

Native Title and Petroleum

The Department of Mines and Petroleum (DMP), Petroleum and Royalties Division deals with access issues associated with Indigenous interests, including native title, Aboriginal heritage and reserve lands.

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Definition of Future Act

A future act is an act done after 1 January 1994, which affects native title. An act affects native title if it extinguishes or is otherwise wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title.

The word act is defined widely to include the making or amendment of legislation, the grant or renewal of licences and permits, and can include executive actions in some circumstances. An act of government may affect native title if, for example, it allows someone to do an activity on native title land that they otherwise have no right to do, or it prevents a native title holders from doing what their native title entitles them to do.

The Native Title Act 1993 seeks to protect native title rights by prescribing procedures which must be complied with by Commonwealth, State and Territory Governments before the future act can be validly done.

Different subdivisions within the Native Title Act 1993 relate to different types of activity:

- Acts with non-claimant protection (Subdivision F)
- Primary production (Subdivision G)
- Managing aquatic resources, water and airspace (Subdivision H)
- Renewal and extension of permits etc (Subdivision I)
- Acts involving parks (Subdivision J)
- Public works (Subdivision K)
- Low impact acts (Subdivision L)
- Legislation, mining, and compulsory acquisition (Subdivision M)
- Offshore acts (Subdivision N) Right to Negotiate (Subdivision P) Most subdivisions set out:
 - the procedures to be followed to ensure the act is valid;
 - the effect of the act on native title; and
 - whether compensation is payable to native title holders for the act.

The Right to Negotiate and the Expedited Procedure

Registered native title claimants and registered native title body corporate (native title parties) are entitled to procedural rights to negotiate in relation to acts to which Subdivision P applies namely the grant of certain mining and petroleum titles, and certain compulsory acquisition of native title rights and interests.

One of the fundamental principles of the right to negotiate is that any relevant act will be invalid to the extent that it affects native title unless it is done in accordance with the procedures set out in the Native Title Act 1993.

The right to negotiate process is overseen by the National Native Title Tribunal. Generally, to validly do an act that attracts the right to negotiate a government has two options. It must either comply with the right to negotiate procedures set out in Subdivision P of the Native Title Act 1993 or it can negotiate an Indigenous Land Use Agreement (ILUA).

Right to Negotiate

The Native Title Act 1993 (Section 29) requires that before doing a future act under Subdivision P, the relevant government must give notice to native title parties and the public. Under Section 31, unless the expedited procedure applies to the act in question, the government is also required to give native title parties the opportunity to make submissions about the proposed act.

All of the negotiation parties (the government, the applicant for the petroleum title and the native title parties) are required to negotiate in good faith with a view to obtaining agreement that the act be done and, if so, on what conditions. Where a notice of a proposed future act is given under Section 29, the parties have a period of six months to negotiate agreement about the proposed act.

If no agreement is reached in that time, then under Section 35 any party can apply to the arbitral body (National Native Title Tribunal) for a determination under Section 38 in relation to the proposed act. The arbitral body may make a determination that the act must not be done, the act may be done, or that the act may be done subject to conditions to be complied with by any of the parties.

Expedited Procedure

Acts attracting the expedited procedure are defined in Section 237 of the Native Title Act 1993. They are acts that are unlikely to interfere directly with community or social activities of the relevant native title parties, or to interfere with areas or sites of particular traditional significance to the relevant native title parties.

Under Section 32 of the Native Title Act 1993, if the government considers that an act is an act attracting the expedited procedure, the government may include a statement to that effect in the Section 29 notice. A native title party may, within four months after the notice is issued lodge an objection with the arbitral body (National Native Title Tribunal) against the inclusion of the expedited statement in the notice.

If a native title party lodges an objection, the arbitral body must determine whether the proposal attracts the expedited procedure. If the arbitral body determines it does, then the government may do the act. If the arbitral body determines it does not, then the parties must enter into right to negotiate negotiations.

Indigenous Land Use Agreements (ILUAs)

ILUAs are voluntary agreements made with native title parties about the use and management of land and waters. An act can generally be done under an ILUA registered with the National Native Title Tribunal, whether or not it falls within any of the categories of acts allowed under the future act regime. This requires the native title parties to give their agreement or consent to the act being done. Even if an act could be done under another subdivision of the future act regime, an ILUA may be the preferred option.

The Native Title Act 1993 provides for different types of ILUAs to be registered, dependent upon whether there are native title holders for the whole of the area the subject of the ILUA and whether there are native title bodies corporate or representative bodies for the area concerned.

Non-Extinguishment Principle (Section 238)

In most cases, the non-extinguishment principle applies to acts permitted under the future act regime or a registered ILUA. Where this principle applies, native title will not be extinguished by a future act, but rather suspended for the period of the time that the future act (for example the grant of a petroleum permit) is in operation. Where the period of operation has ended, native title will no longer be suspended.

Grants/Renewals of Petroleum Titles and Authorities in Onshore and Offshore Areas

This section outlines the future act procedures that have been adopted to satisfy the requirements of the Native Title Act 1993. It is intended as a general guide only and should not be regarded as an authoritative interpretation of the statutory requirements.

Onshore and Offshore Areas

For the purposes of the Native Title Act 1993 offshore is regarded as being all submerged lands below the mean low water mark of the coastline. Onshore for the purposes of the Native Title Act 1993 is the mainland and also any islands forming part of Western Australia.

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Page last modified: 24-Dec-2008

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