contact Officer for advice.

B. Valid with respect to native title

The following table sets out the rules in order to establish if the tenure or vesting is valid in relation to native title.

| Grant/creation date | Validity |
|---|--|
| Pre 31 October 1975 | Grant or vesting is valid |
| Between 31 October 1975 and 31 December 1993 | Grant or vesting is valid or validated |
| Between 1 January 1994 and 23 December 1996 (intermediate period) | Grant or vesting will be validated if a part or whole of the grant or vesting was at some point prior to 1 January 1994, covered by one of the following: <ul style="list-style-type: none">a) A valid freehold estateb) A valid lease (other than a mining lease)c) A valid public work |

1. If the grant or vesting is not valid in relation to native title:
 - Apply this Module BA again to another grant or vesting covering the proposed dealing area
 - Proceed to **Module CA**.
2. If the grant or vesting is valid in relation to native title, then:
 - a. If the grant or vesting is a Crown to Crown grant etc, proceed to Part B
 - b. If you satisfy all preceding requirements, finalise your **Annexure 7.1**. Before relying on any PEPA, you must also ensure that you have considered **Module BB**.

Helpful tips

When trying to validate a tenure that was granted in the intermediate period:

- Check the Specific Parcel Report in QNTIME for your proposed dealing area under the Tenure Administration System heading. This may indicate if there was a tenure prior to the existing non-exclusive pastoral lease.
- Look at the survey plan to see if there is a reference to a previous tenure.
- Look at the instrument of lease to see if it makes reference to a previous tenure.

Does the lease being relied on to validate the intermediate period tenure have to be a PEPA?

No. Provided the lease is not a mining lease and was granted prior to 1 January 1994, it could be any other type of lease - e.g. a pastoral holding.

Examples of how to validate an intermediate period lease

Option 1

Identify if any part of the lease was at some point prior to 1 January 1994 previously a validly dedicated road in accordance with Module CB.

If yes - then it does not matter where that dedicated road sits within the lease area, it will validate all of the non-exclusive pastoral lease as the dedication of the road is the establishment of a public work.

Option 2

Was any part of that area prior to 1 January 1994 previously held as a freehold estate or a lease?

If yes - then it does not matter where that freehold or lease sits within the lease area, it will validate all of the lease.

Part B: Crown to Crown grants or vestings in Time Period C

Crown to Crown grants or vestings made between 1 January 1994 and 23 December 1996 will not be able to be assessed as PEPAs due to the exclusion set out in s23B(9C) of the NTA.

Instead, these grants or vestings fall into the definition of being a Category A intermediate period act for which there is no Crown to Crown exclusion.

Importantly, any extinguishing effect on native title can only be achieved through the intermediate period provisions and not the PEPA provisions.

1. If the Crown to Crown grant or vesting is one which is listed below, complete your Annexure 7.1. Before relying on any Category A intermediate period act, you must also ensure that you have considered **Module BB**.
2. If the Crown to Crown grant or vesting is not listed below, either:
 - a. Apply this Module BA again to another grant or vesting covering the proposed dealing area
 - b. Go to **Module CA**.

Category A intermediate period act categories

Freehold

| Category A intermediate period category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|---|--|---|--|--|
| Freehold/grant or vesting in fee simple | The highest tenure in land. The grant of freehold estate or fee simple interest in the land. | <ul style="list-style-type: none"> • Land Purchase Deed • Town Lot • Deed of Grant • Deed of grant in trust (DOGIT) for non-Aboriginal or Torres Strait Islander purposes | N/A | Yes – vesting only |

Leasehold

| Category A intermediate period category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|---|--|---|--|--|
| Scheduled Interest | <p>Leasehold interests listed in Part 3 of Schedule 1 of the NTA.</p> <p>The leases included are those which Queensland and the Commonwealth considered, on the basis of the common law, had conferred exclusive possession and extinguished native title.</p> | <ul style="list-style-type: none"> • Grazing homestead perpetual lease (N.B. In 1984, all existing grazing homestead leases and grazing farm lease were converted to grazing homestead perpetual leases) • Agricultural farm lease • Miners homestead perpetual lease • Special lease under the <i>Land Act 1962</i> for a dance hall | <p>Grazing only.</p> <p>Refer to helpful tips.</p> | No |

| Category A intermediate period category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|---|---|--|--|--|
| | | <ul style="list-style-type: none"> • Lease under section 64A of the <i>Harbours Act 1955</i> • Prickly pear development selection under the <i>Land Act 1910</i> • Trustee lease for rugby league clubhouse purposes under s.343 of the <i>Land Act 1962</i>. • Special lease for manufacturing, industrial, residential and/or business purposes. | | |
| Commercial lease | <p>A lease (other than a mining lease, pastoral lease or agricultural lease) that allows the lessee to use the land or waters covered by the lease solely or primarily for business or commercial purposes.</p> <p>A special lease for business (grazing) purposes is not a commercial lease as it is for a pastoral purpose.</p> | <ul style="list-style-type: none"> • A lease that permits the construction, operation or use of a building to be used for business or commercial purposes, or of a hotel, motel or tourist resort • A lease that states the purpose of the lease is for business or commercial purposes • Special lease for business purposes • A lease under s.196 of the <i>Harbours Act 1955</i>. | Grazing only. | No |
| Residential lease | <p>A lease that allows the lessee to use the land or waters covered by the lease solely or primarily for constructing or occupying a private residence.</p> <p>A lease for the purpose of a hotel, motel, caravan or tent on land is not for the purpose of occupying a private residence</p> | <ul style="list-style-type: none"> • A lease that permits the construction or use of a private residence (house/unit) • A lease that states the purpose of the lease is for residential purposes. | Grazing only. | No |

| Category A intermediate period category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|---|---|---|--|--|
| | and is therefore not a residential lease, irrespective of the ultimate use that the area covered by the lease was put to. | | | |
| Community purposes lease | <p>A lease that:</p> <p>(a) allows the lessee to use the land or waters covered by the lease solely or primarily for community, religious, education, charitable or sporting purposes</p> <p>(b) contains a statement to the effect that it is solely or primarily a community purposes lease or that it is granted solely or primarily for community, religious, education, charitable or sporting purposes.</p> | <ul style="list-style-type: none"> • A trustee lease on a reserve to a softball association for the construction of a clubhouse • A lease to a church for the construction of a church building • A lease to an environmental group for an environmental education centre. | Grazing only. | No |
| Dissection of a mining tenement | <p>A mining tenement that permits the holder to use the land or waters covered by the tenement solely or primarily for mining.</p> <p>However, the PEPA category only relates to that part of the mining tenement used as a private residence and certain associated buildings.</p> <p>Such use must have been permitted by the tenement and construction commenced prior to 24 December 1996. Mining must also have been taking place at 24 December 1996.</p> | <p>A mining tenement includes:</p> <ul style="list-style-type: none"> • a mining lease • a mining development licence • an exploration permit/prospecting mining claim • a residence area? | Not applicable. | Yes |

| Category A intermediate period category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my Native Title Contact Officer |
|--|---|--|---|---|
| Lease conferring a right of exclusive possession (other than a mining lease) | A lease that confers a right of exclusive possession is one which permits the lessee to exclude anyone from the leased land (apart from statutory exceptions, e.g. meter readers, council inspectors, conservators of forests). | <ul style="list-style-type: none"> • Special lease for manufacturing, industrial, residential and business purposes (MIRB). • Special lease for residential and business. Refer to helpful tips. | Grazing only. Public access. | Yes |

Vesting which confers a right of exclusive possession

| Category A intermediate period category | What is it | Examples | What conditions cause the grant to fall outside of the PEPA category | Do I need to seek advice from ATSILS via my NTCO |
|--|--|--|---|---|
| Vesting of fee simple | To vest means to clothe with legal rights. A vesting of fee simple is the giving of a freehold right in the land. Usually done by Order in Council or Proclamation by the Governor in Council or by legislation. | <ul style="list-style-type: none"> • Vesting of fee simple under s. 61 of the <i>Railways Act 1863</i>, s.16 of the <i>Railways Act 1888</i> or s.92 of the <i>Railways Act 1914</i>. • A vesting in fee simple under the <i>Irrigation Act 1922</i>. • A vesting under s.18(1) of the <i>State Housing Act 1945</i>. | Not applicable. | Yes |
| Vesting of exclusive possession | To vest means to clothe with legal rights. A vesting of exclusive possession is the giving of a present right in the land to exclude anyone from the vested area. | <ul style="list-style-type: none"> • A vesting of the land following the compulsory acquisition or resumption of land which frees and discharges the land of all interests, estates, etc. | Not applicable. | Yes |

Finalising your assessment

If you meet all of the relevant requirements for Module BA, finalise your Native Title Assessment using **Annexure 7.1**.

Before relying on any PEPA or Category A intermediate period grant or vesting you must also ensure that you have considered **Module BB**.

If you do not meet all of the relevant requirements for your time period:

1. Apply this Module BA again to another grant or vesting covering the proposed dealing area
2. Go to **Module CA**.

Part C: Past Acts (Information Only)

Part C of Module BA is for your information only and does not form part of the native title assessment process under the module.

As a result of the High Court decision in *Wik Peoples v Queensland*, the State was no longer to assess pastoral leases as having the effect of wholly extinguishing native title.

However, the NTA operates in such a way that allows certain pastoral leases to still have the effect of extinguishing native title, but only where they satisfy the definition of being a 'past act'.

The categories of pastoral leases that could potentially be past acts were identified in Requirement 1 of this module.

Establishing whether a pastoral lease is a past act requires a technical analysis of the NTA as well as a review of the full tenure history of the land or waters covered by the particular pastoral lease.

If you think a grant or vesting may fall within the definition of being a past act, you must refer the matter, along with any tenure research or tenure history to ATSILS via your Native Title Contact Officer.

Background

Past acts¹ are acts that:

- affected native title
- were invalid in relation to native title
- were done in the period commencing on **31 October 1975** (commencement of the Commonwealth *Racial Discrimination Act 1975* ('RDA')) to (but not including):
 - (a) **1 July 1993** - this date applies to acts that are *legislative acts* or *prior commitments*
 - (b) **1 January 1994** - this date applies to all other acts.

The past act provisions were included in the original NTA to validate State acts in relation to native title that were invalid because they were inconsistent with the RDA. The past act provisions do not operate to validate acts that are invalid under State legislation.

For the past act provisions in the NTA to be engaged, the RDA must operate to invalidate the operation of the State law. The NTA then provides the effect of that act on native title by using four different categories, as shown in the table below.

¹ Sections 228-232, NTA

| Past act category | Type of acts | Effect on native title |
|-------------------|---|--|
| A | Freehold estate, commercial lease, agricultural lease, pastoral lease, residential lease | Extinguishment |
| B | Certain leases other than mining leases | Extinguishment to the extent of the inconsistency |
| C | Mining lease | Non-extinguishment principle |
| D | Any other act | Non-extinguishment principle |