



PREPARED FOR NATIVE TITLE MANAGERS UNDER THE CROWN
LANDS MANAGEMENT ACT 2016

Native title manager workbook

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1. Guide to using the workbook

1.1. How to use this workbook

This workbook has been created to assist you as a native title manager in the process of providing the written advice required by the *Crown Lands Management Act 2016* (CLM Act).

Section 8.7 of the CLM Act says:

1. A responsible person for relevant land cannot do any of the following unless the person has first obtained the written advice of at least one of the person's native title managers that it complies with any applicable provisions of the native title legislation:
 - a. grant leases, licences, permits, forestry rights, easements or rights of way over the land,
 - b. mortgage the land or allow it to be mortgaged,
 - c. impose, require or agree to covenants, conditions or other restrictions on use (or remove or release, or agree to remove or release, covenants, conditions or other restrictions on use) in connection with dealings involving the land,
 - d. approve (or submit for approval) a plan of management for the land that authorises or permits any of the kinds of dealings referred to in paragraph (a), (b) or (c).
2. However, the written advice of a native title manager is not required for the sale or other disposal of the land.

Note: See also Divisions 3.4 and 3.5 and section 4.9 for limitations on Crown land managers and local councils vested with Crown land to sell or dispose of managed or vested land in relation to which native title rights and interests may or do exist.

This workbook outlines the steps you need to take, as well as the information you need to consider, when preparing this advice.

The workbook structure:

- **Part 1** Guide to using this workbook.
- **Part 2** Introduces you to the key concepts of Australian native title law.

It is important for you to understand these key concepts so that you can understand the native title issues that can arise in the management of Crown land.

- **Part 3** Outlines the responsibilities of Crown land managers (previously reserve trust managers), including council managers and non-council managers. This will assist you to understand your role under the new CLM Act.
- **Part 4** is a step-by-step guide to preparing the written advice required by s. 8.7 of the CLM Act and serves as a 'one-stop shop'. Although key native title concepts are included in this work, **you should obtain legal advice if you are unclear regarding what you are required to do**. These steps are summarised:
 - **Step 1** Tells you how to find out whether the land is 'excluded land'; if the land is excluded land then you are not required to prepare a written advice.
 - **Step 2** Lets you know how to obtain a native title certificate on the rare occasions that it may be relevant and available.
 - **Step 3** Outlines whether the relevant act listed in s. 8.7 may affect native title. In those cases where the act will not affect native title, you are still required to prepare written advice indicating there is no need to consider the future acts regime.

- **Step 4** Informs you of the process for finding out the status of the land. These searches will be a standard process because their results are relevant to whether an act is a past act or a future act.
- **Step 5** Gives you guidance on whether the act you are considering is a past act. If the act is a past act, you will not need to validate the act through the future acts regime. However, you are still required to prepare a written advice.
- **Step 6** Explains when each of the subdivisions of the future acts regime may apply.
- **Step 7** Provides a compliance checklist, which contains practical tips on how to resolve disputes as to whether an act has been validated under the *Native Title Act 1993* (NT Act (Cwlth)).
- **Part 5** Has useful examples of how certain acts might be covered by the future acts regime. If you are considering an act that is covered by the examples in Part 5, you can rely on the analysis set out there. However, it is worthwhile following the procedures set out in this guide, including review, by the checklists in Part 4, to ensure that you have fully considered the proposed act.
- **Part 6** Comprises some helpful appendices.

1.2. What this workbook does *not* cover

This workbook does not cover:

- compulsory acquisition of native title rights and interests
- the steps involved in preparing, negotiating and registering indigenous land use agreements or (ILUAs), except to the extent they are necessary to understand the future acts regime
- how to proceed where there is the right to negotiate
- how to lodge and take part in non-claimant proceedings
- how to act as a respondent to a native title application
- details around compensation that may arise for acts under s. 8.7 of the CLM Act.

You should obtain legal advice, or in some cases departmental advice, if you consider that it is necessary to rely on these mechanisms to validate the act that you are considering.

2. Native title

Native title is how Australian law recognises the rights and interests that Aboriginal people and Torres Strait Islanders hold in land and waters under their traditional laws and customs.

Historically, Australian law presumed that the Crown had acquired full title to the land in New South Wales (NSW) (and the rest of Australia). This presumption rested on the view that Australia was not ‘settled at law’—that it was *terra nullius* or ‘nobody’s land’—before European colonisation.

In *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, the High Court recognised that Indigenous Australians held rights and interests in relation to land by virtue of their traditional laws and customs and that the Australian common law recognises those rights and interests, which would endure until they are extinguished by the grant of inconsistent rights or interests.

Following *Mabo [No. 2]*, the Commonwealth Parliament enacted the NT Act (Cwlth) in 1993. The Act, as amended in 1998 following *Wik Peoples v. State of Queensland* (1996) 187 CLR 1 (the *Wik* decision), governs the recognition of native title today.

2.1. Key dates

In order to properly understand some key native title concepts, such as ‘past acts’, ‘intermediate period acts’ and ‘future acts’ in the NT Act (Cwlth), it is important to appreciate certain key dates.

This part of the workbook also gives you a snapshot of history from recognition of native title, to the validation of certain past acts and intermediate period acts in NSW through the NT Act (Cwlth) and the *Native Title (NSW) Act 1994*. A timeline of these events is in section 2.1.6 of this workbook.

2.1.1. Mabo No. 1

A significant step towards the legal recognition of native title was the High Court’s decision in (*Mabo v. Queensland* (1988) 166 CLR 186 (*Mabo No. 1*)).

In 1982, Eddie Mabo and James Rice (on their own behalf and on behalf of the members of their family groups) sued the State of Queensland and the Commonwealth of Australia in the High Court. They accepted that upon annexation of the islands by the Crown in 1879, the Murray Islands had become part of the Colony of Queensland, but they argued that the Crown’s sovereignty was subject to the land rights of the Meriam people based upon local custom and traditional native title. They sought declarations of their land rights and an injunction restraining the state from impairing them. The state admitted that the Murray Islanders inhabited the islands during the whole of their known history but denied the existence of the land rights claimed.

Three years later, the Queensland Parliament enacted the *Queensland Coast Islands Declaratory Act 1985* (the 1985 Act). The 1985 Act vested all rights and interests in the Murray Islands in the State of Queensland (s. 3) and without any right to compensation (s. 5). The state sought to rely on the 1985 Act in its defence.

The plaintiffs argued that the 1985 Act was beyond the legislative power of the State of Queensland for several reasons, including that it was inconsistent with ss. 9 and 10 of the *Racial Discrimination Act 1975* (Cwlth) (RD Act). In *Mabo No. 1*, a majority of the Court found that the 1985 Act was inconsistent with s. 10 of the RD Act and accordingly, was rendered invalid.

Key point

If State legislation purports to operate in a way that is discriminatory to native title holders, it will likely be inconsistent with the *Racial Discrimination Act* and be invalid to the extent of any inconsistency

2.1.2. Mabo No. 2

The Mabo plaintiffs sought declarations that they held rights to use and enjoy the Murray Islands. In the historic 'Mabo' decision, the High Court decided in favour of the plaintiffs and declared that:

'The Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.'¹

The High Court considered the implications of Australia's 'settled' status and found that, on sovereignty, the Crown acquired a 'radical, ultimate or final title' to the land. The High Court, importantly, concluded that the common law of Australia could recognise the rights and interests in land and waters held and enjoyed by Indigenous Australians under their own laws and customs. It described these rights and interests as 'native title'.

The following points are drawn from Justice Brennan's leading judgment:

- **Traditional laws and customs**

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

- **Laws and customs can change**

The rights and interests of a people under their laws and customs can change as those laws and customs change. However, native title will survive those changes as long as the members of a community continue to identify one another as members of that community and continue to observe those laws and customs. Continued observance of these laws and customs entitles the members of that community to continue to enjoy their rights and interests.

- **Native title cannot be transferred like other interests**

Native title rights and interests are not 'alienable', or transferable to others. This distinguishes them from the estates and interests in land recognised by the common law.

- **Acquisition only by the Crown**

Native title rights and interests can only be acquired by the Crown by surrender, purchase or compulsory acquisition.

- **Native title can be extinguished**

Native title enjoyed by a community under its laws and customs is extinguished if the group loses its connection with the land by ceasing to observe those laws and customs, or the last of its members die. Native title which has ceased by abandoning traditional laws and customs cannot be revived.

- **Clear and plain intention required to extinguish native title**

While the Crown can extinguish native title, the exercise of a power to extinguish native title must reveal a clear and plain intention to do so.

- **No clear and plain intention where law regulates native title**

A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control consistent with the continued enjoyment of native title.

¹ *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1 (*Mabo No. 2*) at 2, 76, 217.

- **Extinguishment to the extent of inconsistency**

Where the Crown has granted an interest wholly or partly inconsistent with native title, native title is extinguished to the extent of the inconsistency.

2.1.3. Native Title Act 1993

The recognition of native title raised numerous legal issues. The NT Act (Cwlth) was enacted to resolve those issues.

There are five things about the NT Act (Cwlth) as it was originally enacted that you should understand:

1. Why was the NT Act (Cwlth) enacted?

The Preamble indicates the context in which the NT Act (Cwlth) was enacted. Here is an extract:

Preamble

'The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented.

In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.'

Objects of the Act

The objects of the NT Act (Cwlth) state what it was intended to achieve. At the time the Act was introduced in 1993, the main objects were to:

- provide for the recognition and protection of native title
- establish ways in which future dealings affecting native title may proceed and to set standards for those dealings
- establish a mechanism for determining claims to native title
- provide for, or permit, the validation of past acts invalidated because of the existence of native title.

2. What are past acts and future acts?

The objects draw attention to the second thing you need to understand about the NT Act (Cwlth): it provides for the validation of past acts and future acts.

The NT Act (Cwlth) effectively commenced on **1 January 1994**.²

² Sections 1 and 2 commenced on the date of royal assent (which was 24 December 1993) and Part 10 commenced on 1 July 1994. The remainder of the Act commenced on 1 January 1994.

A 'past act', setting aside certain exceptions, was an act that occurred *before* the NT Act (Cwlth) commenced on 1 January 1994.³

A 'future act' is an act that occurred *after* it commenced on 1 January 1994.⁴

Dates for future acts and past acts

The NT Act (Cwlth) provided for the validation of 'past acts', which were broadly legislative acts before 1 July 1993 and any other acts (such as creation, variation, extension, renewal or extinguishment of any interests in land, or any legal or equitable right whether under legislation or otherwise) before 1 January 1994. By validation, we mean that past acts that done by the Commonwealth were authorised and could not be challenged on the basis that native title exists.

The NT Act (Cwlth) also provided for how 'future acts' would be dealt with, which were broadly defined as legislative acts that were to take place on or after 1 July 1993 and other acts (such as those mentioned above) which were to take place on or after 1 January 1994.

How future acts are currently dealt with in the NT Act (Cwlth) is discussed in section 2.2.6 Future acts.

3. No intermediate period acts

Initially, the NT Act (Cwlth) did not provide for 'intermediate period acts'. These were introduced by amendments to the NT Act (Cwlth) following the High Court's *Wik* decision.

4. States can validate laws and acts

Another important thing to appreciate at this stage is that the NT Act (Cwlth) provided for the states and territories to introduce laws to validate past acts for which the state or territory were responsible. This allowed the states and territories to ensure that acts that they had done could not be challenged or set aside on the basis that native title exists.

5. Making native title claims

Finally, the NT Act (Cwlth) prescribes how native title claims and compensation claims can be made and be determined by the Federal Court and the National Native Title Tribunal (NNTT).

2.1.4. Native Title (NSW) Act 1994

As anticipated by the NT Act (Cwlth) (see point 4. above), the NSW Legislature enacted the *Native Title (NSW) Act 1994 (NT Act (NSW))*, to validate past acts that would otherwise have been invalid because of the existence of native title.

As with the NT Act (Cwlth), the *NT Act (NSW)* was amended after the decision in *Wik* to provide for the validation of previous exclusive possession acts, previous non-exclusive possession acts, and intermediate period acts for which the state is responsible.

These concepts are explained in section 2.2.3.2 Extinguishment of native title.

³ It also included certain acts which occurred after these dates where they related to a previous 'past act' in the way specified by the legislation; so they included certain options, extensions and renewals etc. of pre-existing interests that were held by people.

⁴ To be a 'future act' the act could not be a past act and it either validly affected native title to an extent or it was to an extent invalid, but it would be valid to that extent if native title did not exist and if was valid to that extent, it would affect native title (s. 233). Certain other exceptions also applied (s. 233(2) and (3)).

2.1.5. Wik Peoples

Key point

In *Wik* the High Court found that certain pastoral leases did not wholly extinguish native title. This decision resulted in significant amendments to the NT Act (Cwlth) in 1998 to confirm the validity of various classes of acts and the introduction of a substantially modified future act regime.

The Wik and Thayorre people claimed native title over land in Cape York, which included land on which pastoral leases had been granted. None of the pastoral leases contained an express reservation in favour of Aboriginal people. The principal parties (which included the State of Queensland, the Commonwealth and the pastoralists) argued that the pastoral leases “were true leases in the traditional common law sense and thus conferred rights of exclusive possession”. It was argued that those rights were inconsistent with native title rights and therefore extinguished them.

On 23 December 1996, the High Court found that these pastoral leases did not confer exclusive possession. Thus the grant of the leases did not necessarily extinguish native title.⁵

The decision was considered highly controversial at the time, particularly by pastoralists who feared the effects of the decision.

The NT Act (Cwlth) was subsequently amended to resolve some of the issues that arose from the *Wik* decision. The key amendments, for your purposes, were the creation of the intermediate period regime (see 2.2.5 Intermediate period acts) and the substantial modification of the future act regime (see 2.2.6 Future acts).

⁵ *Wik Peoples v. State of Queensland* (1996) 187 CLR 1.

2.1.6. Native title timeline—key events

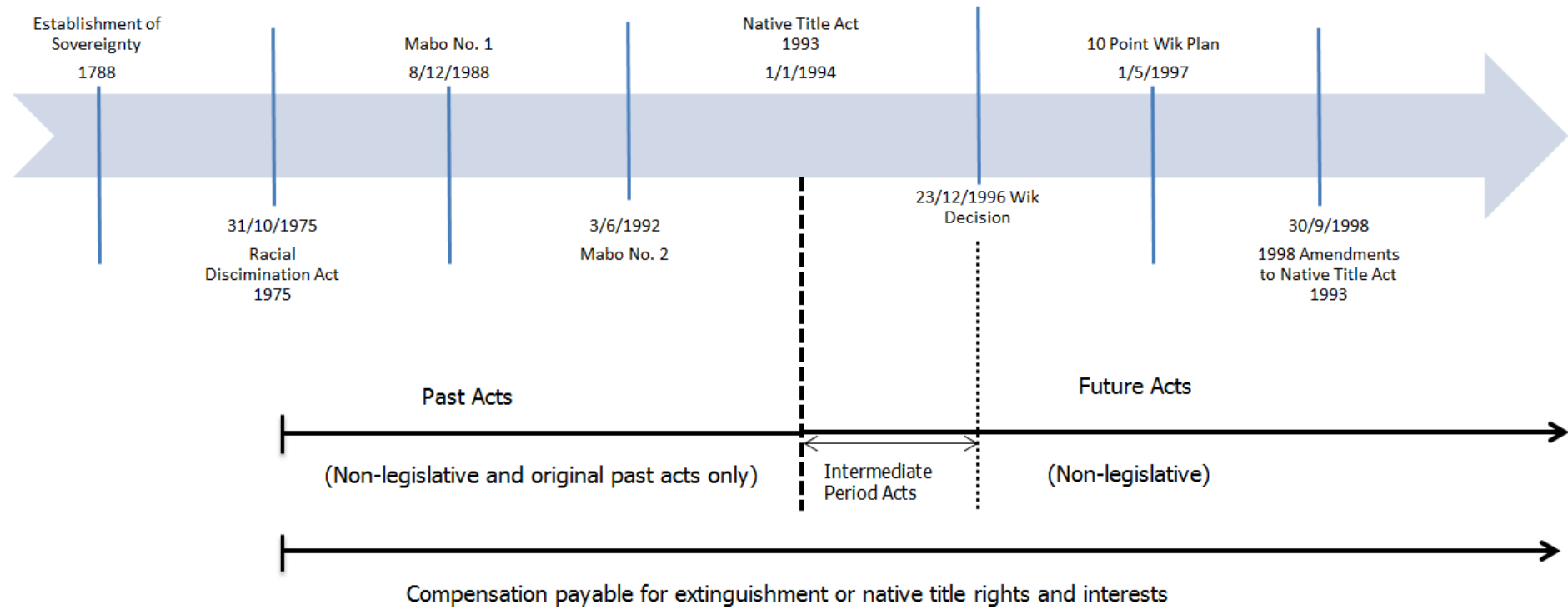


Figure 1. Timeline of events for native title

2.2. Key concepts

2.2.1. Native title

Native title is the bundle of rights held by Indigenous people in relation to land and water in accordance with their traditional laws and customs (*Mabo No. 2*). They are enforceable at common law.

The term 'native title' is defined in s. 223 of the NT Act (Cwlth) as follows.

Section 233

'The expression *native title* or *native title rights* and interests means the communal, group or individual rights and interests of Aboriginal peoples or 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

the rights and interests are recognised by the common law of Australia.'

An example of the sorts of native title rights and interests that may be recognised is provided in the *Bandjalang People* case:⁶

Example of native title rights and interests

'... the nature and extent of the native title rights and interests held by the Bandjalang People ... are the nonexclusive rights set out below:

- a) the right to hunt, fish and gather the traditional natural resources for non- commercial personal, domestic and communal use
- b) the right to take and use waters
- c) the right to access and camp
- d) the right to do the following activities on the land:
 - i. conduct ceremonies
 - ii. teach the physical, cultural and spiritual attributes of places and areas of importance on or in the land and waters; and
 - iii. to have access to, maintain and protect from physical harm, sites in the Consent Determination Area which are of significance to the Bandjalang People under their traditional laws and customs.'

Native title rights and interests are often referred to as a 'bundle of rights'. This draws attention to the fact that native title holders often enjoy several related rights and interests under their traditional laws and customs. These rights and interests may be extinguished separately.⁷

For example, native title holders could have a right to access a parcel of land distinct from the right to control who else accesses that parcel of land.

⁶ *Bandjalang People No 1 and No 2 v. Attorney General of New South Wales* [2013] FCA 1278.

⁷ *Western Australia v. Ward* (2002) 213 CLR 1 per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [222] ('*Ward*').

Although native title arises from the traditional laws and customs of Aboriginal people and Torres Strait Islanders, it is formally recognised by a native title determination made by the Federal Court (or the High Court on appeal). For such a determination to be made there must be evidence that the people:

- have continued to observe their traditional laws and customs; and
- had connection to the area by their laws and customs; and
- that the rights and interests they want recognised came from those laws and customs.

The rights and interests must also be capable of being recognised by the common law.

2.2.2. What is an act?

The concept of an 'act' is central to the validation regime implemented by the NT Act (Cwlth). It is relevant to when an 'act affects native title'⁸ and to other key concepts, such as 'past acts', 'intermediate period acts' and 'future acts'.⁹ These concepts are important because the NT Act (Cwlth) validates classes of acts.¹⁰ 'Act' is broadly defined in s. 226 of the NT Act (Cwlth):

Section 226

Section affects meaning of act in reference relating to native title

- 1) This section affects the meaning of *act* in references to an act affecting native title and in other references in relation to native title.

Certain acts included

- 2) An *act* includes any of the following acts:
 - a) the making, amendment or repeal of any legislation;
 - b) the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument;
 - c) the creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters;
 - d) the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise;
 - e) the exercise of any executive power of the Crown in any of its capacities, whether or not under legislation;
 - f) an act having any effect at common law or in equity.

Acts by any person

- 3) An *act* may be done by the Crown in any of its capacities or by any other person.

Relevantly for native title managers, an 'act' includes the:

- grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument¹¹
- creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters¹²

⁸ Section 226(1) tells us that the definition of an 'act' affects the meaning of the word 'act' in reference to 'an act affecting native title'.

⁹ Section 226 (1) NT Act (Cwlth).

¹⁰ Section 14 provides that past acts attributable to the Commonwealth are valid (with retrospective effect). Section 19 of the NT Act (Cwlth) enables the States and Territories to pass laws validating past acts and s. 8 of the NT Act (NSW) validates past acts attributable to NSW with retrospective effect.

¹¹ NT Act (Cwlth), s. 226(2)(b).

- exercise of any executive power of the Crown (or government)¹³ such as the reservation or dedication of land under legislative authority.

Key points

1. An ‘act’ can fall within several categories of the paragraphs in s. 226(2).¹⁴
2. The definition is inclusive—it *includes* things in the definition but may also include things that are *not* set out in the definition.
3. An act may be done by the government, including by a government agency or a council, or by any other person.¹⁵ This means that some acts can in fact be done by private individuals—so a person may grant a licence over land—but such acts will not necessarily affect native title.

2.2.3. Acts that affect native title

Key point

The concept of an act is integral to the concept of when an act affects native title. Only acts that ‘affect’ native title require validation under the regime of the NT Act (Cwlth). That is because such acts can impact upon the ability of holders to enjoy their native rights and interests.

Section 227 of the NT Act (Cwlth) specifies when an act ‘affects’ native title. It says:

Section 227 of the NT Act (Cwlth)

An act *affects* native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

As was explained by the Federal Court, the concept of an act affecting native title is a broad one and extends beyond mere inconsistency:

‘... that statutory concept does not require that an act be “inconsistent” with the exercise or enjoyment of native title rights. It simply requires that it “affect” the exercise or enjoyment of those rights, and carries with it the notion that the “effect” is unlikely to be a beneficial one (although beneficial effects are not expressly excluded and this issue can be left for another day). The concept of “affecting” connotes an impact, perhaps an impairment, but it is much broader than inconsistency.’¹⁶

If an act does not ‘affect’ native title in this sense it will not be a future act.¹⁷ This means that whether it is necessary to validate an act through the “future acts regime” will depend upon whether the act will ‘affect’ native title.

Part 4 of the Workbook (4.4.1—Does the act affect native title?) discusses whether the matters listed in s. 8.7 of the CLM Act may be considered to affect native title.

¹² NT Act (Cwlth), s. 226(2)(c).

¹³ *Ward* per Gleeson CJ, Gaudron, Gummow and Hayne JJ at [222].

¹⁴ *Williams v. Minister for Land and Water Conservation for the State of New South Wales* [2003] FCA 360 per Wilcox J at [6].

¹⁵ NT Act (Cwlth), s. 226(3).

¹⁶ Mortimer J in *Narrier v. State of Western Australia* [2016] FCA 1519 at [1070].

¹⁷ NT Act (Cwlth), s. 233(1)(c).

2.2.3.1. Physical activities

Some physical activities are ‘acts’ in the sense of s. 226 because they affect native title and the NT Act (Cwlth) requires that they be validated under the future acts regime. It is likely that the following will be ‘acts’:

- construction or establishment of a public work¹⁸
- construction, operation, use maintenance or repair of the public facilities listed in s. 24KA(2), such as a road, railway, bridge and so on
- excavation or clearing of land, and the disposal or storage of any garbage or any poisonous, toxic or hazardous substance (see s. 24LA).

Where you are considering such physical activities it is important to remember that the authorisation to perform them (for example, a licence allowing a contractor to construct a public amenity) will probably be an act, in the sense of s. 226, that requires validation under the NT Act (Cwlth).

2.2.3.2. Extinguishment of native title

Key points

1. Native title cannot be extinguished contrary to the NT Act (Cwlth).¹⁹
2. If it cannot be established with certainty that native title is wholly extinguished, the state’s policy is to **assume that native title exists**.

Native title is extinguished when the Crown (or an entity, such as a council exercising a power under the CLM Act that acts on behalf of the Crown) does an act that is inconsistent with the continued existence of native title rights and interests. Such an act extinguishes native title to the extent of inconsistency.²⁰ Accordingly, an act can extinguish native title wholly (that is, extinguish the complete bundle of native title rights and interests) or partly (extinguish some but not all of the native title rights and interests).

Two Divisions in the NT Act (Cwlth) deal with the extinguishing effect of past acts on native title. As your role is not to provide advice as to whether an act has extinguished native title, a brief summary of these Divisions is provided in Appendix 1.

Section 237A of the NT Act (Cwlth) defines the effect of extinguishment:

Section 237A of the NT Act (Cwlth)

The word *extinguish*, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.

Section 237A confirms that once native title has been extinguished it cannot be later revived (except where sections 47 to 47B of the NT Act (Cwlth) apply to set aside prior extinguishment).

¹⁸ The NT Act (Cwlth) expressly refers to public works in the context of ‘acts’; see, for example, s. 24JB(2).

¹⁹ NT Act (Cwlth), s. 11.

²⁰ *Wik*, per Kirby J at 217.

2.2.4. Past acts

A 'past act' is defined in s. 228(2) of the NT Act (Cwlth):

Past Act definition—Section 228(2)

'Subject to subsection (10), if:

- a) either:
 - i. at any time before 1 July 1993 when native title existed in relation to particular land or waters, an act consisting of the making, amendment or repeal of legislation took place; or
 - ii. at any time before 1 January 1994 when native title existed in relation to particular land or waters, any other act took place; and
 - iii. apart from this Act, the act was invalid to any extent, but it would have been valid to that extent if the native title did not exist;

the act is a past act in relation to the land or waters.'

Key points

1. The future act regime does not apply to past acts.
2. It is important to work out whether the 'act' is a 'past act' before going through the future acts regime.
3. Seek legal advice if you are unsure.

2.2.4.1. For acts (apart from legislative acts) before 1 January 1994

An act (which is a non-legislative act) is a past act if it occurred before 1 January 1994 and the act would have been valid but for native title. 1 January 1994 was the date the NT Act (Cwlth) commenced. As the things listed in s. 8.7 of the CLM Act are not legislative acts, **1 January 1994** is the important date for you to remember.

2.2.4.2. For acts on or after 1 January 1994—certain types of options and renewals

Other categories of past acts can happen after 1 January 1994. In this category, past acts are options or renewals (s. 228(3)), renewals or other extensions (s. 228(4)), and original permits (s. 228(9)). These past acts are discussed in detail in section 4.6 Step 5—Is the act a past act?

The important point about past acts which occur after 1 January 1994 is that even though they occur after this date (rather than before it), *they must relate back to an act which has occurred before 1 January 1994* (or 1 July 1993 in the cases of legally enforceable rights created by legislation) to be a 'past act'.

2.2.4.3. Validation of past acts

Commonwealth

The NT Act (Cwlth) provides for the validation of past acts that were done by the Commonwealth. Section 14 of the NT Act (Cwlth) says that if a past act is an act attributable to the Commonwealth, the act is valid and is taken to always have been valid.

New South Wales

Section 19 of the NT Act (Cwlth) permits the states and territories to enact laws to validate past acts, on the terms set out in the Commonwealth legislation.

In NSW, s. 8 of the NT Act (NSW) provides for the validation of past acts that were done by the State of NSW. This means where the state has done a 'past act' (such as granted a licence), it is deemed to be valid in so far as it affects native title.

2.2.5. Intermediate period acts

Key point

Native title managers in providing advice under s. 8.7 of the CLM Act will usually not need to consider whether the act was an 'intermediate period act' as these acts only occurred between 1 January 1994 and 23 December 1996 (that is, between the commencement of the NT Act (Cwlth) and the *Wik* decision).

Section 232A of the NT Act (Cwlth) defines an intermediate period act:

Section 232A(2)—summary

Subject to the regulations, an act is an intermediate period act if:

- the act took place at any time during the period between 1 January 1994 and 23 December 1996 when native title existed in relation to an area
- the act was not a legislative act (with exceptions)
- the act was invalid to any extent because of Div. 3 of Part 2 (disregarding s. 24EBA) or for any other reason, but it would have been valid to that extent if the native title did not exist
- the act was not a past act
- at any time before the act was done, either a freehold grant or a lease (other than a mining lease) was made covering the area affected by the act, or a public work was constructed or established on the area affected by the act and the grant, or the construction or establishment was valid.

2.2.5.1. Validation of intermediate period acts

Commonwealth

Section 22A of the NT Act (Cwlth) is similar to s. 14 (which validates past acts) as it provides that intermediate period acts are valid and are taken always to have been valid.

Sections 22B and 22C deal with the extinguishing effect of the four categories of 'intermediate period acts', being category A intermediate period acts, category B intermediate period acts, category C intermediate period acts and category D intermediate period acts. These categories mirror the categories of past acts and the consequences for those categories of acts are the same (see Table 42 Extinguishing effect of categories of past acts—Div. 2 in Appendix 1).

New South Wales

Section 22F of the NT Act (Cwlth) permits the states and territories to enact laws to validate intermediate period acts. Section 8 of the NT Act (NSW) provides that every 'intermediate period act' attributable to the State of NSW is valid, and is taken always to have been valid. This means that if the act is an intermediate period act, it will have validly affected native title (as prescribed by the NT Act (Cwlth)).

2.2.6. Future acts

Key points

- Native title managers are most likely to deal with ‘future acts’.
- A future act is not a past act.
- A future act will only be valid if certain procedures are followed.

A future act is defined in s. 233 of the NT Act (Cwlth):

Section 233

- 1) Subject to this section, an act is a future act in relation to land or waters if:
 - a) either:
 - i. it consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993; or
 - ii. it is any other act that takes place on or after 1 January 1994; and
 - b) it is not a past act; and
 - c) apart from this Act, either:
 - i. it validly affects native title in relation to the land or waters to any extent; or
 - ii. the following apply:
 - A. it is to any extent invalid; and
 - B. it would be valid to that extent if any native title in relation to the land or waters did not exist; and
 - C. if it were valid to that extent, it would affect the native title.

To be a future act, the act must:

- i. ‘Affect’ native title; (see point 2.9—Acts that affect native title)
- ii. Be valid (or, be valid if it were not for native title)
- iii. Have occurred on or after 1 January 1994 when the NT Act (Cwlth) commenced, and
- iv. *Not* be a past act.

Where native title has been extinguished any subsequent act will not be a future act, as the act cannot ‘affect’ native title²¹ and you will not need to take any action to ensure compliance with the native title legislation. However, you may still need to prepare a native title manager’s report (see Part 4 of this workbook).

New South Wales

The NT Act (NSW) does not validate future acts. The only way that future acts may be validated is through the future acts regime in Div. 3 of Pt. 2 of the NT Act (Cwlth), which is dealt with in Part 4 of this workbook.

²¹ See *Anaconda Nickel v Western Australia* (2000) 165 FLR 116 at [191].

2.2.7. The non-extinguishment principle

What is the non-extinguishment principle?

The non-extinguishment principle ‘involves the suspension of what otherwise would be native title rights and interests so that, whilst they continue to exist, to the extent of any inconsistency (which may be entire) they have no effect in relation to the “past act” in question. The native title rights and interests again have full effect after the “past act” ceases to operate or its effects are wholly removed.’²²

The **non-extinguishment principle** is defined in s. 238 of the NT Act (Cwlth). It provides:

- If the act affects any native title, that native title is nevertheless not extinguished, either wholly or partly.
- In such a case, if the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the rights and interests have no effect in relation to the act.
- If the act is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency.

Key point

Several parts of the NT Act (Cwlth) apply the non-extinguishment principle, including:

- Subdivision K (facilities for services to the public)²³
- Subdivision L (low impact future acts)²⁴
- Subdivision M (acts passing the freehold test).²⁵

2.2.8. Compensation

Division 5 of Pt. 2 of the NT Act (Cwlth) establishes the compensation regime and provides ‘an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests’ (unless the similar compensable interest test set by s. 240 of the NT Act (Cwlth) applies).²⁶

Total compensation payable must not exceed what would be payable for compulsory acquisition of a freehold estate,²⁷ unless s. 53(1) of the NT Act (Cwlth) applies. Native title compensation law is still developing and is not further addressed in this workbook except at 3.8.²⁸

²² *Ward* per Gleeson CJ, Gaudron, Gummow and Hayne JJ at 63.

²³ NT Act (Cwlth), s. 24KA(4).

²⁴ NT Act (Cwlth), s. 24LA(4).

²⁵ NT Act (Cwlth), s. 24MB(3).

²⁶ NT Act (Cwlth), s. 51(1).

²⁷ NT Act (Cwlth), s. 51A(1).

²⁸ See *Griffiths (Deceased and Jones on behalf of Ngaliwurrurru and Nungali Peoples v. Northern Territory)* [2019] HCA 7 (“Timber Creek”).

3. Responsibilities under the *Crown Land Management Act*

Key points

1. Land previously managed by reserve trusts will now be managed by Crown land managers.
2. Local councils and Category 1 non-council managers are responsible for ensuring their dealings and activities on Crown reserves they manage comply with the native title legislation.
3. Crown land transferred to local councils will be subject to any existing native title rights and interests.
4. Local councils and Category 1 non-council managers will need to employ or engage native title managers to ensure compliance with native title legislation.

The CLM Act permits the Minister to vest Crown land in local councils. A significant difference, however, is that the CLM Act expressly provides that the vesting of the ownership of land in local councils will be subject to any native title rights and interests existing in the land prior to the vesting, as well as any stated reservations and exceptions.²⁹

The CLM Act also categorises non-council managers:

- **Category 1 non-council managers** are professional entities that have been determined to have governance expertise and high levels of capability and, accordingly, are permitted to issue longer term leases and licences (up to 10 years) without the Minister's consent.
- **All other non-council managers are Category 2 non-council managers** and must obtain the Minister's consent to issue a licence for more than one year.

More information is found in the section entitled 3.5 Responsibilities of category 1 non-council managers.

3.1. Ensuring compliance with native title legislation

Local councils will be responsible for compliance with native title legislation in relation to vested land.³⁰ Local councils and Category 1 Crown land managers will be responsible for compliance with native title legislation for Crown reserves they manage because these entities will be able to carry out dealings and activities without the oversight of the Minister or department.

To ensure compliance with the native title legislation, local councils and Category 1 Crown land managers must employ/engage at least one native title manager and obtain written advice from them about native title in relation to certain dealings with land.³¹ Responsibilities of native title managers are discussed in more detail in section 3.7 Native title managers.

3.2. Responsibilities of Crown land managers

The Minister may appoint local councils or other qualified persons as a 'Crown land manager' over reserved land through a written appointment instrument. The appointment takes effect on publication of a Government Gazette notice.³²

²⁹ CLM Act, s. 4.9(2).

³⁰ See Part 8, CLM Act.

³¹ CLM Act, s. 8.6.

³² CLM Act, s. 3.6

Certain persons, including councils appointed to manage reserve trusts, were deemed to be appointed as Crown land managers for the purposes of the CLM Act upon the repeal of the *Crown Lands Act 1989* (CL Act 1989).³³

A Crown land manager of dedicated or reserved Crown land is:

- responsible for the care, control and management of the land
- to exercise any other functions conferred or imposed on the manager by the CLM Act or any other Act.³⁴

Dedicated or reserved Crown land may only be used for the dedicated or reserved purpose, or any ancillary or incidental purpose, as well as any other authorised purpose.³⁵ However, the land can be used for such other purposes as:

- a purpose specified in a plan of management³⁶
- dealings for the purpose of 'any facility or infrastructure' or 'any other purpose the Minister thinks fit', subject to consultation requirements and the public interest³⁷
- other dealings, not within the dedicated or reserved purpose, which are in the public interest and would not be likely to materially harm the use of the land for the dedicated or reserved purpose,³⁸
- short-term licences for any 'prescribed purpose', even if they are inconsistent with the dedicated or reserved purpose.³⁹

Key points

- While land may be available for use for a certain purpose under the CLM Act, this use of the land for this purpose must be consistent with the NT Act (Cwlth)
- This means that where land is not 'excluded land' or the use of the land is not consistent with the NT Act (Cwlth), the act should not be undertaken.

3.2.1. Powers to manage Crown reserves

Crown land managers can deal with the reserved land they manage, including leasing and licensing it. The extent of the powers depends on whether the managers are 'council managers' or 'non-council managers'.⁴⁰ See 3.4 Responsibilities of council Crown land managers and 3.5 Responsibilities of category 1 non-council managers for more information.

The important further powers to deal with reserved land for secondary interests or short-term licences are set out below.⁴¹

3.2.1.1. Secondary interests

A Crown land manager can grant a lease, licence, permit, easement or right of way ('secondary interest') over dedicated or reserved Crown land regardless of the dedicated/reserved purpose if it:

- a) is in the public interest

³³ CLM Act, Sched. 7, cl.11-14.

³⁴ CLM Act, s. 3.13.

³⁵ CLM Act, s. 2.12.

³⁶ CLM Act, s. 3.38.

³⁷ CLM Act, s. 2.18.

³⁸ CLM Act, s. 2.19.

³⁹ CLM Act, s. 2.20.

⁴⁰ A "council manager" is defined in s. 3.20 of the CLM Act as any local council that is a Crown land manager of dedicated or reserved Crown land. A "non-council manager" is defined in s. 3.24 of the CLM Act as a person (except a local council that is a Crown land manager of dedicated or reserved Crown land.

⁴¹ CLM Act, s. 3.17.

- b) would not be likely to materially harm its use for the dedicated or reserved purpose.⁴²

Using dedicated or reserved land for a secondary interest

The following considerations are relevant to the question of whether the use of dedicated or reserved Crown land under a secondary interest would not be likely to materially harm the use of the land for the purposes for which it is dedicated or reserved (with limitation):

- a) the proportion of the area of the land that may be affected by the secondary interest
- b) if the activities to be conducted under the secondary interest will be intermittent, the frequency and duration of the impacts of those activities
- c) the degree of permanence of likely harm and in particular whether that harm is irreversible
- d) the current condition of the land
- e) the geographical, environmental and social context of the land
- f) any other considerations that may be prescribed by the regulations.

3.2.1.2. Short-term licences

Crown land managers may grant a short-term licence over reserved or dedicated land, even if the purpose is inconsistent with the dedicated or reserved purpose of the land. The grant of a short-term licence may only be for a 'prescribed purpose'⁴³ under the CLM Regulations.

Key point

Crown land managers should ensure that any authorisation or restriction of use of Crown land under a Plan of Management is consistent with the NT Act (Cwlth).

⁴² CLM Act, s. 2.19(3).

⁴³ CLM Act, s. 2.20.

3.3. How does a Crown land manager carry out its functions?

A Crown land manager must carry out its functions in accordance with:

- their instrument of appointment
- any applicable Crown land management rules
- any applicable plan of management
- for non-council managers—the requirements of any applicable community engagement strategy⁴⁴
- NT Act (Cwlth).

What you need to know—instrument of appointment

- The instrument may set out how Crown land managers are to do their job, including what functions can or cannot be exercised, the limits of those functions, and any other conditions or obligations that apply when carrying out those functions.
- A further instrument can vary these functions if more than one Crown land manager is appointed for the land.
- The Minister may revoke the appointment for any or no reason.
- The appointment also ends if the manager resigns, or the manager completes the term of appointment and it is not renewed.
- A local council manager cannot resign without the Minister's consent.

For more—go to Div. 3.2 of the CLM Act

What you need to know—Crown land management rules

- The rules must be published in the NSW Government Gazette
- The rules may provide for various things including:
 - the maximum terms for leases, licences or permits
 - terms of the holdings
 - standards of conduct
 - dealing with amounts received by Crown land managers
 - public access to and the use of the land (including by Aboriginal people).

For more—go to s. 3.15 of the CLM Act

⁴⁴ CLM Act, s. 3.13.

What you need to know—plans of management

- Crown land managers may prepare a plan of management or must prepare one if the Minister directs.
- The Minister may make guidelines for draft plans of management.
- If a plan of management is adopted, Crown land managers must apply it, ensure all activities are in accordance with it, and ensure all leases or licences include a provision requiring compliance with it.
- Dedicated or reserved Crown land can be used for a purpose specified in a plan of management that is in addition to the dedicated or reserved purpose.
- Other additional requirements for council managers in s. 3.23(6)-(12) of the CLM Act when preparing plans of management.

For more—go to Div. 3.6 of the CLM Act

What you need to know—community engagement strategy

- The Minister must approve one or more community engagement strategies for 'dealings or other action affecting Crown land use'. This may include:
 - the alteration or removal of a purpose for which Crown land is dedicated or reserved
 - the selling, transferring or vesting of Crown land
 - the granting of leases, licences or permits over Crown land
 - the preparation of plans of management
 - the preparation of a state strategic plan for Crown land.
- The Minister must ensure that one or more community engagement strategies have been approved for dealings or other action affecting Crown land use.
- Council Crown land managers do not need to comply with the community engagement strategy, but must comply with the engagement requirements under the *Local Government Act 1993* that are relevant to land management.
- Non-council managers (and certain others) must ensure that, for any dealings or other action affecting Crown land use, they comply with any requirements of a community engagement strategy that applies to that dealing or action.

For more—go to Div. 5.3 of the CLM Act

3.4. Responsibilities of council Crown land managers

Councils appointed to manage dedicated or reserved Crown land may classify and manage that land as if it were ‘public land’⁴⁵ under the *Local Government Act 1993* (LG Act)—but subject to Div. 3.4 of the CLM Act.

This means that a council Crown land manager may manage its dedicated and reserved Crown land as if it were community land or operational land, but only as permitted or required by Div. 3.4 of the CLM Act.

3.4.1. Functions of council manages under the CLM Act

The functions and powers of council Crown land managers are to:

- manage the land as if it were community land under the LG Act (unless the land has been classified as operational land, which requires Ministerial consent)

The council Crown land manager has all the functions of a local council under that Act in relation to community land (including in relation to leasing and licensing community land).⁴⁶

- manage dedicated or reserved Crown land that is a ‘public reserve’ (within the meaning of the LG Act) as a public reserve under that Act

The council Crown land manager has all the functions that a local council has under that Act in relation to public reserves.⁴⁷

- manage dedicated or reserved Crown land that is classified as operational land (with the consent of the Minister) as if it were operational land
- The council Crown land manager has all the functions of a local council under that Act in relation to operational land.⁴⁸
- To sell or dispose of Crown land but **only** with the consent of the Minister administering the CLM Act.⁴⁹

A council Crown land manager may therefore exercise their usual functions under the LG Act in respect of community land, operational land and public reserves where that classification or reservation relevantly applies.

3.4.1.1. Management of land as community land

The council manager must, as soon as practicable after it becomes the manager of the reserved Crown land, assign the land to one or more categories of community land in s. 36 of the LG Act.

These categories are:

- a natural area
- a sportsground
- a park
- an area of cultural significance

⁴⁵ Public land is defined in the LG Act to mean ‘any land (including a public reserve) vested in or under the control of the council, but does not include:

- a public road, or
- land to which the *Crown Lands Management Act 2016* applies, or
- a common, or
- a regional park under the *National Parks and Wildlife Act 1974*.’

⁴⁶ CLM Act, 3.22(1).

⁴⁷ CLM Act, 3.22(2).

⁴⁸ CLM Act, 3.22(3).

⁴⁹ CLM Act, 3.22(4).

- general community use⁵⁰

The assigned category or categories must be those that the council considers to be most closely related to the purposes for which the land is dedicated⁵¹.

The council manager must give written notice to the Minister of the categories to which it has assigned the land as soon as practicable after assigning them.⁵² The Minister may by written notice to the council manager require the manager to alter an assigned category in certain circumstances.⁵³

There are also important provisions that apply to council managers concerning the preparation and adoption of plans of management and the alteration of land categories by a plan of management in s. 3.23 of the CLM Act. Council managers should familiarise themselves with these provisions.

3.4.1.2. What you *cannot* do with dedicated or reserved Crown Land

A council manager of dedicated or reserved Crown land must not do any of the following:

- Sell or dispose of dedicated or reserve Crown land in any way without the Minister's written consent
- Classify dedicated or reserved Crown land as 'operational land' without the consent of the Minister
- Do any other thing under the LG Act that would involve a contravention of a provision of the CLM Act that applies to council managers
- Do anything that contravenes:
 - any limitations or other restrictions specified by the provisions of the manager's appointment instrument
 - the Regulations
 - any applicable Crown land management rules
 - any applicable plan of management under Division 3.6 (if there is no requirement for a plan of management under the *Local Government Act 1993*).⁵⁴

3.5. Responsibilities of category 1 non-council managers

A non-council manager may exercise the functions of the Minister in relation to the reserved or dedicated Crown land it manages in the way permitted by Div. 3.5 of the CLM Act for the category of manager to which that non-council manager has been assigned.

There are two categories of non-council managers: category 1 and category 2. In this workbook, we only discuss category 1 non-council managers. A non-council manager may be assigned to a particular category of manager by:

- the manager's appointment instrument
- a notice published in the Gazette, or
- the Regulations.⁵⁵

However, a non-council manager is taken to be assigned as a category 2 manager if the manager has not been assigned to a particular category or manager.⁵⁶

⁵⁰ CLM Act, s. 3.23(2).

⁵¹ CLM Act, s. 3.23(3).

⁵² CLM Act, s. 3.23(4).

⁵³ CLM Act, s. 3.23(5).

⁵⁴ CLM Act, s. 3.22(4).

⁵⁵ CLM Act, s. 3.25(2).

⁵⁶ CLM Act, s. 3.25(5).

3.5.1. Exercise of functions by category 1 non-council managers

A category 1 non-council manager may exercise any of the functions of the Minister over the dedicated or reserved land it manages, but ordinarily only with the Minister's consent.⁵⁷

There are a number of exceptions to the requirement to obtain the Minister's consent:

- The grant of a lease or licence for a term of 10 years or less
- The grant of easements in connection with such a lease or licence
- Minor changes to leases or licences which do not result in changes to:
 - the rent
 - the term (including any option to renew)
 - insurance
 - provisions relating to native title rights and interests or claims under the *Aboriginal Land Rights Act 1983*
 - clauses relating to making good any damage to the land or the structures on it
 - clauses relating to works undertaken by the holder for which consent is required, and
 - clauses relating to the termination or revocation of the lease or licence.
- Other functions authorised by the manager's appointment instrument, the regulations or an applicable plan of management.⁵⁸

The Minister has power over dedicated or reserved land Crown land to do the following:

- Grant a lease, licence, permit, easement or right of way over dedicated or reserved Crown land for the purpose of 'any facility or infrastructure' or 'any other purpose the Minister thinks fit' where the Minister complies with the consultation requirements in s. 2.18(2) CLM Act and is satisfied it is in the public interest to grant the relevant interest⁵⁹
- Grant a lease, licence, permit, easement or right of way ('secondary interest') over dedicated or reserved Crown land, where the secondary interest is not limited by its dedication or reservation—and where the Minister is satisfied that the use of the land under the secondary interest would be in the public interest and would not be likely to materially harm its use for the purposes for which it is dedicated or reserved⁶⁰
- Grant a short-term licence over dedicated or reserved Crown land for any prescribed purpose even if the purpose for which it is granted is inconsistent with the purposes for which the Crown land was dedicated or reserved⁶¹
- Do anything a registered proprietor may do, including:
 - selling or transferring (or any other disposal or dealing with) Crown land
 - mortgaging Crown land
 - granting easements, rights of way, leases, licences or permits over Crown land
 - imposing covenants, conditions or other restrictions on use in connection with dealings involving Crown land.⁶²

However, s. 5.3 of the CLM Act does not authorise the sale of Crown land that is dedicated or reserved for a public purpose.

⁵⁷ CLM Act, s. 3.26(1).

⁵⁸ CLM Act, ss. 3.26(2) and 3.28.

⁵⁹ CLM Act, s. 2.18.

⁶⁰ CLM Act, s. 2.19.

⁶¹ CLM Act, s. 2.20.

⁶² CLM Act, s. 5.3.

3.5.2. Further requirements

The Minister may direct non-council managers to establish community advisory groups for dedicated or reserved Crown land under their management.⁶³

Non-council managers are required to provide the Minister with an annual report on the manager's management operations for the period ending 30 June each year. See s. 3.30 of the CLM Act for more about these reporting requirements.

There are also requirements to keep records in accordance with the regulations and to provide the Minister or an authorised officer with these records for inspections and copying. See s. 3.31 of the CLM Act for more about the requirements for record keeping.

3.6. Responsibilities of local councils where land is vested in them

Under the CLM Act, the Minister may, by publishing a notice in the NSW Government Gazette, vest specified 'transferable Crown land' in local councils,⁶⁴ subject to certain conditions.⁶⁵

Transferable Crown land includes dedicated or reserved Crown land or any other Crown land, subject to certain exceptions.⁶⁶

The Minister may limit the land vested in the council to specified parts of the land or include reservations for the Crown.⁶⁷

3.6.1. What occurs when the land is vested in the local council

Once vested, the local council holds the land in fee simple (freehold), subject to any:

- native title rights and interests existing in relation to the land immediately before the vesting; and
- reservations and exceptions contained in the council vesting notice for the land.⁶⁸

⁶³ CLM Act, s. 3.29.

⁶⁴ CLM Act, s. 4.6.

⁶⁵ The conditions are that the land is wholly located within the local government area of the council, the council has agreed, the Minister is satisfied that the land is suitable for local use (taking into account certain criteria) and—if the land is subject to a claim under the *Aboriginal Land Rights Act 1983*—the consent of the local Aboriginal Land Council and, where relevant, the NSW Aboriginal Land Council has been given: s. 4.6 CLM Act.

⁶⁶ Section 4.5 of the CLM Act. These exceptions include:

- a) land dedicated or reserved under the NPW Act or declared to be a wildlife refuge under that Act, or
- b) land that an Act (except the *NSW National Parks and Wildlife (NPW) Act 1974 Act* or the CLM Act) provides is to be used for a purpose referred to in that other Act, or not to be used for any purpose except a purpose referred to in that other Act.

⁶⁷ CLM Act, s. 4.7.

⁶⁸ CLM Act, s. 4.9(1).

3.6.1.1. Dedications and reservations over the land

Note

The fact that land may remain reserved or dedicated after being vested in a local council (because it is excluded land and/or it is s. 24FA protected land) does not prevent the local council from using the land in accordance with the LG Act.

Whether the dedications and reservations over Crown land continue after the land has been vested in a local council under Div. 4.2 of the CLM Act will depend upon the following:

1. Where the land is *not* excluded land when it is vested, *until* it becomes excluded land:
 - for land that was dedicated or reserved for one or more purposes immediately before its vesting, the land continues to be dedicated or reserved for the purposes for which it had been dedicated or reserved.⁶⁹
2. Where the land *is* excluded land when it is vested, or becomes excluded land after the vesting, if it was dedicated or reserved for one or more purposes immediately before the vesting:
 - for land that is s. 24FA protected land:
 - the land continues to be dedicated or reserved for those purposes until it becomes excluded land for some other reason
 - however, the dedication or reservation is revoked if the land is sold or disposed of in any other way while it is protected.
 - For land that becomes excluded land (except for s. 24FA protected land) after its vesting:
 - the dedication or reservation is revoked when it becomes excluded land.⁷⁰
3. Unless 1 and 2 above applies, on the vesting of land in a local council, a dedication or reservation is revoked to the extent it affects the land.

3.6.1.2. Other effects of vesting land in a local council

On the vesting of land in a local council:

- The land ceases to be Crown land
- If the land is subject to a condition, trust or a proviso contained in the Crown grant, or contained or referred to in a folio of the Register created for the land, the local council is released from it except to the extent specified in the council vesting notice
- If a person was a trustee of all or any part of the land immediately before it vested, the person ceases to be a trustee of the land
- If a person was a Crown land manager of the land, the person ceases to be the manager of the land
- If there is a lease or licence over the land in force immediately before the land vested, the lease or licence continues in force as if it were a lease or licence granted by the council and has effect despite any provisions of the lease or licence, or any Act or other law, to the contrary.⁷¹

⁶⁹ CLM Act, s. 4.9(3).

⁷⁰ CLM Act, s. 4.9(4).

⁷¹ CLM Act, s. 4.9(6).

Key point

If the land is not excluded land when it is vested, and until it becomes excluded land, the land cannot be sold or disposed of in any way

3.7. Native title managers

3.7.1. Who is a native title manager?

A native title manager is a person who has undertaken approved training or qualifications.

There are particular requirements in Div. 8.3 of the CLM Act that apply to a 'responsible person', being local council Crown land managers, category 1 non-council managers, and local councils in which land is vested in it under Div. 4.2 of the CLM Act. For ease of reference, we refer to a 'responsible person' as a 'reserve manager' in this Part.

These requirements apply to native title managers and to relevant land unless the land is 'excluded land', which is basically land in which native title issues should not arise.

3.7.2. Why have a native title manager?

A reserve manager for 'relevant land' must employ or engage at least one native title manager to ensure the person's dealings with the land comply with any applicable provisions of the native title legislation.⁷²

This means that a local council who wishes to manage dedicated or reserved Crown land, or have land vested in it under Div. 4.2 of the CLM Act, will need to employ or engage at least one native title manager. The position is the same for category 1 non-council managers.

The reserve manager must notify the Minister in writing about whether they have engaged or employed a native title manager, including their name and contact details. The notice must be given as soon as practicable after 30 June (but not after 31 October) each year.⁷³

3.7.3. What are native title managers responsible for?

Key point

Native title managers are not responsible for determining whether native title has been extinguished and if in doubt should always assume native title exists.

Native title managers are required to provide written advice to the reserve manager who employed or engaged them where the reserve manager intends to perform one of the following functions in relation to the land they manage or own:

- a) grant leases, licences, permits, forestry rights, easements or rights of way
- b) mortgage the land or allow it to be mortgaged
- c) impose, require or agree to (or remove or release, or agree to remove or release) covenants, conditions or other restrictions on use in connection with dealings involving the land, or
- d) approve (or submit for approval) a plan of management for the land that authorises or permits any of the kinds of dealings referred to in paragraph (a), (b) or (c).⁷⁴

⁷² CLM Act, s. 8.6.

⁷³ CLM Act, s. 8.8.

⁷⁴ CLM Act, s. 8.7.

3.7.4. What are native title managers *not* responsible for?

A native title manager is not responsible for providing a written advice for the sale or other disposal of the land.⁷⁵ However, there are other limitations on the ability of reserve managers to sell or dispose of managed or vested land where native title rights and interests may exist, such as:

- A council manager of dedicated or reserved Crown land cannot sell or dispose of the land other than as set out in s. 3.22 without the Minister's written consent: s. 3.22(4) and Div. 3.4.
- A category 1 non-council manager can only exercise the functions of the Minister to sell or dispose of land with the Minister's written consent: s. 3.26; see also Div. 3.5.
- Where the land is not excluded land when it is vested in a council, until it becomes excluded land, the land cannot be sold or disposed of in any way: s. 4.9.

If native title does exist, the land will only be able to be dealt with in accordance with the NT Act (Cwlth) and this would ordinarily involve obtaining the consent of the native title holders.

3.7.5. Discussing native title issues

A reserve manager for relevant land must comply with any requirements of native title legislation in relation to that land.⁷⁶ The reserve managers may want to discuss native title issues with native title managers in relation to any proposed land dealings or other acts.

3.8. Compensation

Key points

- Council and category 1 Crown land managers may be liable to pay compensation for acts that impact on native title rights and interests.
- Importantly, this compensation liability arises for local councils whether or not the act was valid and otherwise in accordance with the future acts regime in the NT Act (Cwlth).

Under the native title legislation, the state is ordinarily liable to pay for compensation for acts that affect title rights and interests, even if the state did not do the act that affects native title.

Under the CLM Act, where a local council is the Crown land manager or land is vested in it by the Minister and does an act that has an impact on native title rights and interests, the local council is made liable for any compensation that would previously have been payable by the state.

Further, the local council or a category 1 non-council manager will be directly responsible to native title holders for any compensation liability in relation to their conduct which affects native title and is valid under s. 24JAA (public housing), 24KA (facilities for services to the public), s. 24MD (acts passing the freehold test) and s. 24NA (acts affecting offshore places) of the NT Act (Cwlth).⁷⁷

⁷⁵ CLM Act, s. 8.7(2).

⁷⁶ CLM Act, s. 8.10.

⁷⁷ CLM Act, s. 8.12.

3.9. Indemnity to the state

It is important to know that local councils and category 1 non-council managers must either contribute to or indemnify the state for their conduct in relation to land they manage, or (for local councils) they hold following vesting by the Minister.

Any amount that is payable to the state in relation to such conduct is recoverable by the state as a debt in a court of competent jurisdiction.⁷⁸

⁷⁸ CLM Act, s. 8.13(2).

4. Advice of native title manager

4.1. Overview

This part of the workbook outlines the steps you need to take, or at least consider, when preparing a native title advice for the purposes of s. 8.7 of the CLM Act.

4.2. Step 1—Is the land ‘excluded land’?

The first step is to find out whether the land is excluded land. You do not need to provide a native title manager advice under s. 8.7 if the land is ‘excluded land’. Section 8.5 of the CLM Act applies Div. 8 to a responsible person for relevant land, but not if the relevant land is excluded land.

Excluded land is defined in s. 8.1 as follows:

Section 8.1

‘Excluded land’ means each of the following:

- Land subject to an approved determination of native title (as defined in the *Native Title Act 1993* of the Commonwealth) that has determined that:
 - all native title rights and interests in relation to the land have been extinguished, or
 - there are no native title rights and interests in relation to the land,
- Land where all native title rights and interests in relation to the land have been surrendered under an indigenous land use agreement (as defined in the *Native Title Act 1993* of the Commonwealth) registered under that Act,
- An area of land to which section 24FA protection (as defined in the *Native Title Act 1993* of the Commonwealth) applies,
- Land where all native title rights and interests in relation to the land have been compulsorily acquired,
- Land for which a native title certificate is in effect.

4.2.1. Searches and other ways to find out whether land is excluded land

You will need to conduct certain searches and activities to ascertain whether the relevant land is excluded land for the purposes of s. 8.1 of the CLM Act.

You should also review your own records to ascertain whether specific searches are necessary.

4.2.1.1. Find out if land is subject to an approved determination that native title has been extinguished or if there is no native title

You should search the **National Native Title Tribunal Register** for any approved determinations of native title in respect to the relevant land. The register includes the determination date, the land or waters covered by the determination, the names of the native title holders and the rights and interests recognised.

Table 1. National Native Title Tribunal Register

National Native Title Tribunal Register

The NNTT also provides information whether land is the subject of a determination of native title, is within a registered claim, whether there is an ILUA over it and other information. Tribunal contact details:

(02) 9227 4000
enquiries@nntt.gov.au

The register can be accessed at www.nntt.gov.au/searchRegApps/Pages/default.aspx

You will need to provide a Lot and DP number or other identifying characteristics of the land you request the search for.

If the land is in a schedule of a determination where native title rights have been wholly extinguished, the land will be 'excluded land' and you will not need to prepare advice for s. 87 of the CLM Act. **If it is unclear whether such land is excluded land, seek legal advice.**

A search of the register will enable you to locate details of determinations made within an LGA. The online register cannot be searched by lot and deposited plan. You will need to review each determination that has been made and then work out (by deduction) whether a determination may affect a specific lot and deposited plan. Search results will appear as below:

The screenshot displays the 'Search National Native Title Register' page. It includes a navigation menu with options like 'ABOUT US', 'FUTURE ACTS', 'INDIGENOUS LAND USE AGREEMENTS', 'NATIVE TITLE CLAIMS', 'ASSISTANCE', and 'SEARCH THE REGISTERS & APPLICATIONS'. The main content area features a search form with the following fields and values:

- Tribunal file no. (empty)
- Federal Court file no. (empty)
- Short name (empty)
- Case name (empty)
- State or Territory: New South Wales
- Registered Native Title Body Corporate (empty)
- Representative ATSI body area (empty)
- Local government area: Hawkesbury City Council
- Determination type: ALL
- Legal process: ALL
- Determination outcome: ALL
- Determination date between: (empty) and (empty)
- Sort by: Determination date

The search results table is as follows:

Short name	Case name	Legal process	Determination date	Outcome
Darug People	Gale on behalf of the Darug People v Minister for Lands	Litigated	07/09/2004	Native title does not exist

Figure 2. Searching the register

For example, in the Hawkesbury City LGA one determination has been made (that native title does not exist for the determination area at the time of writing). By searching the determination extracts the area subject to the determination may be identified.

The screenshot shows the National Native Title Tribunal website. The main content area displays the details for a determination with the ID 'NCD2004/001 - Darug People'. A table lists various details, including the determination outcome 'Native title does not exist' and the local government area 'Hawkesbury City Council'. Below the table, there is a section for 'Register extract and attachments'. A red arrow points to the 'Register extract' link, which is labeled 'NNTRExtract_NCD2004_001.pdf'.

National Native Title Register Details	
Tribunal file no.	NCD2004/001
Federal Court file no(s)	NSD6004/1996
Short name	Darug People
Case name	Gale on behalf of the Darug People v Minister for Lands
Determination type	Claimant
State or Territory	New South Wales
Legal process	Litigated
Determination outcome	Native title does not exist
Representative A/TSI body area(s)	New South Wales
Local government area(s)	Hawkesbury City Council
Determination date	07/09/2004
Date/s of effect	07/09/2004
Registered on National Native Title Register	Registered


Register extract and attachments

Register extract	NNTRExtract_NCD2004_001.pdf
Register extract attachment/s	NCD2004_001 1. Plan of Crown Land showing former artificial ID.pdf

Figure 3. Searching the determination extracts

Native Title Vision

The NNTT also provides Native Title Vision, which is a geospatial tool for mapping native title matters. Native Title Vision can be accessed at www.nntt.gov.au/assistance/Geospatial/Pages/NTV.aspx



Extract from the National Native Title Register

Determination Information:

Determination Reference: Federal Court Number(s): NSD6004/1998
NNTT Number: NCD2004/001

Determination Name: Gale on behalf of the Darug People v Minister for Lands

Date(s) of Effect: 07/09/2004

Determination Outcome: Native title does not exist

Register Extract (pursuant to s. 193 of the *Native Title Act 1993*)

Determination Date: 07/09/2004

Determining Body: Federal Court of Australia

ADDITIONAL INFORMATION:
Not Applicable

MATTERS DETERMINED:

Native title does not exist in the determination area being Lot 7016 in Deposited Plan 1067986 as per the attached registered plan.

REGISTER ATTACHMENTS:

1. Plan of Crown Land showing former artificial ID, 1 page - A4, 07/09/2004

Note: The National Native Title Register may, in accordance with s. 195 of the Native Title Act 1993, contain confidential information that will not appear on the Extract.

Figure 4. Extract where native title does not exist in the determination area

4.2.1.2. Interpreting the search

- The above extract from the National Native Title Register shows that the determination concerned land comprising Lot 7016 DP 1067986. Thus this land can be considered 'excluded land' and would not require native title manager advice.
- The rest of the land within the Hawkesbury City LGA would not be 'land subject to an approved determination of native title' and hence would not fall within this limb of the definition of 'excluded land'.
- However, where there is a determination over a large area of land within an LGA, you may not be able to obtain the necessary information regarding a specific lot and deposited plan. In such cases you should write to the Registrar of the NNTT (see contact details on page 40) asking if the relevant land (described by reference to the Lot and DP or to a plan locating the relevant land) is subject to an approved determination of native title. The Tribunal's website advises that such a search may take up to five working days.
- The results of the search will identify any determinations made in respect of the lot. If there is no determination, you can be satisfied that the land would not be 'land subject to an approved determination of native title that native title rights have been extinguished' or 'there is no native title over that land' as there is no determination over that land. It could therefore not fall within this limb of the definition of 'excluded land'.
- If the NNTT finds relevant determinations you will be provided with a list of those determinations. The following examples list determinations from the Tribunal's website:

Table 2. Example results

Tenement/Parcel ID	Tribunal file number	Name	Type
EL5255	SCD2012/002	Arabana People	Determinations
EPM25882	QCD2012/013	Tagalaka People #2	Determinations
EPM25882	QI2003/021	Tagalaka Croydon Area ILUA #1	ILUAs
Belele PL N049563	WC2004/010	Wajarri Yamatji	Applications (Schedule)
Belele PL N049563	WC2004/010	Wajarri Yamatji	Applications (RNTC)

You will need to review each determination to find out whether the determination was that 'native title rights have been extinguished or that there is no native title over that land'. To do so, you will need to locate a copy of the relevant determination. You can do this by searching the **native title applications, registration decisions and determinations** database on the tribunal's website for the determination.

Search

The link to this search is

<http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx>

You can use the tribunal's file number to search that database easily. This will provide results showing the short name for a particular application (for example 'Arabana People'), the Federal Court of Australia case name ('Dodd v. State of South Australia') and the determination date (22/05/2012).

Once you have the Federal Court case name you can search the Austlii database. Go to Commonwealth Case Law database and search for the case name (e.g. *Dodd v. State of South Australia*) or the medium neutral citation.

Search

The link to this search is: <http://www.austlii.edu.au/au/cth/#>

Once you find a copy of the Federal Court's decision—which will include the terms of the determination—you can then electronically search the schedules for the lot and deposited plan. The Schedules and Orders made by the court will inform you whether 'native title rights have been extinguished' or 'there is no native title over that land'.

Key point

If the land is in a schedule where native title rights have been wholly extinguished, the land will be 'excluded land' and you will not need to prepare advice for s. 8.7 of the CLM Act.

4.2.1.3. Find out if all native title rights and interests in relation to the land have been surrendered under an ILUA that has been registered under the NT Act (Cwlth):

Key points

- To determine whether native title rights and interests in relation to the land have been surrendered under an ILUA, you will need to first review your own records.
- ILUAs will only be relevant where the Crown land manager is a party to the agreement or where they provide that native title has been extinguished or surrendered.

You will need to write to the Registrar of the NNTT asking whether there is an Indigenous Land Use Agreement (ILUA) over the land (see contact details Table 1).

ILUAs are voluntary agreements between native title parties and others (they typically include the state) which concern the use and management of land and waters in the area. You can ask for this information at the same time as you ask the registrar if there are any determinations over the land.

If the search results show that there is no ILUA over the land, then the land is not 'excluded land' within this limb of the definition.

If there is an ILUA over the land you may seek to obtain information about the *surrender* of land under an ILUA by conducting a search of the **Register of Indigenous Land Use Agreements**.

Register of Indigenous Land Use Agreements


The link to this Register is:

<http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx>


The information provided includes the names and contact details of each party of the agreement, the area covered in the agreement, the time period for the agreement (if limited), and extracts of information in the ILUA which may include information of the surrender and extinguishment of native title, the doing of future acts, and the validation of future acts.

You may be able to obtain information as to whether native title to the land was surrendered from these extracts alone. An example extract from the ILUA register is provided on the following page.

However, if such information is not available, you will need to make enquiries of the parties to the ILUA to ask them whether the land has been surrendered to the Crown. The contact details of the parties to the ILUA are available on the Register of Indigenous Land Use Agreements. You should contact the relevant government party to the ILUA.



**National
Native Title
Tribunal**



Extract from Register of Indigenous Land Use Agreements

NNTT number	NI2006/004
Short name	Bundjalung People of Byron Bay (ILUA 2)
ILUA type	Area Agreement
Date registered	22/04/2008
State/territory	New South Wales
Local government region	Byron Shire Council

Description of the area covered by the agreement

The agreement area of approximately 1866 square kilometres is located in the vicinity of Byron Bay.

The agreement area comprises the land and waters within the boundaries of the Byron Bay Bundjalung People #1 native title determination application NSD6010/98 (NC95/1) and the Byron Bay Bundjalung People #3 native title determination application NSD6020/01 (NC01/8) described in Schedules F, G and O of the agreement and mapped in Map "X-3" attached to Schedule A of the agreement.

Schedule F: "Extinguished Lands"
 Lot 398 in DP728550
 Lot 387 in DP728536
 Allotment 5 Section 26 in DP758207
 Allotment 10 Section 62 in DP758207
 Lot 13 in DP112794
 Lot 12 in DP111263
 Lot 7009 in DP1026798
 Lot 14 in DP 112794

Schedule G: "Surrendered Lands"
 Lot 407 in DP729057

Figure 5. Extract from a register

4.2.1.4. Consider whether to apply to the Court and obtain s. 24FA protection

By making a non-claimant application under s. 24FA, you can deal with land where native title may exist, even if the act affects native title.

Future acts 'protected' in this way by s. 24FA remain valid, even if it is later found that native title exists or existed in relation to the land at the time. Section 24FD of the NT Act (Cwlth) says that an area is 'subject to section 24FA protection at a particular time if it is covered by an entry on the National Native Title Register specifying that no native title exists in relation to the area'.

More detail is provided in Section 4.7 Step 6—Working your way through the future acts regime below. See also the NNTT *Information sheet—non-claimant applications in NSW*.

4.2.1.5. Consider compulsory acquisition of land and all native title rights and interest in relation to it

Ordinarily a compulsory acquisition of land will extinguish all interests in land, including native title. However, whether a compulsory acquisition has acquired all native title rights and interests is complex and involves consideration of the effect of the acquisition and various regimes under the *NT Act (Cwlth)*. You should obtain legal advice if you wish rely upon this limb of the definition of 'excluded land'.

Alternatively, you may decide to recommend that the council compulsorily acquires the land, and any native title right and interest to it. That acquisition will be a future act to the extent that it will affect native title. You should contact the department to discuss any such proposal.

4.2.1.6. Do you hold a native title certificate?

You will need to keep copies of any native title certificate over the relevant lot issued by the department. If you do not have a native title certificate, the land is not 'excluded land'. The department has indicated that it will consider issuing native title certificates in certain circumstances and implementing a policy and appropriate procedures (see part 4.3 Step 2—Native title Certificates). If you do not have a native title certificate, the land is not excluded.

4.3. Step 2—Native title certificates

Section 8.4 of the CLM Act provides for the Minister to issue native title certificates. However, the department's policy is that it will rarely issue native title certificates.

In practice, the department will ordinarily only issue a native title certificate in the circumstances set out in the department's guidelines. If you require a native title certificate you will need to make a request that complies with the guidelines. Section 8.4 provides:

Section 8.4 Issue of native title certificates

1. The Minister may, at the Minister's absolute discretion, issue a certificate (a native title certificate) to a person for specified Crown land or former Crown land stating that, following investigations made by the Department, there is adequate evidence to show that native title rights and interests in relation to the land have been extinguished or do not exist. Note: Section 12.8 enables the Minister to charge fees for services provided by the Department (including in connection with issuing native title certificates).
2. The Minister may, by notice given to the person to whom a native title certificate is issued, revoke the certificate.
3. A native title certificate is taken to be revoked if the land becomes subject to an approved determination of native title (as defined in the *Native Title Act 1993* of the Commonwealth).
4. Copies of any native title certificates issued under this section may (but need not) be published on the Department's website.
5. Any requirements of the native title legislation in relation to land are not affected by the issuing of a native title certificate for the land.

4.4. Step 3—Does the act affect native title?

The next issue to consider is whether the proposed act will affect native title. The future acts regime only applies if the act affects native title.

The future acts regime comprises Part 2 Division 3 of the NT Act (Cwlth).

Part 2 Division 3 of the NT Act (Cwlth)

This legislation is available at the following link: www.legislation.gov.au/Details/C2017C00178

Key point

In considering whether an act may affect native title, you should assume that there may be native title rights and interests over the land unless the land is excluded land (which you are not required to advise on)

Key point

Native title manager advice is required for certain activities listed under s. 8.7 of the CLM Act even when they may not affect native title. Make sure your advice addresses the relevant act concerned. For example, advice at the submission stage for a plan of management should address the effect adopting the plan of management would have on native title

Examples

Activities in s. 8.7 of the CLM Act that affect native title include:

- leases that provide for exclusive possession
- licences, permits, forestry rights, easements or rights of way
- covenants, conditions or other restrictions on use and the removal or release of, covenants, conditions or other restrictions, and
- adoption of a plan of management, if it approves an additional use of land.

Activities in s. 8.7 of the CLM Act that probably don't affect native title, without anything more, include:

- requiring covenants, conditions or other restrictions on use (and their removal or release), and
- submitting a plan of management.

4.4.1. Does the act actually affect native title?

It is difficult to conclusively assess whether an act affects native title without evidence of native title rights and interests in the relevant land. Under the NT Act (Cwlth) the term 'affects native title' (see part 2.9 Acts that affect native title) is very broad and includes any act that is inconsistent with the enjoyment or exercise of native title rights and interests.

Examples

Native title may be affected when the grant of a licence includes conditions which:

- might prevent native title holders from accessing and using the site area for a particular purpose, like camping, using natural resources, cultural/spiritual rights or performing traditional ceremonies
- permit temporary fencing that may restrict the native title holder's free movement.

Key points

- Native title managers should not try and work out whether the act actually affects native title by comparing the rights granted under the lease, licence etc. with the possible native title rights and interests that may be recognised in the land. You only need to form a view on whether the act may affect native title.
- If you are unsure, seek legal advice.

4.4.2. In summary

Include a statement in your native title manager advice:

- that the act may/may not be an act that affects native title, and
- whether the relevant 'act' will occur at some further stage (for example, adoption of a plan of management).

4.5. Step 4— What is the status of the land?

4.5.1. Identify the land parcel

Before native title manager advice is provided, you should obtain a title search of the land. This search should provide information as to whether the land is reserved or dedicated and the legislation under which the land was reserved or dedicated.

A sample title search is found in Appendix 4—Sample title search.

However, a title search will not show all the relevant information regarding the reservations and/or dedications over the land. For example, the title search may not show:

1. the date on which the land was reserved or dedicated, or
2. details of the reservation or dedication itself—for example, if the land was reserved for public recreation or future public requirements.

The department holds historical tenure information which will include this information. A schedule of all Crown land managed by a council or category 1 Crown land manager was provided prior to the commencement of the CLM Act. This information includes details of reservations and dedications which may be necessary to form a view that the act is or is not validated as a future act (which is relevant for some types of past acts and for Subdivision J).

4.6. Step 5—Is the act a past act?

The future act regime will not apply where the matter is a past act, as the definition of ‘future act’ makes clear that a future act is not a ‘past act’. This means it is important to work out whether the ‘act’ is a ‘past act’ before going through the future acts regime.

Key points

The past act provisions are complex. Seek legal advice if you are uncertain as to their operation. An act (the later act) is a past act if:

1. It is in exercise of a legal right created by legislation (or its repeal) **before 1 July 1993** or by any other act (not legislation) done **before 1 January 1994** (see situation 1. Options renewals etc.—s.228(3)(b)(i) below); or
2. It gives effect to or is because of a good faith offer, commitment, arrangement or undertaking made or given **before 1 July 1993** (see situation 2. Extensions and renewals etc. – s.228(3)(b)(ii) below); or
3. The interests created by a later act (which takes place on or after 1 January 1994) take effect before, or immediately after, the interests created by an earlier act cease to have effect. The same person (or someone who acquired the first person’s interests) must do the later act as the earlier act and it must permit similar activities. **An example is a renewal of a licence** (see situation 3. Other extensions and developments of earlier acts s.228(4) below); or
4. Done in good faith and under or in accordance with a reservation, condition, permission of authority that took place before 1 July 1993 or 1 January 1994. The land or waters were to be used under the reservation etc. at a later time for a particular purpose e.g. **for forestry purposes** (see situation 4).

See ss. 228(3)(b)(i), 228(3)(b)(ii) and 228(9) for more detail. There are exceptions.

See the checklists below for each provision outlined in the information box above.

4.6.1. Situation 1 & Situation 2. options renewals etc.— s. 228(3)(b)(i) & (ii)

An option or renewal exercised on or after 1 January 1994 may be a past act under s. 228(3) of the NT Act (Cwlth). Section 228(B) provides as follows:

Section 228(B)

3. Subject to subsection (10), an act that takes place on or after 1 January 1994 is a past act if:
 - a. it would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and
 - b. it takes place:
 - i. in exercise of a legally enforceable right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994; or
 - ii. in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made; and
 - c. the act is not the making, amendment or repeal of legislation.

Examples

The cases have decided the following:

- An 'offer, commitment, arrangement or undertaking' does not arise under legislation
- An 'offer, commitment, arrangement or undertaking' can include offers made before 1 January 1994 in departmental correspondence to alienate land, subject to minor conditions
- The grant of land to a land council is a 'past act' as it was in exercise of a legally enforceable right created (in the land council) by a land claim in April 1993
- The renewal of a lease effective on 1 January 1994 gave effect to an 'offer, commitment, arrangement or undertaking' made in good faith before 1 July 1993, namely on 12 February 1993 when the lease was executed.

4.6.2. Checklist example—a renewed lease

The following requirements must be met for a renewal of a lease to be a past act:

Table 3. Requirements for a renewal of a lease to be a past act

Requirement for renewed leases	Section 228
The lease would have been a past act under s. 228(2) except it is granted after 1 January 1994; and	(3)(a)
The grant of the renewal of the lease was a legally enforceable right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994; or	(4)(b)(i)
The grant of the renewal of the lease was in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993 (for which there was written evidence)	(4)(b)(ii)
The renewed licence is not the making, amendment or repeal of legislation	(3)(c)

4.6.3. Situation 3. extensions and renewals etc – s. 228(4)

A renewal that takes places on or after 1 January 1994 may also be a past act if it satisfies s. 228(4) of the NT Act (Cwlth). This provision allows:

Section 228(4)

4. Subject to subsections (6) and (10), an act (the *later act*) that takes place on or after 1 January 1994 is a past act if:
- a. the later act would be a past act under subsection (2) if that subsection were not limited in its application to acts taking place before a particular day; and
 - b. an act (the *earlier act*) that is a past act because of any subsection of this section (including because of another application of this subsection) took place before the later act; and
 - c. the earlier act created interests in a person and the later act creates interests in:
 - i. the same person; or
 - ii. another person who has acquired the interests of the first person (by assignment, succession or otherwise);
 in relation to the whole or part of the land or waters to which the earlier act relates; and
 - d. the interests created by the later act take effect before or immediately after the interests created by the earlier act cease to have effect; and
 - e. the interests created by the later act permit activities of a similar kind to those permitted by the earlier act.”

Examples

This provision will apply to:

- a grazing licence permitting grazing only for a particular animal, followed by the grant of a licence that permits grazing of a different animal licence
- the extension of a licence where the grant of the earlier licence had similar conditions and took effect after the earlier grant.

This provision will not apply:

- to a grazing lease that permits only grazing followed by the grant of a lease that permits mining (not similar activities)
- where the earlier act was the grant of a licence and the later act is the grant of a lease)
- where the earlier act was the grant of a lease and the later act creates a larger proprietary interest (for example, the grant of a freehold estate)
- if the earlier act contains a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders and the later act does not contain the same (or a substantially similar) reservation or condition
- where the earlier act or the later act is the making, amendment or repeal of legislation.

4.6.4. Checklist example—a licence

A licence will be a past act under s. 228(4) if the following checklist of requirements is met:

Table 4. Requirements for licence to be a past act under s. 228(4)

Requirement for renewed licence	Section 228
The renewed licence would have been a past act under s. 228(2) except it is granted after 1 January 1994	(4)(a)
The original licence was granted prior to 1 January 1994	(4)(b)
The renewed licence is renewed to: <ul style="list-style-type: none"> (i) the same person holding the original permit, or (ii) a transferee or assignee of the original permit 	(4)(c)
The renewed licence takes effect before or immediately after original permit ends	(4)(d)
The renewed licence permits similar activities as original licence	(4)(e)
The renewed licence does not: <ul style="list-style-type: none"> (i) create a proprietary interest over the land covered by the original permit, where the original permit created only a non-proprietary interest, or (ii) create a larger proprietary interest in the land than was created by the original licence, or (iii) if the original licence contained a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders—the renewed permit does not contain the same reservation or condition 	(6)

4.6.5. Situation 4. Other extensions and developments of earlier acts— s.228(9)

Other acts which take place on or after 1 January 1994 may also be past acts if they satisfy s. 228(9) of the NT Act (Cwlth). This provision says:

Section 228(9)

an act (the later act) that takes place on or after 1 January 1994 is a past act if:

- a) the later act would be a past act under **subsection (2)** if that **subsection** were not limited in its application to acts taking place before a particular day; and
- b) an act (the earlier act) that is a past act because of any **subsection** of this section took place before the later act; and
- c) the earlier act contained or conferred a reservation, condition, permission or authority under which the whole or part of the land or waters to which the earlier act related was to be used at a later time for a particular purpose (e.g. a reservation for forestry purposes); and
- d) the later act is done in good faith under or in accordance with the reservation, condition, permission or authority (for example, the issue in good faith of a licence to take timber under a reservation for forestry purposes); and
- e) the later act is not the making, amendment or repeal of legislation.

A key feature of this provision is that the reservation, condition, permission or authority under which land or waters to which the earlier act related was to be used at a later time for 'a particular purpose'.

In *Erubam Le*,⁷⁹ the Full Federal Court held that a Crown grant dated 17 October 1985 granting freehold title to the Darnley Island Council to hold in trust for the benefit of Islander inhabitants and for no other purpose was not land used for 'a particular purpose' and therefore was not a past act.⁸⁰

Examples

- A grant of a licence to take timber after 1 January 1994 under a reservation for forestry purposes which occurred before 1 January 1994
- A grant of a permit to camp issued after 1 January 1994 that was granted under a reservation of land as a national park which occurred before 1 January 1994

⁷⁹ *Erubam Le (Darnley Islanders) #1 v. State of Queensland* [2003] FCAFC 227.

⁸⁰ *Erubam Le (Darnley Islanders) #1 v. State of Queensland* [2003] FCAFC 227.

4.6.6. Checklist example—a permit

A grant of a permit will be a past act under s. 228(9), if the following checklist is met:

Table 5. Requirements for a grant of a permit to be a past act under s. 228(9)

Requirement	Section 228
The grant of the permit would have been a past act under s. 228(2) except that it was granted after 1 January 1994	(9)(a)
The reservation, condition, permission or authority was a past act which took place before the grant of the permit	(9)(b)
The reservation, condition, permission or authority was over the whole or part of land or waters and was to be used at a later time for a particular purpose	(9)(c)
The grant of the permit was done in good faith under or in accordance with the reservation, condition, permission or authority	(9)(d)
The permit is not the making, amendment or repeal of legislation	(9)(e)

4.7. Step 6—Working your way through the future acts regime

Key points

- Part 2 Div. 3 of the NT Act (Cwlth) sets out the future acts regime
- A future act will be valid if it is covered by one of the subdivisions and invalid if it is not.⁸¹

The subdivisions in the future acts regime are cascading so that if a future act is valid under a subdivision higher in the list, it cannot be done under a subdivision lower down.⁸² This is necessary because different consequences may flow from the application of different provisions (for example, different procedural or compensation arrangements may apply).

In the event a future act is covered by an ILUA, the ILUA will take precedence.⁸³

If a future act is not covered by any of the future act subdivisions, it can only be validated by way of an ILUA or a non-claimant application to obtain s. 24FA protection.

An overview of the future acts regime is as follows:

⁸¹ NT Act (Cth), s. 24AA(2).

⁸² NT Act (Cth), s. 24AB(2).

⁸³ NT Act (Cth), s. 24AB(1).

Table 6. Overview of future acts

Subdivision	Summary of subdivision
B-E	<p>Subdivisions B-E cover ILUAs. ILUAs can be negotiated when the other subdivisions of the future acts regime do not apply (subject to the agreement of the native title holders and/or native title claimants)</p> <p>ILUAs are not covered in detail in this Workbook. You should consider whether the outcome you seek warrants the cost of negotiation and recognition.</p>
F	<p>Subdivision F covers future acts where there is an absence of native title. A government body may obtain s. 24FA protection for future acts by making a non-claimant application in the Federal Court. A requirement is that there be no relevant native title claims over the whole or part of the area: see ss. 24FC(c) and 24FC(d).</p>
G	<p>Subdivision G deals with certain acts relating to primary production on areas subject to non-exclusive agricultural and pastoral leases that were granted on or before 23 December 1996.</p>
H	<p>Subdivision H relates to management or regulation of surface and subterranean water, living aquatic resources and airspace.</p>
I	<p>Subdivision I applies to acts which are pre-existing rights-based acts or acts that are permissible e.g. lease renewals.</p>
JA	<p>Subdivision JA deals with public housing for the benefit of Aboriginal peoples or Torres Strait Islanders.</p>
J	<p>Subdivision J deals with future acts done in good faith under or in accordance with a reservation, dedication, condition, permission or authority made on or before 23 December 1996 which required the land to be used for a particular purpose, or the future act otherwise had no greater an impact on native title than any act that could have been done that was under or in accordance with the reservation.</p>
K	<p>Subdivision K relates to future acts involving the provision of facilities for services to the public.</p>
L	<p>Subdivision L covers low-impact activities and can include excavation or clearing that is reasonably necessary for the protection of public health or public safety, or tree lopping, clearing of noxious or introduced animal or plant species, foreshore reclamation, regeneration or environmental assessment or protection activities.</p> <p>Subdivision L ceases to apply once land is the subject of a determination of native title.</p>
M	<p>Subdivision M covers future acts that pass the freehold test i.e. acts that could be done if the native title holders instead held ordinary title to the land or waters. This includes the compulsory acquisition of land.</p>
N	<p>Subdivision N covers acts affecting offshore places – that is, any land or waters to which the NT Act (Cwlth) extends, other than land or waters within the limits of a State or Territory to which the NT Act (Cwlth) extends.</p>

4.7.1. Subdivision B-E—Indigenous Land Use Agreements (ILUAs)

An Indigenous Land Use Agreement (ILUA) is a voluntary agreement between native title holders and others, regarding the use of land and waters. They are binding on all parties, including all persons holding native title in the area who are not parties to the agreement, while it is registered. ILUAs allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances and can cover topics such as native title holders agreeing to future developments, coexistence of native title rights, access to an area, compensation, employment and economic opportunities for native title groups.

Pursuant to s. 24EB of the NT Act (Cwlth), a future act carried out in accordance with a registered ILUA will be valid. In these circumstances, an ILUA would allow for negotiations between the parties in relation to how any future acts in the area could be validly carried out. Generally, an ILUA will provide benefits to native title holders by way of compensation for the doing of the act.

A proponent, such as a council, cannot compel native title holders to agree to an ILUA. Further, there is no guarantee that native title holders would agree to enter such an agreement at all, or on terms that would be acceptable to the proponent.

There are three types of ILUAs:

- Body Corporate Agreements
- Area Agreements
- Alternative Procedure Agreements

A body corporate agreement must not be made unless there is a registered native title body corporate in relation to all of the area: s. 24BC NT Act (Cwlth).

An area agreement or an alternative procedure agreement is used where there are no registered native title bodies corporate in relation to all of the area. Importantly, native title rights and interests may not be extinguished when alternative procedure agreements are used.

4.7.1.1. Who can be party to an ILUA

Who must or may be a party depends upon the type of ILUA and the obligations contained in the agreement.

The agreement types are as follows:

Table 7. Agreement types

Agreement Type	Who must be a party?	Who may be a party
Body Corporate Agreement*	All relevant registered native title body corporates Commonwealth, State or Territory	Any other person or persons may be parties
Area Agreement*	All persons in the native group, in relation to the area. Commonwealth, State or Territory	Any other person or persons may be parties
Alternative Procedure Agreements	All persons in the native group, in relation to the area. Commonwealth, State or Territory	Registered native title claimant Any other person who claims to hold native title Any other person

[* these government bodies are only mandatory where the ILUA provides for extinguishment of native title rights by surrender; s. 24BD(2) and s. 24CD(5)]

Following negotiation between the state and the native title group, an ILUA needs to be registered with the NNTT to take effect. The registration process has different notification requirements and periods depending on the agreement type.

The registration process for area agreements, for example, involves a three-month notice period and allows persons claiming to hold native title the opportunity to object to registration on the basis that it has not been properly authorised by them.

Where only one act is subject to the ILUA (such as granting an easement), drafting the ILUA is not an overly complex task, however negotiating and registering the ILUA may take some time.

4.7.1.2. When to use an ILUA?

Where you have conducted a search of the National Native Title Register and Register of Native Title Claims and found there is a native title claim or application over the land or waters and:

- no other mechanism of the future acts regime is available
- there are several future dealings/acts that you intend to occur over the land
- there are other matters (such as plans of management) where the co-operation of native title holders will be need to be sought, and/or
- the advantages of using an ILUA outweigh its disadvantages.

4.7.1.3. Advantages of ILUAs

There are many advantages in using ILUAs, including:

- ILUAs can validate invalid acts that have already occurred
- ILUAs provide certainty for parties who wish to carry out activities and developments on the land and waters in the agreement area before native title has been determined. Area agreements can be entered into, for example, when there is a known native title claim and the state wishes to do a future act validly
- ILUAs can deal with classes of future acts (such as the grant of leases or permits), which makes them a useful option where a reserve manager contemplates many acts that will affect native title over numerous parcels of land.

4.7.1.4. Disadvantages

The principal disadvantages in using ILUAs are:

- Depending on the complexity of the matters to be covered, and the number of parties (including Indigenous parties), they may take years to negotiate
- The notification period following registration of an ILUA may also result in further delays if claimant proceedings are commenced after that notification period (for example, where area agreements or alternative procedure agreements are entered into)
- ILUAs can also be costly to prepare and negotiate.

4.7.1.5. Compensation

Compensation will also invariably need to be negotiated for the affect (or potential affect) acts have over native title rights and interests.

4.7.1.6. Resources

Resources on ILUAs

Resources on ILUAs are available at the NNTT website
www.nntt.gov.au/ILUAs/Pages/default.aspx

4.7.2. Subdivision F—s. 24FA protection

A general mechanism for validating future acts that is available to state agencies (and other non-claimants) is subdivision F of the NT Act (Cwlth). Section 24FA validates any future act in relation to a parcel of land while the land is subject to an unopposed non-claimant application. This is referred to as 's. 24FA protection'.

Section 24FA protection arises (once the procedural requirements are satisfied) after notification of a non-claimant application.⁸⁴ Notification of the application to the Federal Court is required by the NT Act (Cwlth). While an area has s. 24FA protection, any future act by any person in relation to the area that is done at the time is valid.⁸⁵

Section 24FB applies to the State and statutory authorities,⁸⁶ including councils, and provides:

Section 24FB

An area is subject to section 24FA protection at a particular time if:

- a) before that time, a non-claimant application (see section 253), or a corresponding application for an approved determination of native title under a law of a State or Territory, has been made by or on behalf of a Minister, the Crown in any capacity, or a statutory authority; and
- b) the area is the whole of the area covered by the application and the application has not been amended as to area; and
- c) the period specified in the notice given under section 66, or under a corresponding provision of the law of the State or Territory, has ended; and
- d) at the end of that period, there is no relevant native title claim (see section 24FE) covering the area or a part of the area; and
- e) the application has not been withdrawn, dismissed or otherwise finalised; and
- f) there is no entry on the National Native Title Register, included under paragraph 193(1)(a) or (b), specifying that native title exists in relation to the area or a part of the area.

⁸⁴ Section 253 of the NT Act defines 'non-claimant application' as a native title determination application that is not a claimant application. A claimant application is relevantly defined to mean a native title determination application that a native title claim group has authorised to be made. Accordingly, any other application seeking a determination of the existence of native title, including a determination that native title does not exist, is a non-claimant application. This will include applications made to obtain s. 24FA protection.

⁸⁵ NT Act (Cwlth), s. 24FA(1)(a).

⁸⁶ A 'statutory authority' is defined in s. 253 of the NT Act (Cwlth) in relation to the Crown in right of the Commonwealth, a state or a territory, to mean any authority or body (including a corporation sole) established by a law of the Commonwealth, the state or territory other than a general law allowing incorporation as a company or body corporate.

Key point – the effect of s. 24FA(1)

‘... that without the need for the Court to determine the non-claimant application, all future acts in relation to the land will be valid even if those acts extinguish native title. The NT Act, therefore, contemplates a procedure where non-claimants may get security as to the validity of their title merely by making a non-claimant application which is properly notified. They do not, therefore, need to undertake the potentially laborious task of proving that there is no native title. Extinguishment of native title by such acts will, however, give the native title holders a right to compensation: s. 24FA(1)(b)’⁸⁷

For government applications, s. 24FA protection will only cease:

- a) if the non-claimant application is ‘withdrawn, dismissed or otherwise finalised’, or
- b) an approved determination that native title exists in relation to the area is registered.

Typically, a non-claimant application facilitates a particular dealing/act being done over the land. Once the future act is completed, the non-claimant application is discontinued. At that time s. 24FA protection ceases to apply.

Any future act done over the land after the s. 24FA proceedings are discontinued will not be covered by that s. 24FA protection though it may be validated by other provisions of the NT Act (Cwlth) e.g. if s. 24FA protection were obtained to validate the grant of a lease, Subdivision I may validate the exercise of an option for a further term.

Section 24FC enables a person who holds a non-native title interest in relation to the area to apply for s. 24FA protection. Such an application cannot be made if there is a government application for s. 24FA protection over the same area.⁸⁸

Unlike government applications, a person must have an ‘interest’ in the relevant land to make a non-claimant application under s. 24FC. Current state practice is for these applications to be brought by the party seeking to obtain a benefit in respect of the land. It will be their interest in the land that will be relevant in terms of bringing an application under section 24 FC. For example, the person seeking an easement over adjoining Crown land will make the application.

If an act validated under s. 24FA has extinguished native title, or resulted in the loss, diminution, impairment or had any other effect on native title rights, the native title holders will be entitled to compensation under Div. 5 of Pt. 2 of the NT Act (Cwlth).⁸⁹

⁸⁷ *Lightning Ridge Local Aboriginal Land Council v. Premier of New South Wales in his capacity as the State Minister pursuant to the Native Title Act 1993* (Cth) [2012] FCA 792, per Perram J.

⁸⁸ NT Act (Cwlth), s. 24FC(b).

⁸⁹ NT Act (Cwlth), s. 24FA(1)(b).

4.7.2.1. Checklist—24FA requirements

In respect of government applications, the future act will be validated by s. 24FA if the following requirements are met:

Table 8. Requirements for a future act to be validated

Requirement	Section 24FB
A non-claimant application has previously been made by or on behalf of a Minister, the Crown or a statutory authority in relation to the land	(a)
The land subject to the non-claimant application has not been amended	(b)
The three-month period specified in the notice given under s. 66 of the NT Act (Cwlth) has ended and at the end of that period there is no native title claim covering the area	(c) and (d)
The application has not been withdrawn, dismissed or otherwise finalised	(e)
There is no entry on the National Native Title Register that native title exists in relation to the land	(f)

In respect of non-government applications, a future act will be validated under s. 24FA if the following requirements are met:

Table 9. Requirements for a future act to be validated under s. 24FA

Requirement	Section 24FC
The land is not covered by a government application under s. 24FB(a)	(b)
A non-claimant application has been made in relation to the whole or part of the area covered by the application	(a) and (c)
The three-month period specified in the notice given under s. 66 of the NT Act (Cwlth) has ended and at the end of that period there is no native title claim covering the area or all entries that relate to a relevant native title claim that covered an area are removed from the Register of Native Title Claims, or cease to cover the area	(d) and (e)
The application has not been withdrawn, dismissed or otherwise finalised	(f)
There is no entry on the National Native Title Register that native title exists in relation to the land	(g)

4.7.2.2. Advantages

Obtaining s. 24FA protection is a useful where you:

- are uncertain whether the other mechanisms of the future acts regime are available, and
- have conducted a search of the National Native Title Register and the Register of Native Title Claims and there are no native title claims or applications over the area, as you will not have s. 24FA protection if this is the case (see above).

4.7.2.3. Disadvantages

The disadvantages in using s. 24FA protection include:

- It will typically take several weeks for notices to be issued and three months for the notification period, plus a possible further time if a native title claim is commenced
- It can be costly as court proceedings need to be commenced and maintained to obtain the protection.

Further information is available from the NNTT

www.nntt.gov.au/Information%20Publications/Information%20Sheet%20-%20Non-claimant%20applications%20in%20NSW.pdf

4.7.3. Subdivision G—primary production

Key point

This subdivision covers licences for pastoral uses (such as grazing licences). Otherwise this would rarely to native title manager advice.

Subdivision G provides a mechanism to validate future acts which permit primary production activities. Section 24GA(2) explicitly states that primary production activities do *not* include mining.

The most relevant provisions for native title managers will be ss. 24GB and 24GD. As such, these are the only provisions that are discussed in this Workbook.

Section 24GA provides guidance on future acts that may constitute a ‘primary production activity’. The term “primary production activity” has its ordinary meaning.

However, s. 24GA provides the following examples of specific primary production activities:

Table 10. Examples of specific primary production activities

Primary production activity	Acts included
Cultivating land	Includes the preparation and use (including watering, fertilising or spraying) of soil for crops, animal pasture and market gardening, and the raising and production of plants, including harvesting. ⁹⁰
Maintaining, breeding or agisting animals	Includes maintaining, breeding and raising animals for purposes like selling them or their bodily produce or maintaining them for tourism purposes. (agistment is hosting and feeding or pasturing animals for a fee)
Taking or catching fish or shellfish	Shellfish include oysters and crustacea ⁹¹
Forest operations	Defined as meaning the planting or tending of trees intended for felling in a plantation or forest, or the felling of such trees. ⁹²

⁹⁰ Native Title Amendment Bill 1997, Explanatory Memorandum, Table 9.1.

⁹¹ Native Title Amendment Bill 1997, Explanatory Memorandum, Table 9.1.

⁹² NT Act (Cth), s. 253.

Primary production activity	Acts included
Horticulture activities [Defined in s. 253]	Includes: (1) propagation or maintenance, as well as cultivation; (2) propagation etc. of seeds, bulbs, spores, or similar things; (3) propagation etc. of fungi; or (4) propagation etc. in environments other than soil, whether natural or artificial. ⁹³
Aquacultural activities	Includes the breeding, keeping and harvesting fish or shellfish and the propagation, maintenance, cultivation and harvesting of aquatic plants. ⁹⁴
Leaving fallow or de- stocking land in connection with doing any primary production activity	This category recognises that primary production may require land to be left uncultivated or de-stocked for periods of time. ⁹⁵

4.7.3.1. Section 24GB: Acts permitting primary production on non-exclusive agricultural and pastoral leases

Section 24GB validates future acts occurring *after* 23 December 1996 that permit or require the carrying on of a primary production activity, or an activity incidental thereto, while a non-exclusive agricultural or pastoral lease is in force (including renewals). Where the future act is incidental to primary production, the majority of the lease area must be used for primary production activities.

To be validated by this section, the future act must be one which could have been validly done or authorised prior to 31 March 1998, if any native title in the area covered by the lease had not then existed. Importantly, section 24GB also does not cover an act that converts a non-exclusive agricultural or pastoral lease into a lease conferring a right of exclusive possession or a freehold estate, over any of the land or waters covered by the lease.⁹⁶

Section 24GB also applies to a future act that takes place after 23 December 1996 and permits a farm tourism activity in the area covered by a valid non-exclusive agricultural lease or non-exclusive pastoral lease, while the lease is in force. However, the observing of activities or cultural works of Indigenous people will not be validated by this section.⁹⁷

Where there is a non-exclusive pastoral lease covering more than 5,000 hectares, s. 24GB does not validate an act where the majority of the lease area is required or permitted to be used for non-pastoral purposes.⁹⁸

⁹³ NT Act (Cth), s. 253.

⁹⁴ Native Title Amendment Bill 1997, Explanatory Memorandum, Table 9.1.

⁹⁵ Native Title Amendment Bill 1997, Explanatory Memorandum, Table 9.1.

⁹⁶ NT Act (Cth), s. 24GB(4)(b).

⁹⁷ NT Act (Cth), s. 24GA(3).

⁹⁸ NT Act (Cth), s. 24GB(4)(a).

4.7.3.2. Checklist

A future act permitting primary production on non-exclusive agricultural and pastoral leases will be validated under s. 24GB if the requirements in the following checklist are met:

Table 11. Requirements for a future act permitting primary production on non-exclusive agricultural and pastoral leases to be validated under s. 24GB

Requirement	Section 24GB
A non-exclusive agricultural lease or a non-exclusive pastoral lease is in force (i.e. a lease for agricultural or pastoral purposes which does not confer a right of exclusive possession) ⁹⁹	(1)(a)
The lease was granted on or before 23 December 1996	(1)(a)
The lease was valid, that is of full force and effect, including because it is a past act or intermediate period act	(1)(b)
The future act takes place after 23 December 1996	(1)(c)
The future act permits or requires the carrying on of the following while the lease is in force (including as renewed on one or more occasions): <ul style="list-style-type: none"> (a) a primary production activity, or (b) an activity which is incidental to a primary production activity, provided that the majority of the area covered by the lease is used for primary production activities. 	(1)(d)
The future act could have been validly done or authorised prior to 31 March 1998, if any native title in the area covered by the lease had not then existed	(1)(e)

However, there are exclusions:

4.7.3.3. Exclusions

Table 12. Exclusions

Exclusion	Section 24GB
Exclusion 1: Section 24GB does not validate a future act where the lease granted by 23 December 1996 was a non-exclusive pastoral lease covering an area greater than 5,000 hectares and the future act has the effect that the majority of the area covered by the lease is required or permitted to be used for purposes other than pastoral purposes	(4)(a)
Exclusion 2: Section 24GB does not validate a future act which converts a non-exclusive agricultural or pastoral lease granted by 23 December 1996 into a lease conferring a right of exclusive possession or a freehold estate, over any of the land or waters covered by the lease	(4)(b)

Where the future act involves farm tourism, it can be validated under s. 24GB(2) if the requirements in the following checklist are met:

⁹⁹ NT Act (Cth), ss. 247B and 248B.

Requirement	Section 24GB
A future act takes place after 23 December 1996	(2)(a)
The future act:	(2)(b)
(a) permits a farm tourism activity in the area covered by a valid non-exclusive agricultural lease or non-exclusive pastoral lease, while the lease is in force, but	
(b) does not permit the observing of activities or cultural works of Indigenous people	(3)
Exclusions	(4)(a)
1. Section 24GB does not validate a future act where the lease granted by 23 December 1996 was a non-exclusive pastoral lease covering an area greater than 5,000 ha and the future act has the effect that the majority of the area covered by the lease is required or permitted to be used for purposes other than pastoral purposes	
2. Section 24GB does not validate a future act which converts a non-exclusive agricultural or pastoral lease granted by 23 December 1996 into a lease conferring a right of exclusive possession or a freehold estate, over any of the land or waters covered by the lease	(4)(b)

4.7.3.4. Section 24GD: Acts permitting off-farm activities that are directly connected to primary production activities

If s. 24GB does not apply to an act, s. 24GD may. Section 24GD applies where the proposed future act will take place in an area adjoining or near the area covered by a freehold estate or agricultural/pastoral lease validly granted on or before 23 December 1996. Section 24GD does not validate the grant of a lease or any other act that confers a right of exclusive possession over land.

The proposed future act must permit or require the carrying on of grazing, or an activity consisting of, or relating to, gaining access to water or taking water.¹⁰⁰ The phrase “permits or requires” indicates that s. 24GD covers activities that require the granting of a permit, licence, or authority before they can be carried out.

For the proposed future act to be validated by s. 24GD, it must be directly connected to the carrying on of any primary production activity on the area which is covered by the freehold estate, agricultural lease or pastoral lease. It must also take place on adjoining or nearby land to the area covered by the freehold estate, agricultural lease or pastoral lease.

The proposed future act must not prevent native title holders in relation to land or waters in the area in which the activity will be carried on from having reasonable access to the area.

¹⁰⁰ NT Act (Cwlth), s. 24GD(1)(e).

4.7.3.5. Checklist

If the proposed future act meets the following requirements, then it is valid under s. 24GD:

Table 13. Requirements for a future act to be valid under s. 24GD

Requirement	Section 24GD
<p>Either of the following was granted on or before 23 December 1996:</p> <ul style="list-style-type: none"> • A freehold estate, or • An agricultural lease being a lease that permits the lessee to use the leased area solely or primarily for agricultural purposes including the planting and growing of trees, vines or vegetables, or contains a statement to the effect that it is solely or primarily an agricultural lease or that it is granted solely or primarily for agricultural purposes, or • A pastoral lease being a lease that was permits the lessee to use the leased area solely or primarily for maintaining or breeding sheep, cattle or other animals, or any other pastoral purpose, or contains a statement to the effect that it is solely or primarily for pastoral purposes 	(1)(a)
The lease was valid (including because it is a past act or intermediate period act)	(1)(b)
The future act takes place after 23 December 1996	(1)(c)
<p>The future act permits or requires the carrying on of grazing, or an activity consisting of, or relating to, gaining access to water or taking water that:</p> <ul style="list-style-type: none"> (a) takes place while the freehold estate exists or the lease is in force, and (b) is directly connected to the carrying on of any primary production activity on the area covered by the freehold estate, agricultural lease or pastoral lease, and (c) takes place in an area adjoining or near the area covered by the freehold estate, agricultural lease or pastoral lease, and (d) does not prevent native title holders in relation to land or waters in the area in which the activity will be carried on from having reasonable access to the area 	(1)(e)
<p>Exclusions</p> <p>1. Section 24GD does not validate a future act where it concerns the grant of a lease, or any act that confers a right of exclusive possession over land</p>	(1)(d)

Example—Subdivision G

The grant of a licence for grazing or agriculture

- An example of an act that can be validated under s. 24GB is the grant of a licence for grazing or agriculture
- Grazing is a primary production activity as it involves “maintaining, breeding or agisting animals” (s. 24GA)
- The exclusion in relation to exclusive possession would not apply as

a licence does not confer a right of exclusive possession and is not a freehold estate

4.7.3.6. Consequences of Section 24GB and Section 24GD

Non-extinguishment principle

If s. 24GB or s. 24GD applies to a future act, the act will be valid. The non-extinguishment principle will apply.¹⁰¹

Compensation

The native title holders affected are entitled to compensation for the future act’s effect on their native title rights and interests.¹⁰² The state is responsible for paying compensation where the act is attributable to the state.¹⁰³

Notification and opportunity to comment

Notification procedures apply under s. 24GB where the primary production activity involves forest operations, horticultural activity or aquaculture activity;¹⁰⁴ or where the primary production activity is an agricultural activity on a non-exclusive pastoral lease area.¹⁰⁵ The same notification procedures apply to any future act validated by ss. 24GD or 24GE.¹⁰⁶

The person proposing to do the act must give notice prior to the act being done.

Notice must be given to the representative Aboriginal or Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the land or waters covered by the non-exclusive agricultural lease or non-exclusive pastoral lease that the act, or acts of that class, will affect. An opportunity to comment on the act, or class of acts, must be given.¹⁰⁷

See 4.8 Step 7—Compliance checklist for details on the requirements for ‘Notification’ and ‘Opportunity to comment’.

¹⁰¹ NT Act (Cwlth), s. 24GB(6), s. 24GD(3).

¹⁰² NT Act (Cwlth), s. 24GB(7), s. 24GD(4).

¹⁰³ NT Act (Cwlth), s. 24GB(8), s. 24GD(5).

¹⁰⁴ NT Act (Cwlth), s. 24GB(9)(a).

¹⁰⁵ NT Act (Cwlth), s. 24GB(9)(b).

¹⁰⁶ NT Act (Cwlth), ss. 24GD(6) and 24GE(1)(f).

¹⁰⁷ What was intended by the ‘opportunity to comment’ was explored by the Full Court of the Federal Court in *Harris v. Great Barrier Reef Marine Park Authority* (2000) 178 ALR 159. In relation to s. 24HA(7), which is identical in terms to s. 24GB(9), the Full Court held that s. 24HA(7) imposed no obligation upon the decision-maker to comply with the rules of procedural fairness, including those relating to the giving of proper notice.

4.7.4. Subdivision H—management of water and airspace

Subdivision H deals with future acts that involve legislation relating to the management or regulation of surface and subterranean water, living aquatic resources or airspace.

This may be through the making, amending or repealing of legislation,¹⁰⁸ or through the granting of a new lease, licence, permit or authority.¹⁰⁹

In this context, “water” means water in all its forms, and management or regulation of water includes granting access to water, or taking water.

For non-legislative acts, a proposed future act that meets the following requirements will be valid under s. 24HA:

4.7.4.1. Checklist – Subdivision H

Table 14. Checklist for Subdivision H

Requirement	Section 24HA
A future act consists of the grant of a lease, licence, permit or authority under legislation	(2)
The legislation is valid	(2)(a)
The legislation relates to the management or regulation of surface and subterranean water, living aquatic resources or airspace	(2)(b)

Example of the application of Subdivision H

Granting a water access licence

The future act involves the granting of a licence involving access to water, which is included in the definition of management and regulation of water.

4.7.4.2. Consequences of Subdivision H

Non-extinguishment principle

The non-extinguishment principle applies to future acts which are validated by Subdivision H.

Compensation

The native title holders affected are entitled to compensation for the future act’s effect on their native title rights and interests. The state is responsible for paying compensation where the act is attributable to it.¹¹⁰

Notification and opportunity to comment

Prior to the act being done, the person proposing to do the act must give notice to any representative Aboriginal or Torres Strait Islander bodies, registered native title bodies corporate

¹⁰⁸ NT Act (Cwlth), s. 24HA(1).

¹⁰⁹ NT Act (Cwlth), s. 24HA(2).

¹¹⁰ NT Act (Cwlth), s. 24HA(6)(b).

and registered native title claimants in relation to the affected land or waters. Further, an opportunity to comment on the act, or class of acts, must be given.¹¹¹

See 4.8 Step 7—Compliance checklist for details on ‘Notification’ and ‘Opportunity to comment’ requirements.

4.7.5. Subdivision 1—renewals and extension etc.

Subdivision I validates future acts that are either pre-existing right-based acts (s. 24IB), or permissible renewals of leases, licences, permits or authorities (s. 24IC). Perry and Lloyd¹¹² explain that:

Subdivision I

‘Subdivision I was inserted by the *Native Title Amendment Act 1998* (Cwlth). In broad terms, it was intended to ensure that grants of interests and authorities in relation to land are valid, together with renewals of interests and authorities, where those acts occur after 23 December 1996 (when *Wik Peoples v. Queensland* (1996) 187 CLR 1 was delivered) but pursuant to a pre-existing right.’

4.7.5.1. Section 24IB—pre-existing right-based acts

Section 24IB applies to pre-existing right based acts, which were offered, arranged or committed to on or before 23 December 1996 and have not yet occurred. In these circumstances, s. 24IB allows these acts to occur and be valid in relation to native title.

4.7.5.2. Checklist—permissible lease etc. renewal

A future act is a ‘pre-existing rights based act’ and one that is validated if the following checklist of requirements is met:

Table 15. Requirements for a future act to be a ‘pre-existing one’ and validated

Requirement	Section 24IC(1)
The act is done in the exercise of a legally enforceable right created by any act done on or before 23 December 1996 that is valid (including because it is a past act or intermediate period act), or	(a)
The act is done in good faith in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith on or before 23 December 1996, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made	(b)

Where the future act involves the exercise of a Ministerial discretion which arises from the application of a legally enforceable right, it is not likely to satisfy s. 24IB.

¹¹¹ NT Act (Cwlth) s. 24HA(7)(b). What was intended by the ‘opportunity to comment’ was explored by the Full Court of the Federal Court in *Harris* (cited above). In relation to s. 24HA(7), the Court held that s. 24HA(7) imposed no obligation upon the decision - maker to comply with the rules of procedural fairness, including the giving of proper notice.

¹¹² Perry, M and Lloyd S (2003) *Australian Native Title Law* (Lawbook Co, Sydney) at 253.

In a key case, the Federal Court held:

Future acts

‘The relevant future acts, the re-grant of each mining lease, did not take place in the exercise of a legally enforceable right. They took place in the exercise of a statutory discretion exercised by the Minister under the 1978 Act. The fact that this statutory discretion was enlivened by an application made in exercise of a legally enforceable right, in my view, is insufficient to bring the facts within the description in s 24IB(a).’¹¹³

The Federal Court also found that s.24IB(b) did not apply as there was not the causal relationship between the ‘offer, commitment, arrangement or undertaking’ and the future act of the granting or the re-grant of the mining leases. Justice Jagot stated:

Finding

‘... In circumstances where the offer, commitment, arrangement or undertaking in cl 2(1) concerns only the making of an application, and the Minister had a discretion to deal with the application as the Minister thinks fit, I am not satisfied that the re-granting of the 2004/2006 leases took place in giving effect to or because of an offer, commitment, arrangement or undertaking in cl 2(1).’¹¹⁴

4.7.5.3. Section 24 IC: Permissible leases etc. renewals

Key points

- Obtain legal advice if you are intending to rely upon s. 24IC for successive renewals. It is not clear from the case law whether Subdivision I applies to successive renewals which rely on the original interest being granted on or before 23 December 1996
- This means if you rely on s. 24IC to validate a successive renewal, it may be invalid. You need to assess the level of risk which is acceptable with respect to relying on Subdivision I to validate successive renewals and obtain legal advice

Section 24IC (‘permissible lease etc. renewals’) applies to future acts which are the renewal, re-grant, re-making or extension of the term of a valid lease, licence, permit or authority.

Section 24IC(4) specifies features which do not prevent an act from being a renewed, re-granted, re-made or extended lease, licence, permit or authority; or two or more new leases, licences, permits or authorities being granted in place of a new, single lease, licence, permit or authority.

These features are:

- The new authority, or the new authorities together, cover a smaller area than the old authority
- The term of the new authority, or the term of any of the new authorities, is longer than the term of the old authority
- The new authority, or any of the new authorities, is a perpetual lease (other than a mining lease)
- If the new authority or any of the new authorities is a non-exclusive agricultural or pastoral lease, the new authority permits or requires the carrying on of an activity that the old authority did not permit or require that consists of:

¹¹³ *State of Western Australia v. Graham on behalf of the Ngadju People* [2016] FCAFC 47, Jagot J (Mansfield and Dowsett JJ agreeing) at [130].

¹¹⁴ *Ibid* at [136].

- a primary production activity, or
- another activity, on the area covered by the new authority or of any of the new authorities, that is associated with or incidental to a primary production activity (provided that, when the other activity is being carried on, the use of the majority of the area covered by the new authority, or the new authorities together, will be for primary production activities).

In the *Graham* case, the Federal Court noted:

Effect of s. 24IC

‘Insofar as s 24IC is concerned, there is no doubt that the re-grant of the ... leases falls within s 24IC(1)(a). The fact that the provision is dealing with renewals, re- grants and extensions of the term of interests is relevant to its construction. This is because s 24IC(1)(c) requires a comparison between the rights created by the original interest and those created by the renewed, re-granted or extended interest. Section 24IC(1)(b)(i) is also satisfied. There was no dispute that the original mining leases (be they the initial mining leases or the mining leases as renewed...) were validly granted on or before 23 December 1996.’¹¹⁵

Justice Jagot then considered the excluding provisions of s. 24IC(1)(c) and found they did not apply. Her Honour held the re-grant of the leases were valid future acts.

Subdivision I will apply where two or more leases, licences, permits or authorities are granted in the place of a single one. In those cases, each of the two or more grants will be taken to be a renewal of the single lease, licence, permit or authority.

Subdivision I will also apply in situations where a single lease, licence, permit or authority is granted in place of two or more leases, licences, permits or authorities.

¹¹⁵ Jagot J (Mansfield and Dowsett JJ agreeing) at [130].

4.7.5.4. Checklist—permissible lease etc. renewal

A renewal of an 'original lease etc.' will be a future act that is a 'permissible lease etc. renewal' and will be validated by s. 24IC if the following requirements are met:

Table 16. Requirements for a renewal of an 'original lease' to be a future act that is a 'permissible lease etc. renewal' validated by s. 24IC

Requirement	Section 24IC(1)
<p>The act is a</p> <ul style="list-style-type: none"> (i) renewal, (ii) re-grant or re-making, or (iii) extension of the term, <p>of a lease, licence, permit or authority (original lease etc.) that is valid (including because it is a past act or intermediate period act); and</p>	(a)
<p>Any of the following apply -</p> <ul style="list-style-type: none"> (i) the original lease etc. was granted on or before 23 December 1996; or (ii) the grant of the original lease etc. was a permissible lease etc. renewal or a "pre-existing right-based act"; or (iii) the original lease etc. was created by an act under s. 24GB, GD, GE or HA (primary production or management or regulation of water and airspace); and 	(b)
<p>The permit does not:</p> <ul style="list-style-type: none"> • confer a right of exclusive possession over any of the land covered by the original lease etc.; or • create a larger proprietary interest in the land than was created by the original lease etc.; or • create a proprietary interest over any of the land covered by the original lease etc., where the original lease etc. created only a non-proprietary interest. 	(c)
<p>If the original lease etc. contains, or is subject to, a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders – the renewed, re-granted, re-made or extended lease, licence, permit or authority contains, or is subject to, the same reservation or condition.</p>	(d)
<p>If the original lease etc. did not permit mining – the renewed, re-granted, re-made or extended lease, licence, permit or authority does not permit mining.</p>	(e)

4.7.5.5. Examples of the application of Subdivision I

Example 1: Renewal of an original domestic waterfront licence granted on or before 23 December 1996

If Subdivision I applies the renewed term of the domestic waterfront licence will be valid. Subdivision P, dealing with the right to negotiate, will not apply. No notification would be required where a domestic waterfront licence was renewed under Subdivision I (as it does not confer a right of exclusive possession).

Example 2: Renewal of an original permit for mooring that was an act covered by s. 24HA

If Subdivision I applies (see Checklist) the renewed term of the permit will be valid. Again, you do not need to give a notice when a permit was renewed under Subdivision I.

4.7.5.6. Consequences of Subdivision I

Right to negotiate

If Subdivision I applies to a future act, the act will be valid subject to Subdivision P. Subdivision P deals with the right to negotiate and applies where the renewal, re-grant, re-making or extension of the term of the lease or other permit involves a right to mine.¹¹⁶

Key point

Native title managers will not need to consider the right to negotiate, as there will be not be an interest or right granted by Crown land managers which involves an associated right to mine.

Non-extinguishment principle

The non-extinguishment principle will apply to acts validated by Subdivision I, unless the future act consists of the grant of a freehold estate, or the conferral of a right of exclusive possession. In these situations, notification procedures will apply prior to the doing of the act and the act will extinguish any native title in relation to the land or waters.

Compensation

The native title holders affected are entitled to compensation for the effect of the future act on their rights and interests. The state is responsible for paying compensation where the act is attributable to the state.¹¹⁷

Notification and opportunity to comment

Notification procedures will apply where the act consists of the grant of a freehold estate or the conferral of a right of exclusive possession over land or water. Prior to the act being done, the person proposing to do the act must give notice to any representative Aboriginal or Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the land or waters that will be affected by the act, or acts of that class. Further, an opportunity to comment on the act, or class of acts, must be given.¹¹⁸

¹¹⁶ NT Act (Cth), s. 26(1A).

¹¹⁷ NT Act (Cth), s. 24ID(2)(b).

¹¹⁸ NT Act (Cth), s. 24ID(3).

See 4.8 Step 7—Compliance checklist for details on the requirements for ‘Notification’ and the ‘Opportunity to comment’.

Other procedural rights

The procedural rights in s. 24MD(6B) will also apply where the act is the grant of a permissible lease, licence, permit or authority renewal of a non-exclusive agricultural lease or a non-exclusive pastoral lease in circumstances where the term of the new authority is longer than the term of the old authority, or where the new authority is a perpetual lease.¹¹⁹

In relation to the state, these procedural rights are:

- The state must notify any registered native title claimant, any registered native title body corporate and any representative Aboriginal/Torres Strait islanders in relation to the land or waters that the act is to be done
- The persons notified have the right to object within 2 months after the notification, to the doing of the act so far as it affects their registered native title rights and interests
- The state must consult any claimants and bodies corporate who object about ways of minimising the act’s impact on registered native title rights and interests and, if relevant, any access to the land and waters or the way in which anything authorised by the act might be done
- If the claimant or body corporate objects and so requests, the state must ensure that the objection is heard by an independent person or body, and
- If the independent person or body hearing the objection makes a determination upholding the objection or that contains certain conditions about the doing of the act that relate to registered native title rights and interests, the determination must be complied with unless the state is consulted, the consultation is taken into account and it is in the interests of the state not to comply with the determination.¹²⁰

¹¹⁹ NT Act (Cth), s. 24ID(4).

¹²⁰ NT Act (Cth), s. 24MD(6B).

4.7.6. Subdivision JA – public housing

Subdivision JA concerns the validation of certain acts that relate to public housing and other facilities for the benefit of Aboriginal peoples or Torres Strait Islanders. It is unlikely that you will have to consider whether a proposed future act can be validated under this subdivision.

A future act is validated under s. 24JAA if the following checklist of requirements is met:

4.7.6.1. Checklist—public housing

Requirement	Section 24JAA
The future act relates to any extent to an onshore place	(1)(a)
It relates to an area: <ul style="list-style-type: none"> • over which a freehold exists or a lease is in force, or that is vested in any person, where the grant of the freehold estate or lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of Aboriginal peoples or Torres Strait Islanders; or • that is held expressly for the benefit of, or held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders 	(1)(b)
It permits or requires or consists of the construction, operation, use, maintenance or repair by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities (the action body), of: <ul style="list-style-type: none"> (a) public housing provided for Aboriginal people or Torres Strait Islanders living in, or in the vicinity of, the area; (b) any of the following that benefit Aboriginal people or Torres Strait Islanders: (c) public education facilities; public health facilities; police facilities; emergency facilities; (d) staff housing provided in connection with housing or facilities mentioned a) or b) above; (e) any of the following provided in connection with housing or facilities covered by (a), (b) or (c) above - things listed in s. 24KA(2) and sewerage treatment facilities. 	(1)(c)
If the act permits or requires the construction, operation, use, maintenance or repair of the matters in (a)-(d) by the action body - it is done within the period of 10 years beginning on the day on which the Native Title Amendment Act (No. 1) 2010 commences; or	(1)(d)
If the act consists of the construction, operation, use, maintenance or repair of the matters in (a)-(d) by the action body - it is commenced within the period of 10 years beginning on the day on which the Native Title Amendment Act (No. 1) 2010 commences.	
A law of the state makes provision in relation to the preservation or protection of areas, or sites that may be in the area in which the act is done and of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions.*	(1)(e)
The future act relates to any extent to an onshore place.	(1)(a)

* This criterion is satisfied in NSW by the *National Parks and Wildlife Act 1974* (NSW) (“NPW Act”), which aims to protect places, objects and features of significance to Aboriginal people in NSW.

4.7.6.2. Consequences of Subdivision JA

Non-extinguishment principle

The non-extinguishment principle will apply to acts validated by Subdivision JA.

Compensation

The native title holders affected are entitled to compensation for the effect of the future act on their rights and interests, if they would be entitled to compensation under s. 17(2) of the NT Act (Cwlth). The state is responsible for paying compensation where the act is attributable to the state.¹²¹

Notification and opportunity to comment

Notification procedures will apply. Prior to the act being done, the person proposing to do the act must give notice to any representative Aboriginal or Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the area that will be affected by the act, or acts of that class.

Further, an opportunity to comment on the act, or class of acts, must be given.¹²²

See 4.8 Step 7—Compliance checklist for details on the requirements for “Notification” and the “Opportunity to comment”.

Consultation

Any registered native title claimant or native title body corporate may make a written request to be consulted about the doing of the act which affects their registered native title rights and interests.

If such a request is made within 2 months of notification, the relevant authority must consult with the claimant/body corporate about ways of minimising the act’s impact on registered native title rights and interests in relation to the area and, if relevant, any access to the area or the way in which anything authorised by the act might be done.¹²³

Report

The relevant authority must provide the Commonwealth Minister with a written report on the things done under the consultation requirements noted above.

¹²¹ NT Act (Cwlth) s 24JAA(8).

¹²² NT Act (Cwlth) s 24JAA(10).

¹²³ NT Act (Cwlth), s. 24JAA(13)-(15).

4.7.7. Subdivision J—reservations, lease etc.

Key point

As a native title manager you will rely on Subdivision J the most to validate acts that are future acts.

Subdivision J of the NT Act (Cwlth) validates:

- acts relating to areas that are subject to a reservation, proclamation, dedication, condition, permission or authority (**reservation or dedication**); and
- acts in relation to certain leases granted to statutory authorities.

4.7.7.1. Areas subject to reservation

Validity of future acts (**later act**) under Subdivision J that relate to areas that are subject to a reservation depends upon the following conditions being met:

4.7.7.2. Checklist – subject to reservation

Table 17. Requirements for validity of future acts (later act) under Subdivision J that relate to areas that are subject to a reservation

Requirement	Section 24JA
There is a valid earlier act that took place before the later act and on or before 23 December 1996	(1)(a)
The earlier act was valid (including because of Div. 2 or 2A)	(1)(b)
The earlier act was done by the Crown (the Commonwealth or State), or consisted of the making, amendment or repeal of legislation	(1)(c)
The earlier act contained, made or conferred a reservation, proclamation, dedication, condition, permission or authority (the reservation) under which the whole or part of any land or waters was to be used for a particular purpose	(1)(d)
The later act is done in good faith under: <ul style="list-style-type: none"> (i) under or in accordance with the reservation, or (ii) in the area covered by the reservation, so long as the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had 	(1)(e)

4.7.7.3. Certified leases granted to the statutory authorities

The validity of future acts (**later act**) under Subdivision J that are acts in relation to certain leases granted to statutory authorities depends upon the following conditions:

4.7.7.4. Checklist—certified lease

Table 18. Certified lease checklist

Requirement	Section 24JA
An act (the earlier act) took place before the later act and on or before 23 December 1996	(2)(a)
The earlier act was valid and was done by the Crown (the Commonwealth, a State or a Territory)	(2)(b) and (c)
The earlier act consisted of the grant of a lease to a statutory authority (of the Commonwealth, State or Territory) where: <ul style="list-style-type: none"> Under the lease, the whole or part of any land or waters covered by the lease was to be used for a particular purpose; or There is written evidence that the whole or part of any land or waters covered by the lease was to be used for a particular purpose 	(2)(d)
The later act is done in good faith and consists of the use of the area by the statutory authority or any person of the area for the particular purpose	(2)(e)

4.7.7.5. Examples of the application of Subdivision J

Example 1: Construction of facilities (such as play equipment, water fountains, flower gardens and footpaths) on Crown reserves.

The construction of various structures such as play equipment, fountains and footpaths may affect native title. A flower garden, unlike the other structures, is not a fixture, but its construction may prevent other uses of land. Assuming that the native title rights that may exist in the area include the non-exclusive right to hunt, fish and gather traditional resources, access the area, conduct ceremonies and protect significant sites, the preparation of the ground for a flower garden could conceivably affect such rights and as such may be a 'future act'.

Assuming the installation of play equipment is consistent with the reserve purpose (such as public recreation) including the purpose for the pre-1996 reservation, the 'good faith' requirement under s. 24JA(1)(e)(i) is met. Assuming the other elements of s. 24JA(1) are met, for example the pre- 1996 reservation was validly created by the State for a particular purpose, these acts will be valid future acts under Subdivision J.

Example 2: Construction of facilities (such as kiosks, changing sheds or ablutions blocks) on Crown reserves which are consistent with the reserve purpose

The construction of buildings such as kiosks, changing sheds or ablution blocks may be validated under Subdivision J if the construction and operation of such facilities may affect native title.

Assuming the construction of a kiosk is consistent with the reserve purpose (such as public recreation), the good faith requirement under s. 24JA (1)(c)(1) is met.

4.7.7.6. Consequences of Subdivision J

The procedural rights and other consequences attaching to these acts pursuant to the NT Act (Cwlth) will depend upon whether or not the acts are 'public works'.

Public works are defined in s. 253 of the NT Act (Cwlth) as follows

‘Public work means:

- a) any of the following that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:
 - i. a building, or other structure (including a memorial), that is a fixture; or
 - ii. a road, railway or bridge; or
 - iii. where the expression is used in or for the purposes of Division 2 or 2A of Part 2—a stock-route; or
 - iv. a well, or bore, for obtaining water; or
 - v. any major earthworks; or
- b) a building that is constructed with the authority of the Crown, other than on a lease.

Note: In addition, section 251D deals with land or waters relating to public works.’

The term ‘major earthworks’ is defined in s 253 NT Act (Cth) as, relevantly, ‘earthworks ... whose construction causes major disturbance to the land...’. In the *Banjima People* case, the Federal Court considered whether gravel pits, which varied in size from between one hectare and five hectares and were dug by means of a bulldozer, were major earthworks. Justice Barker concluded that where the pits did not constitute a major disturbance to the land and, this did not constitute major earthworks,¹²⁴ they were not public works.

4.7.7.7. Consequences of Subdivision J

Non-extinguishment principle

If Subdivision J applies to the act, the act will be valid and the non-extinguishment principle will apply unless the act is the construction or establishment of a public work, in which case native title will be extinguished.

Compensation

Compensation is payable in accordance with Division 5 NT Act (Cwlth) by the Crown in the right of the state if the act is attributable to the state.

Procedural rights

The procedural rights under Subdivision J, if applicable, are to notify any representative body, registered native title body corporate and registered native title claimant and provide them with an opportunity to comment.

However the notice is only required if the act consists of the construction or establishment of a public work, or the creation of a plan for the management of a National or State park intended to preserve the natural environment of an area.

See also 4.8 Step 7—Compliance checklist for details on the requirements for ‘Notification’ and ‘Opportunity to comment’.

Relevantly for native title managers, acts validated under Subdivision J that are not public works do not require notification and do not confer other procedural rights.¹²⁵

¹²⁴ *Banjima People v. State of Western Australia* (No 2) [2013] FCA 868, Barker J at [1467-8].

¹²⁵ If the act consists of the creation of a plan for the management of a national, state or territory park intended to preserve the natural environment of an area then the notification and opportunity to comment procedural rights apply.

4.7.8. Subdivision K—facilities for services to the public

Subdivision K validates future acts that permit or require the construction, operation, use, maintenance or repair of facilities for services to the public. Accordingly, subdivision K may be relevant to acts undertaken in the course of managing reserves. Acts by subdivision K can be undertaken by non-government bodies, since the definition in s.24KA(1)(i) extends to ‘any person’, as long as the facility is ‘for the general public’.

However, Subdivision K does not apply to a future act that is the compulsory acquisition of the whole or part of any native title rights and interests.¹²⁶

Section 24KA(1)(b) defines two categories of future acts that can be validated by this Subdivision:

- Section 24KA(1)(b)(i) comprises acts which permit or require the construction, operation, use, maintenance or repair by any person of facilities listed in s. 24KA(2) which are to be operated for the general public.
- Section 24KA(1)(b)(ii) comprises future acts consisting of construction, operation, use, maintenance or repair, by the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities, of any of the things listed in s. 24KA(2) that is to be operated for the general public.

The list of future acts envisaged to be validated by this Subdivision is set out in s. 24KA(2):

- a) a road, railway, bridge or other transport facility (other than an airport or port)
- b) a jetty or wharf
- c) a navigation marker or other navigational facility
- d) an electricity transmission or distribution facility
- e) lighting of streets or other public places
- f) a gas transmission or distribution facility
- g) a well, or a bore, for obtaining water
- h) a pipeline or other water supply or reticulation facility
- i) a drainage facility, or a levee or other device for management of water flows
- j) an irrigation channel or other irrigation facility
- k) a sewerage facility, other than a treatment facility
- l) a cable, antenna, tower or other communication facility
 - a. an automatic weather station
- m) other thing that is similar to any one or more of the things mentioned in the paragraphs above

Acts under Subdivision K must relate to an onshore place.¹²⁷ “Onshore place” is defined at s. 253 of the NT Act (Cwlth) to mean land or waters within the limits of a state or territory to which the act extends. This includes the:

- mainland; and
- intertidal zone (including internal bodies of waters such as rivers, canals and heavily enclosed bays).

The area seaward of the low water mark (excluding islands) is not included as it is an offshore area.

The future act will be invalid if it prevents the native title holders of land or waters from having reasonable access to land and waters in the vicinity.¹²⁸ There are two exceptions:

¹²⁶ NT Act (Cth), s. 24KA(1A).

¹²⁷ NT Act (Cth), s. 24KA(1)(a).

- during construction
- health and safety concerns.

You will not be able to rely on Subdivision K if the proposed act requires land to be closed to the public generally apart from, for example, health and safety concerns. The criterion that there must be a provision for preserving significant areas or sites to Aboriginal or Torres Strait Islanders, is satisfied by the NPW Act, which includes a regime for protecting places, objects and features of significance to Aboriginal people in this state.

Use this checklist of requirements to ensure that a future act may be validated under Subdivision K.

4.7.8.1. Checklist—Subdivision K

Table 19. Checklist for Subdivision K

Requirement for facilities for services to the public	Section 24KA
The future act relates (to any extent) to an onshore place	(1)(a)
<p>The facility is any of the following:</p> <ul style="list-style-type: none"> (a) a road, railway, bridge, or other transport facility (other than an airport or port) (b) a jetty or wharf (c) a navigation marker or other navigational facility (d) an electricity transmission or distribution facility (e) lighting of streets or other public places (f) a gas transmission or distribution facility (g) a well, or a bore, for obtaining water (h) a pipeline or other water supply or reticulation facility (i) a drainage facility, or a levee or other device for management of water flows (j) an irrigation channel or other irrigation facility (k) a sewerage facility, other than a treatment facility (l) a cable, antenna, tower or other communication facility <ul style="list-style-type: none"> a. an automatic weather station (m) any other thing that is similar to any one or more of the things mentioned above 	(2)
<p>The future act either:</p> <ul style="list-style-type: none"> (i.) Permits or requires the construction, operation, use, maintenance or repair, by or on behalf of any person, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public, or (ii.) Consists of the construction, operation, use, maintenance or repair, by or on behalf of the Crown or a local government body or other statutory authority of the Crown, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public 	(1)(b)

¹²⁸ NT Act (Cth), s. 24KA(1)(c).

Requirement for facilities for services to the public	Section 24KA
<p>The future act does not prevent native title holders in relation to the land or waters on which the thing is located or to be located from having reasonable access to the land or waters in the vicinity, except:</p> <ul style="list-style-type: none"> (i) while the thing is being constructed (ii) for reasons for health and safety 	(1)(c)
<p>If there are any areas or sites in the future act area of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions, a law of the State is made in relation to the area or sites preservation or protection</p>	(1)(d)
<p>The future act does not relate to the compulsory acquisition of the whole or part of any native title rights and interests</p>	(1A)

4.7.8.2. Examples of the application of Subdivision K

Example 1: Extension of an existing training wall

A training wall refers to a wall built along the bank of a river or estuary, parallel to the direction of flow, to direct and confine the flow of water. A training wall can be used to create a deeper and more stable channel, thereby reducing impact on nearby land. Trained entrances can also provide for better water quality and navigation. For these reasons, the act of extending a training wall may be a valid act under s. 24KA(2)(i).

If the training wall does not include any area landward of the mean low water mark, it would not fall within Subdivision K as it would not be an “onshore place”.

Section 24KA(2)(i) provides that ‘a drainage facility, or a levee or other device for management of water flows’¹²⁹ may be a valid future act under this Subdivision. A training wall could be described as a device for the management of water flow.

In the event that construction or extension of an existing training wall does not fall within s. 24KA(2)(i), it would fall within s. 24KA(2)(m). Section 24KA(2)(m) validates future acts which are similar to any one or more of the things mentioned in s. 24KA(2). Training walls are similar to the structures validated by s. 24KA(2)(i).

The extension of a training wall may not restrict access to land and waters to native title holders but this ultimately depends upon the factual scenario concerned. The construction of a training wall may reduce the impact on nearby land. For these reasons, it is unlikely that an extension of such a wall would reduce the access that native title holders have to the subject land and waters.

Example 2: Construction and use of a telecommunications tower

The construction and use of a telecommunications tower is a provision of a service to the public and is a future act that would fall within Subdivision K as it concerns the construction or use of a “cable, antenna, tower or other communication facility”.

The following conditions would need to apply:

- The act relates to an onshore place, and
- Access to the vicinity not being prevented by the use of the tower, except during construction and where such access would cause health and safety concerns (such access to the area would need to form part of the licence conditions).

¹²⁹ NT Act (Cwlth), s. 24KA(2)(i).

4.7.8.3. Consequences of Subdivision K

Non-extinguishment principle

If Subdivision K applies to the act, the act will be valid and the non-extinguishment principle will apply.

Compensation

The native title holders affected are entitled to compensation for the effect of the future act on their rights and interests, if they would be entitled to compensation under s. 17(2) of the NT Act (Cwlth). The state is responsible for paying compensation where the act is attributable to the State.

Other procedural rights

Native title holders and registered native title claimants have the same procedural rights in relation to the land or waters in the area affected by the future act as if they instead held:

- a non-exclusive agricultural lease (s. 247B) or a non-exclusive pastoral lease (s. 248B), or
- ordinary title to the land or the land adjoining, or surrounding any waters concerned.¹³⁰

An example of a procedural right would be where native title exists or potentially exists over Crown land and the Minister administering the CLM Act wished to grant an easement over that land to an electricity provider.

In such a case, the proposed easement requires the consent of the land holder (s. 5.48 of the CLM Act). The equivalence provisions in s. 24KA(7) mean that the native title holder/claimant would have to consent to the creation of the easement.

If, in the exercise of those procedural rights, the native title holders are entitled to have matters considered, those matters include their native title rights and interests.¹³¹

Where there is no registered native title body corporate in the area concerned, ss. 24KA(8) and (9) provide that any procedural steps may be addressed to a representative Aboriginal or Torres Islander body in that area or to a registered native title claimant for that area.

4.7.9. Subdivision L—low-impact future acts

Subdivision L deals with 'low-impact future acts'. Low-impact future acts are acts that have a **minimal effect** on native title, such as beekeeping or collecting firewood.¹³² They will typically be underpinned by a permit such as a licence.

Low-impact future acts are defined by the exclusions in s. 24LA(1)(b), such as granting a freehold, land clearing or building fixed structures.

Subdivision L validates low-impact future acts without the requirement to pay compensation or undertake procedural steps. Such acts do not extinguish native title.¹³³

A Subdivision L act is time-limited.¹³⁴ That is, once a positive native title determination has been made, any term remaining under the permit (e.g. a beekeeping licence) will cease to comply with s. 24LA and will thus no longer be valid to the extent it affects native title¹³⁵ (assuming no other subdivision of the future acts regime is relevant).

¹³⁰ NT Act (Cwlth), s. 24KA(7).

¹³¹ NT Act (Cwlth), s. 24KA(7A).

¹³² Native Title Amendment Bill 1997, Explanatory Memorandum, para 14.3.

¹³³ NT Act (Cwlth), s. 24LA(3) and (4).

¹³⁴ NT Act (Cwlth), s. 24LA(1).

¹³⁵ NT Act (Cwlth), s. 24OA.

4.7.9.1. Checklist—Subdivision L

An act will be validated by Subdivision L if the following requirements are satisfied:

Table 20. Checklist for Subdivision L

Requirement	Section 24LA
The act takes place before, and does not continue after, an approved determination of native title is made in relation to the land or waters, if the determination is that native title exists	(1)(a)
<p>The act does not consist of, authorise or otherwise involve:</p> <ul style="list-style-type: none"> (i.) the grant of a freehold estate in any of the land or waters (ii.) the grant of a lease over any of the land or waters (iii.) conferral of a right of exclusive possession over any of the land or waters (iv.) the excavation or clearing of any of the land or waters <ul style="list-style-type: none"> (iv.) mining (other than fossicking by using hand-held implements) (v.) the construction or placing on the land, or in the waters, of any building, structure, or other thing (other than fencing or a gate), that is a fixture (vii.) the disposal or storing, on the land or in the waters, of any garbage or any poisonous, toxic or hazardous substance 	(1)(b)
<p>However, the excavation or clearing of any of the land or waters is permitted where it involves:</p> <ul style="list-style-type: none"> (a) excavation or clearing that is reasonably necessary for the protection of public health or public safety, or (b) tree lopping, clearing of noxious or introduced animal or plant species, foreshore reclamation, regeneration or environmental assessment or protection activities 	(2)

4.7.9.2. Consequences of Subdivision L

Non-extinguishment principle

The non-extinguishment principle applies.

Compensation

Compensation does not arise.

Procedural requirements

There are no procedural requirements.

4.7.10. Subdivision M—acts passing the freehold test

Subdivision M validates acts that pass the ‘freehold test’.

4.7.10.1. Legislative acts

Section 24MA applies to legislative future acts such as the making, amendment or repeal of non-legislative acts. Therefore it is unlikely to be relevant to native title managers.

4.7.10.2. Non-legislative acts

Section 24MB(1) provides that Subdivision M will apply to a non-legislative future act to the extent that it affects native title if ‘the act could be done in relation to the land concerned if the native title holders instead held ordinary title to it.’¹³⁶

‘Ordinary title’ essentially refers an estate in fee simple (that is, ‘freehold’).¹³⁷

Section 24MB(1) also requires that a law of the State makes provision in relation to the preservation or protection of areas or sites that may be in the area to which the act relates and of particular significance to Aboriginal Peoples or Torres Strait Islanders: s. 24MB(1)(c). This criterion is satisfied by the NPW Act.

In short, where the ‘freehold test’ is satisfied, the future act is valid.¹³⁸

4.7.10.3. Checklist—Subdivision M—the ‘freehold test’

Subdivision M will validate an act if, relevantly, the following requirements are satisfied:

Table 21. Checklist for Subdivision M

Requirement	Section 24MB
It is an act other than the making, amendment or repeal of legislation	(1)(a)
Either: <ul style="list-style-type: none"> (i.) the act could be done in relation to the land concerned if the native title holders concerned instead held ordinary title to it, or (ii.) the act could be done in relation to the waters concerned if the native title holders concerned held ordinary title to the land adjoining, or surrounding, the waters 	(1)(b)
A law of the Commonwealth, a State or a Territory makes provision in relation to the preservation or protection of areas, or sites, that may be: <ul style="list-style-type: none"> (i.) in the area to which the act relates, and (ii.) of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions. This requirement will always be satisfied in NSW by the NPW Act 	(1)(c)
The subdivision only applies to a future act to the extent that it relates to an onshore place	s.24MC

¹³⁶ NT Act (Cth), s. 24MB(1)(b)(i).

¹³⁷ NT Act (Cth), s. 253.

¹³⁸ This is subject to Subdivision P, which deals with the right to negotiate (which will not be applicable to local councils).

4.7.10.4. Example—grant of a waterfront licence

An example of a future act covered by this section is the grant of a waterfront licence allowing an adjoining owner to build a private jetty. This act is validated where the act could be done in relation to the waters concerned if the native title holders held ordinary title to their land adjoining or surrounding these waters (s. 24MB(1) (b) (ii)).

4.7.10.5. Consequences of Subdivision M

Non-extinguishment principle

Under Subdivision M the non-extinguishment principle applies unless the act is the compulsory acquisition of land or the surrender of native title following negotiations in relation to the acquisition of land.¹³⁹

Compensation—compulsory acquisition

Under s. 24MD(2)(e), compensation is payable to native title holders, on just terms, for a compulsory acquisition.

Where there is a surrender of native title following negotiations in relation to the proposed compulsory acquisition of land, s. 24MD(2A) provides for compensation by agreement between the parties.

Compensation—acts other than compulsory acquisition

Under s. 24MD(3)(b), compensation is payable to native title holders if the similar compensable interest test is satisfied in relation to the act. The similar compensable interest test, prescribed by s. 240 of the NT Act (Cth), is satisfied where:

- the native title relates to an onshore place, and
- the compensation would (apart from the NT Act (Cwlth)) be payable under a law for the act on the assumption that the native title holders instead held ordinary title to any land or waters concerned (or any adjoining area).

If there is no provision under the relevant law for the compensation of any native title holders for the act, they are entitled to compensation in accordance with Div. 5 of the NT Act (Cwlth).

The state is ordinarily liable where the act is attributable to the State. However, where a law such as the CLM Act provides that compensation liability rests with other persons such as local councils who undertake the future act, those persons will be liable for that compensation.¹⁴⁰

Under s. 24MD(2)(d), the claimant may request compensation in the form other than money, and the compensator must consider the request and negotiate in good faith in relation to it.

Procedural rights

If (relevantly) the right to negotiate process does not apply - the same procedural rights must be afforded to the native title holders as would apply if they instead held ordinary (that is, freehold) title to the land or waters: s. 24MD(6A).

There are other procedural rights which apply if (relevantly) the act concerns the compulsory acquisition of land. These are set out in s. 24MD(6B).¹⁴¹ For local councils seeking to compulsorily acquire land, s. 187 of the LGA requires compliance with the *Land Acquisition (Just Terms Compensation) Act 1991* (LA(JTC) Act), which regulates the compulsory acquisition of land in NSW.

¹³⁹ These acts will extinguish native title rights and interests if the requirements of s. 24MD(2) or s. 24MD(2A) are satisfied.

¹⁴⁰ NT Act (Cth), s. 24MD(4)(b)(i).

¹⁴¹ The procedural requirements of s. 24MD(6B) are set out in Subdivision I.

Section 72(3) of the LA(JTC) Act and s. 103 of the NT Act (NSW) 1994 together confirm that notice to a native title holder should be the same as for an ordinary title holder. For compulsory acquisitions, this will be a Proposed Acquisition Notice ('PAN) under s. 12 of the LA(JTC) Act. A PAN must be provided to any registered native title claimant in the area concerned (s. 12(5)).

4.7.11. Subdivision N—acts affecting offshore places

Key point

This subdivision will rarely apply to acts considered by Crown land managers

Subdivision N deals with future acts which relate to offshore places and are not covered by an earlier provision of the future act regime.

An offshore place refers to any land or waters to which the NT Act (Cwlth) applies which lie outside the territorial limits of NSW. The territorial limit of the State is at the mean low-water mark.

If an act relates to both an on-shore and an offshore place, Subdivision N will only apply to the future act to the extent it relates to an offshore place. The future act to the extent it relates to an onshore place will need to be validated under some other subdivision of the future act regime.

4.7.11.1. Consequences of Subdivision N

Non-extinguishment principle

Aside from the compulsory acquisition of native title rights and interests, the non-extinguishment principle applies.

Compensation

The native title holders affected are entitled to compensation for the future act's effect on native title rights and interests.

Procedural rights

Subdivision N confers the same procedural rights on the native title holders and registered native title claimants as if they instead held any corresponding non-native title rights and interests over the offshore place.¹⁴²

Sections 24NA(9) and (10) facilitate compliance with procedural requirements in cases where there has been no approved determination of native title.

4.8. Step 7—Compliance checklist

Your native title manager advice should outline the procedural steps that need to be taken when relying upon a particular Subdivision to validate the future act.

4.8.1. What procedural steps need to be taken?

There are two steps that *may* need to be taken prior to the future act taking place:

1. notification
2. opportunity to comment

These procedures are required only in the circumstances specified in the relevant section, so you need to confirm whether they are required.

¹⁴² NT Act (Cwlth), s. 24NA(8).

1. Notification

The Native Title (Notices) Determination 2011 (No. 1) (Cth) prescribes how notification must occur.

Clause 8(1) requires that notification must be given by post, unless the person to be notified agrees otherwise, in which case notice may be given by a different means.¹⁴³

Clause 8(3) states that such notice (except in the case of s. 24JAA (public housing etc.) must include:

- a) A clear description of the area to which the act or class of acts mentioned in the notice relates
- b) A description of the general nature of the act or class of acts
- c) A statement that the person to be notified must be given an opportunity to comment on the act or class of acts within a period mentioned in the notice
- d) The name and postal address of the person to whom comment must be given.¹⁴⁴

Clause 4 of the Determination defines 'clear description' for an area to mean a description of the area that contains enough information, whether by map drawn to scale or description by other means, to work out:

- a) The general location of the area, and
- b) The approximate boundaries of the area.

Notice Template

Where notice is required for a specific future act, or class of future acts, the template at Appendix 3—Notice template indicates the minimum level of information to be provided. Native Title managers should consider whether it is appropriate to provide further information.

This information may be provided in a single notification that names all the registered native title claimants, or by individual notifications to each registered native title claimant.

2. Opportunity to comment

The opportunity to comment only provides an entitlement to give an opinion as to whether the act should not be done at all, or only on conditions, and provide the decision-maker with information which he/she should consider in determining whether to authorise the proposed act.

The Full Federal Court has stated that the opportunity to comment under s. 24JB(6) in relation to public works is a right to proffer information and argument to the decision-maker, who can then make such use of the information or argument as she or he considers appropriate.¹⁴⁵

The following table identifies which procedures are generally required by specific subdivisions:

¹⁴³ Sub-cl. 8(1) and (2) of the *Native Title (Notices) Determination 2011* (No. 1).

¹⁴⁴ The notice for s. 24JAA (public housing etc.) is located in cl. 8(4) of the *Native Title (Notices) Determination 2011* (No. 1).

¹⁴⁵ *Harris v. Great Barrier Reef Marine Park Authority* [2000] FCA 603.

Table 22. Procedures generally required

Subdivision	Notification	Opportunity to comment	Consultation	Reporting	Other
B-E - ILUAs					
F – FA protection					
G - Primary production	Yes	Yes			
H - Water, living aquatic resources and airspace	Yes	Yes			
I - Pre-existing acts or renewals	Yes	Yes			Yes
JA - Public housing	Yes	Yes	Yes	Yes	
J - Reservations	Yes	Yes			
K - Facilities for services to the public	Yes	Yes			Yes
L - Low-impact activities					
M - Acts that pass the freehold test	Yes	Yes			Yes
N - Acts affecting offshore places	Yes	Yes			Yes

Note

The procedural requirements as marked only arise in the circumstances specified in the relevant section. You need to check the circumstances in which it arises.

4.8.2. What if none of the subdivisions appear to apply?

Sometimes none of the subdivisions in the future acts regime apply. In that case, you can potentially resort to an ILUA or s. 24FA protection. If these options are not available, you **cannot** validate the proposed act.

4.8.2.1. When to consider an ILUA or s. 24FA protection

Both mechanisms allow you to do future acts that you cannot otherwise do under the future acts regime. Which one should you use?

Table 23. When to consider an ILUA or s. 24A protection

ILUA	Section 24FA
Need to identify the potential native title holders	No need to identify potential native title holders
Can use an ILUA after there is a determination that native title exists	Cannot obtain s 24FA protection after there is a determination that native title exists
No more compensation payable than what is provided in the ILUA	Compensation may be payable at a later date if native title is found to exist

You should also consider the advantages and disadvantages of an ILUA and the process of obtaining s. 24FA protection—see **Subdivision B-E ILUAs** and **Subdivision F – s 24FA protection** in 4.7 Step 6—Working your way through the future acts regime

4.8.2.2. The compulsory acquisition of land

It is beyond the scope of this Workbook to address the powers of Crown land managers and councils to compulsorily acquire land.

4.8.2.3. When legal advice may be required

It is extremely important when native title managers are asked questions by their reserve managers or when they prepare an advice for the purposes of s. 8.7 of the CLM Act that legal advice is sought in the following circumstances:

- Wherever the native title manager is uncertain whether the proposed act may be valid
- Where a proposed act may need to be validated under multiple subdivisions
- When you are considering getting s. 24FA protection (as this involves litigation)
- When you are considering entering into an ILUA as there are particular legal requirements that need to be satisfied (note: that when considering an ILUA you should first liaise with the department)
- When you are considering the compulsory acquisition of land (note: you must first liaise with the department when considering compulsory acquisition of land. This will require Ministerial consent prior to undertaking any action that will result in the compulsory acquisition of native title rights and interests in relation to the land).

4.8.2.4. Saying ‘no’

If you are unable to obtain legal advice in circumstances in which it is required, the proposed act should not be carried out. In these circumstances you will need to say ‘no’ to the proposed act.

4.8.2.5. Practical tips

It is possible to negotiate the conditions of any licence, lease or other dealing with Indigenous parties. This would ordinarily take place after the notification and opportunity to comment procedural rights have been exercised.

For example, if the Indigenous parties identify a culturally significant site on a parcel of land it may be possible to negotiate conditions that relate to the access and maintenance of that site as a condition of a lease.

5. Workbook examples

This section gives you examples of how to apply the future acts regime to various acts.

5.1. Issue of a licence or permit for the extension of an existing break wall or training wall

The construction of an extension to an existing break wall could be a future act that affects native title because it may hinder native title holders from accessing the harbour.

Scenario

This scenario considers how to validate a licence or permit that authorises the construction of an extension to an existing break wall adjoining freehold land. Part of the break wall is constructed onshore, that is, on the mainland or within the intertidal zone. Similar principles may apply to the validation of a licence or permit for the construction of a training wall.

5.1.1. Subdivision K

The construction of an extension to an existing break wall or training wall is a future act that may be validated under Subdivision K if the following checklist of requirements is satisfied:

Table 24. Checklist

Requirement number	Requirement for facilities for services to the public	Section 24KA	Requirement satisfied
1.	The future act relates (to any extent) to an onshore place; and	(1)(a)	Yes
2.	<p>The facility is any of the following:</p> <ul style="list-style-type: none"> (a) a road, railway, bridge, or other transport facility (other than an airport or port) (b) a jetty or wharf (c) a navigation marker or other navigational facility (d) an electricity transmission or distribution facility (e) lighting of streets or other public places (f) a gas transmission or distribution facility (g) a well, or a bore, for obtaining water (h) a pipeline or other water supply or reticulation facility (i) a drainage facility, or a levee or other device for management of water flows (j) an irrigation channel or other irrigation facility (k) a sewerage facility, other than a treatment facility (l) a cable, antenna, tower or other communication facility <ul style="list-style-type: none"> a. an automatic weather station (m) any other thing that is similar to any one or more of the things mentioned above; and 	(2)	Yes
3.	<p>The future act either:</p> <ul style="list-style-type: none"> (i) permits or requires the construction, operation, use, maintenance or repair, by or on behalf of any person, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public; or (ii) consists of the construction, operation, use, maintenance or repair, by or on behalf of the Crown or a local government body or other statutory authority of the Crown, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public; and 	(1)(b)	Yes

Requirement number	Requirement for facilities for services to the public	Section 24KA	Requirement satisfied
4.	The future act does not prevent native title holders in relation to the land or waters on which the thing is located or to be located from having reasonable access to the land or waters in the vicinity, except: <ul style="list-style-type: none"> (i.) while the thing is being constructed; or (ii.) for reasons for health and safety; and 	(1)(c)	Yes
5.	If there are any areas or sites in the future act area of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions, a law of the State is made in relation to the area or sites preservation or protection; and	(1)(d)	Yes
6.	The future act does not relate to the compulsory acquisition of the whole or part of any native title rights and interests.	(1A)	Yes

5.1.2. Meeting the requirements—break wall extension

Requirement 1 will be satisfied because part of the break wall is constructed onshore and does not include any area landward of the mean low water mark.

Requirement 2 will be satisfied if the break wall falls within any of the categories specified in s. 24KA(2). The construction of a break wall is usually intended to reduce the intensity of wave action (by creating a barrier that breaks the force of waves). To the extent that it does so, a break wall could be described as a “device for management of water flows” (s. 24KA(2)(i)), if that phrase is construed broadly. If it is not, then a break wall is likely to be “similar to any one or more of the things mentioned” in s. 24KA(2) (s. 24KA(2)(m)).

Requirement 3 will be satisfied where the future act consists of construction of the facility on behalf of a local government body. However, the construction of the break wall will need to benefit the general public. Thus, where the purpose of the break wall is to benefit a particular landholder, such as the owner of adjoining land, requirement 3 will not be satisfied.

Requirement 4 will be satisfied where the proposed break wall does not restrict native title holders from accessing adjacent land or waters (other than during the period of construction). Satisfaction of this requirement will depend on the type of break wall being constructed. In other words, it is possible to distinguish a small break wall that does not prevent any native title holders from accessing a harbour at a point where they have previously been able to access the water (which may satisfy requirement 4) from a larger break wall that removes such access (and which will not satisfy requirement 4).

Requirement 5 may be satisfied if there are no areas or sites of particular significance to Aboriginal peoples in the area of the break wall. If there are such areas or sites, Requirement 5 is satisfied by the NPW Act, which aims to protect places, objects and features of significance to Aboriginal people in NSW.

Requirement 6 may be satisfied as the construction of the break wall or training wall does not involve the compulsory acquisition of native title rights and interests.

If all the requirements for Subdivision K are satisfied, the future act of granting a licence authorising construction of an extension to an existing break wall will be validated.

5.1.2.1. Summary—Licence or permit for break wall

Subdivision that *may* validate the future act: 24K

5.2. Grant of an interest consistent with the reserve purpose—issue of a licence for the construction and operation of a shed or bushfire shed

Scenario

This scenario considers how to validate a licence for the construction and operation of a bushfire shed on Crown land reserved for bush fire brigade purposes. Similar principles may apply to the construction of bushfire, or other types of shed on Crown land reserved for consistent purposes. For the purposes of this scenario, the land was reserved under the *Crown Lands Consolidation Act 1913* in 1950

5.2.1. Past act

First, the grant of the licence may be a past act. The grant will be a past act for the purposes of s. 228(9) if the following requirements are satisfied:

Table 25. Requirements

Requirement Number	Requirement	Section 228(9)	Requirement satisfied
1.	The issue of the licence would have been a past act under s. 228(2) except that it was granted after 1 January 1994; and	(a)	Yes
2.	The reservation, condition, permission or authority was a past act which took place before the issue of the licence; and	(b)	Yes
3.	The reservation, condition, permission or authority was over the whole or part of land or waters and was to be used at a later time for a particular purpose; and	(c)	Yes
4.	The issue of the licence was done in good faith under or in accordance with the reservation, condition, permission or authority; and	(d)	Yes
5.	The licence is not the making, amendment or repeal of legislation.	(e)	Yes

5.2.2. Future act

If the factual scenario were changed, so the licence was granted under land reserved in 1995 for example, then the future act provisions would be applicable.

5.2.3. Subdivision J

The issue of the licence may be validated under Subdivision J if it takes place on land or waters subject to a reservation, proclamation, dedication, condition, permission or authority ('reservation').

The issue of the licence may be validated under Subdivision J if the following requirements are satisfied:

Table 26. Requirements under Subdivision J

Requirement number	Requirement	Section 24JA	Requirement satisfied
1.	The reservation was created on or before 23 December 1996	(1)(a)	Yes
2.	The reservation was valid	(1)(b)	Yes
3.	The creation of the reservation was done by the Crown (Commonwealth or State)	(1)(c)	Yes
4.	The whole or part of any land or waters under the reservation was to be used for a particular purpose	(1)(d)	Yes
5.	The issue of the licence is done in good faith: <ul style="list-style-type: none"> (i.) under or in accordance with the reservation, or (ii.) in the area covered by the reservation, so long as the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had 	(1)(e)	Yes

5.2.4. Meeting the requirements—bushfire shed

Requirement 1 will be satisfied if the relevant land was subject to a reservation created before 23 December 1996. 'Reservation' in s. 24JA refers to an earlier act that reserved, proclaimed, dedicated, permitted, or authorised the use of all or part of any land for a particular purpose.

Requirement 2 will be satisfied if the reservation or dedication was done validly. This may require the native title manager to show that there is no reasonable basis for inferring that any relevant procedural requirements under the relevant legislation such as the *Crown Lands Consolidation Act 1913* (CLC Act 1913) or the *Western Lands Act 1901* (WL Act 1901) were satisfied at the time e.g. if there was a notification requirement, this requirement will need to have been fulfilled.

Requirement 3 will be satisfied if the reservation was done by the Crown. In our example of a reservation under the CLC Act 1913, such a reservation will have been a statutory power, exercised by the Minister on behalf of the Crown.

Requirement 4 will be satisfied if the reservation required the land to be used for a specific purpose. In our example, a reservation under CLC Act 1913 would need to reserve the land from sale for bush fire brigade purposes rather than just reserve the land from sale generally or for no specified purpose.

Requirement 5 will be satisfied if the licence is issued in good faith. For example, the native title manager would need to be satisfied that a licence permitting the construction and operation of a bushfire shed was an act that could be lawfully done under the CLM Act in respect of land reserved for bush fire brigade purposes.

The requirement of good faith will also be satisfied where the licence is not in accordance with the reservation but the grant of the licence would have no greater impact on native title than any act that could have been done in accordance with the reservation.

Note: a native title manager should seek to rely on Subdivision J to avoid having to comply with requirements imposed by other subdivisions of the future act regime.

5.2.4.1. Summary—Licence for shed or bushfire shed, where consistent with reserve purpose

Subdivision that *may* validate the future act: 24J

5.3. Grant of an interest inconsistent with the reserve purpose—issue of a licence for the construction and operation of a men’s shed

Scenario

This scenario considers how to validate a licence authorising the construction and operation of a men’s shed on land reserved from sale for the purpose of public recreation. The land was reserved under the CLCA 1913. The men’s shed will be operated by a not-for-profit organisation

An act inconsistent with the reserve purpose can be authorised by the Minister under the CLM Act as long as the requirements of that Act are complied with (see s. 2.14 CLM Act).

5.3.1. Subdivision J

The issue of the licence may be validated under Subdivision J if the following requirements are satisfied:

Table 27. Requirements

Requirement number	Requirement	Section 24JA	Requirement satisfied
1.	The reservation was created on or before 23 December 1996	(1)(a)	Yes
2.	The reservation was valid	(1)(b)	Yes
3.	The creation of the reservation was done by the Crown (Commonwealth or State)	(1)(c)	Yes
4.	The whole or part of any land or waters under the reservation was to be used for a particular purpose	(1)(d)	Yes
5.	The issue of the licence is done in good faith: <ul style="list-style-type: none"> (i) under or in accordance with the reservation, or (ii) in the area covered by the reservation, so long as the act’s impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had 	(1)(e)	Yes

5.3.2. Meeting the requirements—men’s shed

Requirement 1 will be satisfied if the relevant land was subject to a reservation created before 23 December 1996. ‘Reservation’ in s. 24JA refers to an earlier act that reserved, proclaimed, dedicated, permitted, or authorised the use of whole or part of any land to be used for a particular purpose.

Requirement 2 will be satisfied if the reservation or dedication was done validly. This requirement may require the native title manager to show that there is no reasonable basis for inferring that any

relevant procedural requirements under the relevant legislation (such as the CLC Act 1913 or the WL Act 1901) were satisfied at the time. If, for example, there was a notification requirement, this requirement will need to have been fulfilled. This can be shown by obtaining a copy of the relevant notification.

Requirement 3 will be satisfied if the reservation was done by the Crown. Considering a reservation under the CLC Act 1913, such a reservation will have been a statutory power exercised by the Minister on behalf of the Crown.

Requirement 4 will be satisfied if the reservation required the land to be used for a specific purpose. For example, a reservation under the CLC Act 1913 would need to reserve the land from sale for the purpose of public recreation rather than reserve the land from sale generally for no specified purpose.

Requirement 5 will be satisfied if the licence is issued in good faith in accordance with the reservation. Further, the native title manager should not be seeking to rely on Subdivision J to avoid having to comply with requirements imposed by other subdivisions of the future act regime.

As the construction and operation of the men's shed is not consistent with the reserve purpose, it will be necessary to consider whether it would have any 'greater impact than the impact that any act that could have been done under or in accordance with the reservation would have had' (s. 24JA(1)(e)).

This will depend on the terms of the reservation and the relevant legislative regime. If, for example, the relevant land had been reserved for police purposes, it is arguable that the construction of a men's shed would not have a greater impact. The situation is less clear where the land has been reserved for future public requirements.

5.3.3. Subdivision F

Assuming the non-claimant application will be brought by the person who wants to do things on the land such as a non-government organisation (NGO) or community group, a non-government application will need to be made.

Section 24FA protection (non-government) will be available if the following requirements are satisfied:

Requirement number	Requirement	Section 24FC	Requirement satisfied
1.	The land is not covered by a government application under s. 24FB(a)	(b)	Yes
2.	A non-claimant application needs to be made in relation to the whole or part of the area covered by the application	(a) and (c)	Yes
3.	The three-month notice period under s. 66 of the NT Act (Cwlth) has ended and at the end of that period there is no native title claim covering the area or all entries that relate to a relevant native title claim that covered an area are removed from the Register of Native Title Claims, or cease to cover the area	(d) and (e)	Yes
4.	The application has not been withdrawn, dismissed or otherwise finalised	(f)	Yes

Requirement number	Requirement	Section 24FC	Requirement satisfied
5.	There is no entry on the National Native Title Register that native title exists in relation to the land	(g)	Yes

5.3.3.1. ILUA

If s. 24FA protection is not available, you will need to negotiate an ILUA to validate the licence. The type of ILUA that will be suitable will depend on the factual circumstances of the land at the relevant time.

5.3.3.2. Summary—Licence for a men's shed

Where:

- licence is inconsistent with reserve purpose
- the shed is not a fixture
- the act could only be done if it had not greater impact than any act that could have been done under the reservation.

Subdivisions that *may* validate the future act: 24F, 24J and ILUA.

5.4. Grant of a lease inconsistent with the reserve purpose— child care centre where the purpose was for public recreation (secondary interest)

Scenario

This scenario considers how to validate the grant of a lease authorising the construction and operation of a child care centre on Crown land reserved in 1993 for the purpose of public recreation under the then CL Act 1989. The child care centre will be operated by a private provider and will require the enclosure of most of the reserve.

5.4.1. Subdivision J

The issue of the licence may be validated under Subdivision J if the following requirements are satisfied:

Table 28. Requirements for Subdivision J

Requirement number	Requirement	Section 24JA	Requirement satisfied
1.	The reservation was created on or before 23 December 1996	(1)(a)	Yes
2.	The reservation was valid	(1)(b)	Yes
3.	The creation of the reservation was done by the Crown (Commonwealth or State)	(1)(c)	Yes
4.	All or part of any land or waters under the reservation was to be used for a particular purpose	(1)(d)	Yes
5.	The issue of the lease is done in good faith: <ul style="list-style-type: none"> (i) under or in accordance with the reservation, or (ii) in the area covered by the reservation, so long as the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had	(1)(e)	?

5.4.2. Meeting the requirements—childcare centre

Requirement 1 will be satisfied if the relevant land was subject to a reservation created before 23 December 1996. 'Reservation' in s. 24JA refers to an earlier act that reserved, proclaimed, dedicated, permitted, or authorised the use of whole or part of any land to be used for a particular purpose.

Requirement 2 will be satisfied if the reservation or dedication was done validly. This requirement may require the native title manager to show that there is no reasonable basis for inferring that any relevant procedural requirements under the relevant legislation (such as the CLC Act 1913 or the

WL Act 1901) were satisfied at the time. If, for example, there was a notification requirement, this requirement will need to have been fulfilled.

Requirement 3 will be satisfied if the reservation was done by the Crown. In our example of a reservation under the CL Act 1989, such a reservation will have been a statutory power exercised by the Minister on behalf of the Crown.

Requirement 4 will be satisfied if the reservation required the land to be used for a specific purpose. For example, a reservation under the *Crown Lands Act 1989* would need to reserve the land from sale for the purpose of public recreation rather than reserve the land from sale generally for no specified purpose.

Requirement 5 will be satisfied if the lease is issued in good faith in accordance with the reservation. Further, the native title manager should not be seeking to rely on Subdivision J to avoid having to comply with requirements imposed by other subdivisions of the future act regime.

As the construction and operation of the child care centre is not consistent with the reserve purpose, it will be necessary to consider whether it would have any 'greater impact than the impact that any act that could have been done under or in accordance with the reservation would have had' (s. 24JA(1)(e)).

This will depend on the terms of the reservation and the relevant legislative regime. For example, if the land had been reserved for police purposes, it is arguable that the construction of a child care centre would not have a greater impact. The situation is less clear where the land has been reserved for future public requirements.

5.4.3. Subdivision F

Section 24FA protection (non-government) will be available if the requirements in the checklist on page 61 are satisfied.

5.4.3.1. ILUA

If s. 24FA protection is not available, it will be necessary to negotiate an ILUA to validate the licence. The type of ILUA that will be suitable will depend on the factual circumstances of the land at the relevant time.

5.4.3.2. Summary—lease for a child care centre

Where:

- lease is inconsistent with reserve purpose
- the act could only be done if it had a greater impact than any act that could have been done under the reservation.

Subdivisions that *may* validate the future act: 24F, ILUA.

Other subdivisions: 24J?

5.5. Grant of a licence for the purpose of a florist in a cemetery (including selling flowers from a cart no to be fixed to ground)

Scenario

This scenario considers how to validate the grant of a licence authorising a florist to undertake various activities on Crown land dedicated for cemetery purposes. The activities will not require the florist to exclude other people from accessing the cemetery generally

5.5.1. Will the licence affect native title?

You must consider whether the grant of the licence in respect of land reserved for cemetery purposes will affect native title. This licence may not affect native title, however, if the activities extend beyond a floral cart, it may.

5.5.2. Subdivision J

The issue of the licence may be validated under Subdivision J if the following requirements are satisfied:

Table 29. Requirements for Subdivision J

Requirement number	Requirement	Section 24JA(1)	Requirement satisfied
1.	There is a valid earlier act that took place before the later act and on occurred or before 23 December 1996	(a)	Yes
2.	The earlier act was valid (including because of Div. 2 or 2A)	(b)	Yes
3.	The earlier act was done by the Crown (Commonwealth or State), or consisted of the making, amendment or repeal of legislation	(c)	Yes
4.	The earlier act contained, made or conferred a reservation, proclamation, dedication, condition, permission or authority (the reservation) under which the whole or part of any land or waters was to be used for a particular purpose	(d)	Yes
5.	The later act is done in good faith: <ul style="list-style-type: none"> (i.) Under or in accordance with the reservation, or (ii.) in the area covered by the reservation, so long as the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had 	(e)	Yes

5.5.3. Meeting the requirements—florist in cemetery

Requirement 1 will be satisfied if the relevant land was subject to a reservation created before 23 December 1996. ‘Reservation’ in s. 24JA refers to an earlier act that reserved, proclaimed, dedicated, permitted, or authorised the use of whole or part of any land to be used for a particular purpose.

Requirement 2 will be satisfied if the reservation or dedication was done validly. This may require the native title manager to show that there is no reasonable basis for inferring that any relevant procedural requirements under the relevant legislation (such as the CLC Act 1913 or the WL Act 1901) were satisfied at the time. If, for example, there was a notification requirement, this requirement will need to have been fulfilled.

Requirement 3 will be satisfied if the reservation was done by the Crown. Considering a reservation under, for example, the CLC Act 1913, such a reservation will have been the exercise of a statutory power by the Minister on behalf of the Crown.

Requirement 4 will be satisfied if the reservation required the land to be used for a specific purpose. For example, a reservation under the CLC Act 1913 would need to reserve the land from sale for cemetery purposes rather than reserve the land from sale generally or for no specified purpose.

Requirement 5 will be satisfied if the licence is issued in good faith and in accordance with the reservation. Further, the native title manager should not be seeking to rely on Subdivision J to avoid having to comply with requirements imposed by other subdivisions of the future act regime.

As the activities contemplated by the licence may not be consistent with the reserve purpose, you should consider whether it would have any ‘greater impact than the impact that any act that could have been done under or in accordance with the reservation would have had’ (s. 24JA)(1)(e)).

This will depend on the terms of the reservation and the relevant legislative regime. If, for example, the relevant land had been reserved for police purposes, it is arguable that the licence, to the extent that it allows the florist to sell flowers, would not have a greater impact.

5.5.3.1. Summary—licence for florist at a cemetery

Where:

- the licence is issued in accordance with a reservation for a specific purpose

Subdivisions that *may* validate the future act: 24J.

5.6. Grant of an easement for pipeline and/or pump site

Scenario

This scenario considers how to validate the grant of an easement for a pipeline or a pump site. The easement will be granted over land reserved from sale or lease for future public requirements under the former CL Act 1989

5.6.1. Subdivision K

The grant of an easement may be validated under Subdivision K if the following requirements are satisfied:

Table 30. Requirements for Subdivision K

Requirement number	Requirement for facilities for services to the public	Section 24KA	Requirement satisfied
1.	The future act relates (to any extent) to an onshore place	(1)(a)	Yes
2.	<p>The facility is any of the following:</p> <ul style="list-style-type: none"> (a) a road, railway, bridge, or other transport facility (other than an airport or port) (b) a jetty or wharf (c) a navigation marker or other navigational facility (d) An electricity transmission or distribution facility (e) lighting of streets or other public places (f) a gas transmission or distribution facility (g) a well, or a bore, for obtaining water (h) a pipeline or other water supply or reticulation facility (i) a drainage facility, or a levee or other device for management of water flows (j) An irrigation channel or other irrigation facility (k) a sewerage facility, other than a treatment facility (l) a cable, antenna, tower or other communication facility <ul style="list-style-type: none"> a. an automatic weather station (m) any other thing that is similar to any one or more of the things mentioned above 	(2)	Yes

Requirement number	Requirement for facilities for services to the public	Section 24KA	Requirement satisfied
3.	The future act either: <ul style="list-style-type: none"> (i) permits or requires the construction, operation, use, maintenance or repair, by or on behalf of any person, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public, or (ii) consists of the construction, operation, use, maintenance or repair, by or on behalf of the Crown or a local government body or other statutory authority of the Crown, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public 	(1)(b)	?
4.	The future act does not prevent native title holders in relation to the land or waters on which the thing is located or to be located from having reasonable access to the land or waters in the vicinity, except: <ul style="list-style-type: none"> (i) while the thing is being constructed, or (ii) reasons for health and safety 	(1)(c)	Yes
5.	If there are any areas or sites in the future act area of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions, a law of the State is made in relation to the area or sites preservation or protection; and	(1)(d)	Yes
6.	The future act does not relate to the compulsory acquisition of the whole or part of any native title rights and interests.	(1A)	Yes

5.6.2. Meeting the requirements—easement for pipeline and/or pump site

Requirement 1 will be satisfied because the pipeline and pump site is constructed onshore.

Requirement 2 will be satisfied if the pipeline and pump site falls within any of the categories specified in s. 24KA(2). The construction of a pipeline falls within s. 24KA(2)(m) and a pump site may fall within s. 24KA(2)(m) as “any other thing that is similar to any one or more of the things mentioned above”.

Requirement 3 will be satisfied where the pipeline and pump site is operated for the general public.

Requirement 4 will be satisfied where the pipeline and pump site does not prevent native title holders from having access to land in the vicinity except while the pipeline and pump site is being constructed.

Requirement 5 may be satisfied if there are no areas or sites of particular significance to Aboriginal peoples in the area of the pipeline and pump site. If there are such areas or sites,

Requirement 5 is satisfied by the NPW Act, which aims to protect places, objects and features of significance to Aboriginal people in NSW.

Requirement 6 may be satisfied as the construction of the pipeline and pump site does not involve the compulsory acquisition of native title rights and interests.

5.6.2.1. Summary—easement or licence for pipeline and/or pump site

Subdivisions that *may* validate the future act: 24F, ILUA.

Other subdivisions: 24K?

5.7. Grant of an easement for an encroachment

Scenario

This scenario concerns the grant of an easement for a driveway that encroaches on reserved Crown land. The land was reserved from sale or lease for public recreation under the former CL Act 1989. A concrete driveway was laid in 2010; however it was laid within the course of a gravel driveway that was in use when the current owner purchased the property in 1990

5.7.1. Past act

You must establish whether the creation of the driveway was a past act. As this encroachment contravened the Crown Lands legislation (being unauthorised), the act is not valid and will thus not be a past act.

Table 31. Requirements

Requirement Number	Requirement	Section 228(9)	Requirement satisfied
1.	The issue of the easement would have been a past act under s. 228(2) except that it was granted after 1 January 1994	(a)	No
2.	The reservation, condition, permission or authority was a past act which took place before the issue of the licence	(b)	
3.	The reservation, condition, permission or authority was over the whole or part of land or waters and was to be used at a later time for a particular purpose	(c)	
4.	The issue of the easement was done in good faith under or in accordance with the reservation, condition, permission or authority	(d)	
5.	The easement is not the making, amendment or repeal of legislation	(e)	

5.7.2. Future act

As this is not a past act, you need to assess which of the future act provisions are applicable.

5.7.3. Subdivision J

The grant of the easement may be validated under Subdivision J if the following requirements are satisfied:

Table 32. Requirements for Subdivision J

Requirement Number	Requirement	Section 24JA	Requirement satisfied
1.	The reservation was created on or before 23 December 1996	(1)(a)	Yes
2.	The reservation was valid	(1)(b)	Yes
3.	The creation of the reservation was done by the Crown (Commonwealth or State)	(1)(c)	Yes
4.	The whole or part of any land or waters under the reservation was to be used for a particular purpose; and	(1)(d)	Yes
5.	The grant of the easement is done in good faith: <ul style="list-style-type: none"> (i) under or in accordance with the reservation, or (ii) in the area covered by the reservation, so long as the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had 	(1)(e)	?

5.7.4. Meeting the requirements—driveway encroachment on Crown land

Requirement 1 will be satisfied if the relevant land was subject to a reservation created before 23 December 1996. 'Reservation' in s. 24JA refers to an earlier act that reserved, proclaimed, dedicated, permitted, or authorised the use of whole or part of any land to be used for a particular purpose.

Requirement 2 will be satisfied if the reservation was done validly. This requirement may require the native title manager to show that there is no reasonable basis for inferring that any relevant procedural requirements under the relevant legislation (such as the *Crown Lands Act 1989*) were satisfied at the time. If, for example, there was a notification requirement, this requirement will need to have been fulfilled.

Requirement 3 will be satisfied if the reservation was done by the Crown. In our example of a reservation under the *Crown Lands Act 1989*, such a reservation will have been the exercise of a statutory power by the relevant Minister on behalf of the Crown.

Requirement 4 will be satisfied if the reservation required the land to be used for a specific purpose. For example, a reservation under the *Crown Lands Act 1989* would need to reserve the land from sale for a specific purpose rather than reserve the land from sale generally or for no specified purpose.

Requirement 5 will be satisfied if the licence is issued in good faith in accordance with the reservation. Further, the native title manager should not be seeking to rely on Subdivision J to avoid having to comply with requirements imposed by other subdivisions of the future act regime.

As the activities contemplated by the licence may not be consistent with the reserve purpose, you need to consider whether it would have any 'greater impact than the impact that any act that could have been done under or in accordance with the reservation would have had' (s. 24JA(1)(e)). This will depend on the terms of the reservation and the relevant legislative regime. For example, if the land had been reserved for police purposes, arguably the easement would have no greater impact.

5.7.5. Subdivision F

Section 24FA protection (non-government) will be available to the home owner if the requirements in section 4.7.2.1 Checklist—24FA requirements.

5.7.5.1. ILUA

If section 24FA protection is not available, it will be necessary to negotiate an ILUA to validate the licence. The type of ILUA that will be suitable will depend on the factual circumstances of the land at the relevant time.

5.7.5.2. Summary—easement for encroachment

Subdivisions that *may* validate the future act: 24F, ILUA.

Other subdivisions: 24J?

5.8. Issue of a licence to remove materials

Scenario

This scenario involves the validation of a licence for the removal of materials from land subject to a reservation from sale or lease for future public requirements under the CL Act 1989. The reservation was gazetted in 1997. A quarry had previously operated on the site

5.8.1. Will the licence affect native title?

Where there is a history of removal activity occurring on the land, you need to ascertain whether that activity may have affected native title. Who carried out the removal, when the removal occurred, and the circumstances of the removal may be relevant. This information will assist in ascertaining whether native title has been partially or wholly extinguished or whether the previous removal was done validly. If the history shows that native title has been extinguished by previous activities, it will not be necessary to validate the grant of the licence.

5.8.2. Subdivision J—removal of materials subject to a Crown Reserve

The grant of the easement will not be validated under Subdivision J as Requirement 1 will not be satisfied because the reservation was created after 23 December 1996:

Table 33. Requirements

Requirement number	Requirement	Section 24JA	Requirement satisfied
1.	The reservation was created on or before 23 December 1996	(1)(a)	No
2.	The reservation was valid	(1)(b)	
3.	The creation of the reservation was done by the Crown (Commonwealth or State)	(1)(c)	
4.	The whole or part of any land or waters under the reservation was to be used for a particular purpose	(1)(d)	
5.	The issue of the licence is done in good faith: <ul style="list-style-type: none"> (i) under or in accordance with the reservation, or (ii) in the area covered by the reservation, so long as the act's impact on native title is no greater than the impact that any act that could have been done under or in accordance with the reservation would have had 	(1)(e)	

5.8.3. Subdivision F

Section 24FA protection (non-government) will be available if the requirements in the checklist on page 61 are satisfied.

5.8.3.1. ILUA

If section 24FA protection is not available, it will be necessary to negotiate an ILUA to validate the licence. The type of ILUA that will be suitable will depend on the factual circumstances of the land at the relevant time.

5.8.3.2. Summary—issue of a licence to remove materials where subject to Crown Reserve

Subdivisions that *may* validate the future act: 24F, ILUA.

Subdivisions that will not validate the future act: 24J.

5.9. Issuing of a licence for grazing or agriculture

Scenario

This scenario considers how to validate the grant of a licence for grazing over land reserved from sale or lease for future public requirements that has not previously been subject to a licence or permissive occupancy. The licence is sought by a dairy farmer who wants to agist his herd on a reserve over a riverbank during the summer months. The farmer owns the adjacent property (in fee simple), which was originally granted in 1890. The licence will not allow the holder to exclude the public from the riverbank (except in certain situations)

5.9.1. Subdivision G

The grant of the licence may be validated by s. 24GD if the following requirements are satisfied:

Requirement number	Requirement	Section 24GD	Requirement satisfied
1.	Either of the following was granted on or before 23 December 1996: <ul style="list-style-type: none"> • a freehold estate • an agricultural lease • a pastoral lease 	(1)(a)	Yes
2.	The freehold or lease was valid (including because it is a past act or intermediate period act)	(1)(b)	Yes
3.	The future act takes place after 23 December 1996	(1)(c)	Yes
4.	The future act permits or requires the carrying on of grazing, or an activity consisting of, or relating to, gaining access to water or taking water that: <ul style="list-style-type: none"> (a) Takes place while the freehold estate exists or the lease is in force (b) Is directly connected to the carrying on of any primary production activity on the area covered by the freehold estate, agricultural lease or pastoral lease (c) Takes place in an area adjoining or near the area covered by the freehold estate, agricultural lease or pastoral lease (d) Does not prevent native title holders in relation to land or waters in the area in which the activity will be carried on from having reasonable access to the area 	(1)(e)	Yes
Exclusion 1	1. Section 24GD does not validate a future act where it concerns the grant of a lease, or any act that confers a right of exclusive possession over land.	(1)(d)	Yes

5.9.2. Meeting the requirements—licence for grazing or agriculture

Requirement 1 will be satisfied if land adjoining the land to be subject to the licence was either held in freehold or subject to an exclusive agricultural or pastoral lease.

Requirement 2 will be satisfied if that freehold or lease was validly granted.

Requirement 3 will be satisfied if the grant of the licence takes place after 23 December 1996.

Requirement 4 will be satisfied if the grant of the licence permits grazing that is directly connected to the conduct of a primary production activity on land that adjoins, or is near, the land subject to the land held in freehold or subject to the exclusive agricultural or pastoral lease.

Requirement 4(d) will be satisfied if the licence does not prevent native title holders from having reasonable access to the relevant land.

Exclusion 1: This exclusion in s. 24GD does not apply; this scenario concerns the grant of a licence, rather than a lease or other right of exclusive possession.

5.9.2.1. Summary—issue of licence for grazing

Subdivisions that *may* validate the future act: 24GD.

5.10. Renewal of a licence for grazing or agriculture

Scenario

This scenario considers how to validate the grant of a licence for grazing over land reserved from sale or lease for future public requirements that has previously been subject to a licence or permissive occupancy. The current licence was initially a permissive occupancy that was granted in the mid-1980s

5.10.1. Subdivision G

The grant of the licence may be validated under s. 24GB if the following requirements are satisfied:

Table 34. Requirements

Requirement number	Requirement	Section 24GB	Requirement satisfied
1.	A non-exclusive agricultural lease or a non-exclusive pastoral lease is in force (i.e. a lease for agricultural or pastoral purposes which does not confer a right of exclusive possession on the land was granted) ¹⁴⁴	(1)(a)	Yes
2.	The lease was granted on or before 23 December 1996	(1)(a)	Yes
3.	The lease was valid, that is of full force and effect, including because it is a past act or intermediate period act	(1)(b)	Yes
4.	The future act takes place after 23 December 1996	(1)(c)	Yes
5.	The future act permits or requires the carrying on of the following while the lease is in force (including as renewed on one or more occasions): <ul style="list-style-type: none"> (a) a primary production activity, or (b) an activity which is incidental to a primary production activity, provided that the majority of the area covered by the lease is used for primary production activities 	(1)(d)	Yes
6.	The future act could have been validly done or authorised prior to 31 March 1998, if any native title in the area covered by the lease had not then existed	(1)(e)	Yes

Table 35. Exclusions

Exclusion	Exclusion	Section	Requirement satisfied
Exclusion 1	1. Section 24GB does not validate a future act where the lease granted by 23 December 1996 was a non-exclusive pastoral lease covering an area greater than 5,000 hectares and the future act has the effect that the majority of the area covered by the lease is required or permitted to be used for purposes other than pastoral purposes	(4)(a)	Yes
Exclusion 2	2. Section 24GB does not validate a future act which converts a non-exclusive agricultural or pastoral lease granted by 23 December 1996 into a lease conferring a right of exclusive possession or a freehold estate, over any of the land or waters covered by the lease	(4)(b)	Yes

5.10.2. Meeting the requirements—licence for grazing or agriculture (Subdivision G)

Requirement 1 will be satisfied if a non-exclusive agricultural lease or a non-exclusive pastoral lease is in force over the relevant land.

Requirement 2 will be satisfied if that lease was granted on or before 23 December 1996.

Requirement 3 will be satisfied if that lease is valid.

Requirement 4 will be satisfied if the grant of the licence occurs after 23 December 1996.

Requirement 5 will be satisfied if the grant of the licence permits:

- a) a primary production activity such as grazing, or
- b) and activity incidental to such an activity.

Requirement 6 will be satisfied if the licence could have been granted prior to 31 March 1998 if there had been no native title in respect of the land that it covers.

Exclusions: Exclusions 1 and 2 do not apply.

5.10.3. Subdivision I

The grant of the licence may be validated under Subdivision I if the following requirements are satisfied:

Requirement number	Requirement	Section 24IC(1)	Requirement satisfied
1.	<p>The act is a</p> <ul style="list-style-type: none"> (i) renewal (ii) re-grant or re-making, or (iii) extension of the term <p>of a lease, licence, permit or authority (original lease etc.) that is valid (including because it is a past act or intermediate period act)</p>	(a)	Yes
2.	<p>Any of the following apply:</p> <ul style="list-style-type: none"> (i) the original lease etc. was granted on or before 23 December 1996 (ii) the grant of the original lease etc. was a permissible lease etc. renewal or a “pre-existing right-based act” (iii) the original lease etc. was created by an act under s. 24GB, GD, GE or HA (primary production or management or regulation of water and airspace) 	(b)	Yes
3.	<p>The permit does not:</p> <ul style="list-style-type: none"> • confer a right of exclusive possession over any of the land covered by the original lease etc. • create a larger proprietary interest in the land than was created by the original lease etc. • create a proprietary interest over any of the land covered by the original lease etc., where the original lease etc. created only a non-proprietary interest 	(c)	Yes
4.	<p>If the original lease etc. contains, or is subject to, a reservation or condition for the benefit of Aboriginal peoples or Torres Strait Islanders – the renewed, re-granted, re-made or extended lease, licence, permit or authority contains, or is subject to, the same reservation or condition</p>	(d)	N/A
5.	<p>If the original lease etc. did not permit mining – the renewed, re-granted, re-made or extended lease, licence, permit or authority does not permit mining</p>	(e)	N/A

5.10.4. Meeting the requirements—licence for grazing or agriculture (Subdivision I)

Requirement 1 will apply if the licence being renewed is valid.

Requirement 2 will apply to the renewal where:

- i. the original lease was granted on or before 23 December 1996,
- ii. was a permissible lease renewal or a 'pre-existing right-based act', or
- iii. the original lease was validated under certain provisions of the NT Act.

Requirement 3 will apply where the renewal does not confer a right of exclusive possession, or a larger proprietary interest, than the original lease or licence.

Requirement 4 will be satisfied if any conditions for the benefit of Aboriginal people are maintained.

5.10.4.1. Summary—licence for grazing or agriculture

Table 36. Summary—licence for grazing or agriculture

Licence for grazing	Subdivision that <i>may</i> validate the future act
Where no previous licence or permissive occupancy has been issued	24G
Where a previous licence or permissive occupancy has been issued	24G and 24I

5.11. Granting of a lease for agricultural purposes

Scenario

This scenario considers how to validate the grant of a lease for agricultural purposes over land that is not subject to a previous interest

5.11.1. Subdivision G

The lease cannot be validated under s. 24GB as there is no non-exclusive agriculture lease or non-exclusive pastoral lease over the land that was granted on or before 23 December 1996:

Table 37. Requirements

Requirement number	Requirement	Section 24GB	Requirement satisfied
1.	A non-exclusive agricultural lease or a non-exclusive pastoral lease is in force (i.e. a lease for agricultural or pastoral purposes which do not confer a right of exclusive possession on the land was granted) ¹⁴⁶	(1)(a)	No
2.	The lease was granted on or before 23 December 1996	(1)(a)	No

Neither can the lease be validated under s.24GD if the future act concerns the grant of a lease, because it falls foul of Exclusion 1:

Table 38. Exclusions

Requirement number	Requirement	Section 24GD	Requirement satisfied
Exclusion 1	1. Section 24GD does not validate a future act where it concerns the grant of a lease, or any act that confers a right of exclusive possession over land.	(1)(d)	No

5.11.2. Subdivision F

Section 24FA protection (non-government) will be available if the requirements in section 4.7.2.1 Checklist—24FA requirements are satisfied.

5.11.2.1. ILUA

If section 24FA protection is not available, it will be necessary to negotiate an ILUA to validate the licence. The type of ILUA that will be suitable will depend on the factual circumstances of the land at the relevant time.

5.11.2.2. Summary—lease for agricultural purposes

Subdivisions that *may* validate the future act: ILUA, 24F.

Subdivisions that will not: 24G.

¹⁴⁶ NT Act (Cth), ss. 247B and 248B.

5.12. Land management—vegetation clearing for asset protection zones

Scenario

This scenario considers how to validate a licence permitting vegetation clearing for an asset protection zone on Crown land reserved from sale or lease for future public requirements. An asset protection zone (or fire protection zone) aims to protect human life, property and highly valued assets by creating a buffer between a bush fire hazard and buildings. This buffer also provides a safe area for landowners and firefighters to fight bushfires

5.12.1. Subdivision L

The grant of the licence may be validated under Subdivision L if the following requirements are satisfied:

Table 39. Requirements for Subdivision L

Requirement number	Requirement	Section 24LA	Requirement satisfied
1.	The act takes place before, and does not continue after, an approved determination that native title exist is made in relation to the land or waters	(1)(a)	Yes
2.	The act does not consist of, authorise or otherwise involve: <ul style="list-style-type: none"> (i.) the grant of a freehold estate in any of the land or waters (ii.) the grant of a lease over any of the land or waters (iii.) conferral of a right of exclusive possession over any of the land or waters (iv.) the excavation or clearing of any of the land or waters (v.) mining (other than fossicking by using hand-held implements) (vi.) the construction or placing on the land, or in the waters, of any building, structure, or other thing (other than fencing or a gate), that is a fixture (vii.) the disposal or storing, on the land or in the waters, of any garbage or any poisonous, toxic or hazardous substance 	(1)(b)	Yes

Requirement number	Requirement	Section 24LA	Requirement satisfied
3.	<p>However, the excavation or clearing of any of the land or waters is permitted where it involves:</p> <p>(a) excavation or clearing that is reasonably necessary for the protection of public health or public safety; or</p> <p>(b) tree lopping, clearing of noxious or introduced animal or plant species, foreshore reclamation, regeneration or environmental assessment or protection activities.</p>	(2)	Yes

5.12.2. Meeting the requirements—vegetation clearing for asset protection zones

Requirement 1 will be satisfied where:

- a) the licence is granted before any determination of native title over the land, and
- b) the licence includes a clause that provides for its termination in the event of native title is determined to exist in relation to the land.

Thus, requirement 1 will not be satisfied where land has been found, in a determination by the Federal Court, to be subject to native title.

Requirements 2 and 3 will be satisfied to the extent that the clearing that is reasonably necessary for the protection of public health or public safety or for certain environmental purposes. The grant of a licence also does not involve the grant of a freehold estate, the grant of a lease or the conferral of right of exclusive possession.

5.12.3. Subdivision F

Section 24FA protection (non-government) will be available if the requirements in the checklist on page 61 are satisfied.

5.12.3.1. ILUA

If section 24FA protection is not available, it will be necessary to negotiate an ILUA to validate the licence. The type of ILUA that will be suitable will depend on the factual circumstances of the land at the relevant time.

5.12.3.2. Summary—vegetation clearing for asset protection zones

Table 40. Subdivisions that *may* validate the future act

Vegetation clearing for asset protection zones	Subdivision 24L	Subdivision 24F	ILUA
Where native title determination has not been made	Yes	Yes	Yes
Where native title determination has been made	No	No	Yes

5.13. Vegetation clearing and track development to create or make good a fire trail

Scenario

The scenario considers how to validate the establishment of a fire trail over land reserved from sale or lease for future public requirements. The fire trail is a permanent track cleared through bush to provide firefighters access to bushfires.

5.13.1. Subdivision K

The establishment of the fire trail may be validated under Subdivision K if the following requirements are satisfied:

Requirement number	Requirement for facilities for services to the public	Section 24KA	Requirement satisfied
1.	The future act relates (to any extent) to an onshore place	(1)(a)	Yes
2.	<p>The facility is any of the following:</p> <ul style="list-style-type: none"> (a) a road, railway, bridge, or other transport facility (other than an airport or port) (b) a jetty or wharf (c) a navigation marker or other navigational facility (d) An electricity transmission or distribution facility (e) lighting of streets or other public places (f) a gas transmission or distribution facility (g) a well, or a bore, for obtaining water (h) a pipeline or other water supply or reticulation facility (i) a drainage facility, or a levee or other device for management of water flows (j) an irrigation channel or other irrigation facility (k) a sewerage facility, other than a treatment facility (l) a cable, antenna, tower or other communication facility <ul style="list-style-type: none"> a. an automatic weather station (m) any other thing that is similar to any one or more of the things mentioned above 	(2)	Yes

Requirement number	Requirement for facilities for services to the public	Section 24KA	Requirement satisfied
3.	The future act either: <ul style="list-style-type: none"> (i.) permits or requires the construction, operation, use, maintenance or repair, by or on behalf of any person, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public, or (ii.) consists of the construction, operation, use, maintenance or repair, by or on behalf of the Crown or a local government body or other statutory authority of the Crown, of any of the facilities listed in Requirement 2 that is operated or to be operated for the general public 	(1)(b)	?
4	The future act does not prevent native title holders in relation to the land or waters on which the thing is located or to be located from having reasonable access to the land or waters in the vicinity, except: <ul style="list-style-type: none"> (i) while the thing is being constructed, or (ii) for reasons for health and safety 	(1)(c)	Yes
5.	If there are any areas or sites in the future act area of particular significance to Aboriginal peoples or Torres Strait Islanders in accordance with their traditions, a law of the State is made in relation to the area or sites preservation or protection	(1)(d)	Yes
6.	The future act does not relate to the compulsory acquisition of the whole or part of any native title rights and interests	(1A)	Yes

5.13.2. Meeting the requirements—create or make good a fire trail

Requirement 1 will be satisfied because the fire trail is constructed onshore.

Requirement 2 will be satisfied if the fire trail falls within any of the categories specified in s. 24KA(2). Construction of a fire trail can be characterised as being similar to the construction of a road (s. 24KA(2)(m)).

Requirement 3 may not necessarily be satisfied as it is not clear that the fire trail will be operated for the general public.

Requirement 4 will be satisfied where the fire trail does not prevent native title holders from having access to land in the vicinity except while the fire trail is being constructed or where safety requires it to be temporarily closed to the public e.g. during a bushfire or during back-burning.

Requirement 5 may be satisfied if there are no areas or sites of particular significance to Aboriginal peoples in the area of the fire trail. If there are such areas or sites, Requirement 5 is satisfied by the NPW Act, which aims to protect places, objects and features of significance to Aboriginal people in NSW.

Requirement 6 may be satisfied as the construction of the fire trail does not involve the compulsory acquisition of native title rights and interests.

5.13.3. Subdivision F

Section 24FA protection (non-government) will be available if the requirements in the checklist on page 61 are satisfied.

5.13.3.1. ILUA

If section 24FA protection is not available, it will be necessary to negotiate an ILUA to validate the licence. The type of ILUA that will be suitable will depend on the factual circumstances of the land at the relevant time.

5.13.3.2. Summary—issue of licence for a fire trail

Subdivisions that *may* validate the future act: 24F, ILUA.

Other subdivisions: 24K?

6. Appendices

Appendix 1—Summary of extinguishment

Two Divisions in the NT Act (Cwlth) deal with the extinguishing effect of past acts on native title: Division 2 or Division 2B. As to which extinguishment regime applies to past acts, if s. 23 (in Div. 2B) applies, then ss. 15 and 22B (in Div. 2) do not apply to the act.¹⁴⁷

A majority High Court in *Ward* said this (at 63):

‘If Div. 2B applies to a particular act, then, in general, s 15 (in Div. 2) and State and Territory counterparts do not apply and the extinguishment regime which Div. 2 otherwise in some cases might impose is put aside. In that way, Div. 2B provides the analytical starting point and any overlapping between the two extinguishment regimes is resolved in favour of Div. 2B and the corresponding State and Territory provisions.’

Division 2B

Division 2B deals with the extinguishing effect of certain acts attributable to the Commonwealth that were done on or before 23 December 1996. Unlike Division 2 (which deals with ‘past acts’), Division 2B deals with ‘previous acts’.

The majority of the High Court in *Ward* said (at 63):

Division 2B

‘Division 2B fixes upon certain “previous” acts but not the definition of “past act”. The previous act must have taken place before 23 December 1996 but need not still have been effective at that date. For example, Div. 2B applies to certain pastoral leases granted before 31 October 1975 which had expired before 23 December 1996 and were not “past acts”.’

Division 2B then deals with ‘previous exclusive possession acts’ (or PEPAs) and ‘previous non-exclusive possession acts’ (or PNEPAS).

To be a previous exclusive possession act, the act:

- must be valid (including because it is a past act or intermediate act)
- have taken place on or before 23 December 1996
- must consist of the grant or vesting of acts listed in s. 23B(2(c); set out in the table below entitled ‘Extinguishing effect of categories of previous acts – Div. 2B’.

To be a previous non-exclusive possession act, the act:

- must be valid (including because it is a past act or intermediate act)
- have taken place on or before 23 December 1996
- must consist of the grant of a non-exclusive agricultural lease or a non-exclusive pastoral lease.

In limited circumstances an act is also a PNEPA if it takes place after 23 December 1996.¹⁴⁸

¹⁴⁷ See s. 23(3) NT Act (Cth); *Daniel v. State of WA* [2003] FCA 666 Nicholson J at [915].

¹⁴⁸ I.e. that it would otherwise be a non-exclusive possession act except for the date it occurred; and it takes place in the exercise of a legally enforceable right created by an act done on or before 23 December 1996, or was done in good faith in giving effect to, or otherwise because of an arrangement or undertaking made or given in good faith in writing on or before 23 December 1996.

The extinguishing effect of the act depends upon whether the act was a previous exclusive possession act or a previous non-exclusive possession act. The following table sets out the extinguishing effect of PEPAs and PNEPAs:

Table 41. Extinguishing effect of previous exclusive possession acts (PEPAs) and previous non-exclusive possession acts (PNEPAs)

Category	Acts in the category	Extinguishing effect
PEPAs	<ul style="list-style-type: none"> • Freehold estates¹⁴⁹ • Construction or establishment of public works • Acts set out in Schedule 1 of the NT Act (Cwlth) • Commercial leases (not being an agricultural or pastoral lease) • Exclusive agricultural leases • Residential leases • Community purposes leases • Separate leases • Any lease (other than a mining lease) that confers a right of exclusive possession¹⁵⁰ 	The act extinguishes any native title in relation to the land or waters ¹⁵¹
PNEPAs	<ul style="list-style-type: none"> • Non-exclusive agricultural leases • Non-exclusive pastoral leases 	<p>To the extent the act involves the grant of rights and interests inconsistent with native title rights and interests - the rights and interests granted and the doing of any activity in giving effect to them prevail over the native title rights and interests, but do not extinguish them.</p> <p>Although, to the extent of inconsistency with native title rights and interests such acts may extinguish the native title.¹⁵²</p>

There are various exclusions for acts benefitting Aboriginal people or Torres Strait Islands, acts involving the establishment of national parks, acts where legislation expressly provides that the act does not extinguish native title, certain Crown to Crown grants and so on: see s. 23B.

Section 23E of the NT Act (Cwlth) enables states and territories to enact laws which confirm the extinguishment of native title by PEPAs or PNEPAs attributable to them. Accordingly, the NT Act (NSW) mirrors the provisions of the NT Act (Cwlth) as to the extinguishing effect of PEPAs or PNEPAs (in the table above), where the act was done by the State of NSW.¹⁵³

¹⁴⁹ A freehold grant allows the land holder to use the land as he or she sees fits and exclude anyone else from access to the land: *Fejo v. Northern Territory* (1998) 195 CLR 96 at 126 [43].

¹⁵⁰ NT Act (Cwlth), s. 23B(2).

¹⁵¹ NT Act (Cwlth), s. 23C(1) and (2).

¹⁵²¹⁵² NT Act (Cwlth), s. 23G(1)(b).

¹⁵³ NT Act (NSW), Part 2, Div. 2.

Division 2

Division 2 deals with validation and extinguishment of past acts where the grant was made before 1 January 1994 and the freehold estate or lease was in force at that date. Section 15 of the NT Act (Cwlth) tells us about the extinguishing effect of the various categories of past acts. The table below summarises the extinguishing effects of these categories of past acts.

The NT Act (NSW) again mirrors the provisions of the NT Act (Cwlth) as to the extinguishing effect of the various categories of past acts, where the act was done by the State of NSW.¹⁵⁴

Table 42. Extinguishing effect of categories of past acts—Division 2

Name of category	Acts in the category	Extinguishing effect
Category A past act ¹⁵⁵	<ul style="list-style-type: none"> • Freehold estates (if granted during relevant periods and the exceptions do not apply) • Various Leases - commercial leases, agricultural leases, pastoral leases, residential leases and 'separate leases' (if granted during relevant periods and the exceptions do not apply) • Public works (if constructed or established during certain periods or other conditions applied) 	Extinguishes native title
Category B past act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights concerned	Grant of leases that are not category A past acts or mining leases (if granted during relevant periods and the exceptions do not apply)	Extinguishes native title to the extent of inconsistency
Category C past act	Grant of a mining lease	Non-extinguishment principle applies*
Category D past act	Any past act that is not a category A, B or C past act	Non-extinguishment principle applies*

Exception

If the act contains a reservation of condition for the benefit of Aboriginal people or Torres Strait Islanders, or the doing of the act would affect their rights or interests, then s. 15 does not affect that reservation or condition or those rights or interests.

*For details on the non-extinguishment principle, see 2.2.7 The non-extinguishment principle

¹⁵⁴ NT Act (NSW), ss. 20 and 23

¹⁵⁵ Including public works, but see s. 15 and s. 229(2) of the NT Act (Cwlth) for the details of the public works that fall within this category.

Appendix 2—Glossary

Crown Lands Management Act 2016

excluded land means each of the following:

- a) land subject to an approved determination of native title (as defined in the *Native Title Act 1993* of the Commonwealth) that has determined that:
 - i. all native title rights and interests in relation to the land have been extinguished, or
 - ii. there are no native title rights and interests in relation to the land
- b) land where all native title rights and interests in relation to the land have been surrendered under an Indigenous land use agreement (as defined in the *Native Title Act 1993* of the Commonwealth) registered under that Act
- c) an area of land to which section 24FA protection (as defined in the *Native Title Act 1993* of the Commonwealth) applies
- d) land where all native title rights and interests in relation to the land have been compulsorily acquired
- e) land for which a native title certificate is in effect.

relevant land means:

- a) dedicated or reserved Crown land managed by a council manager, or
- b) dedicated or reserved Crown land managed by a non-council manager assigned as a category 1 manager under Division 3.5, or
- c) land vested in a local council under Division 4.2 (Vesting of Crown land in local councils).

responsible person for relevant land means the local council or non-council manager that manages the land or the local council in which the land is vested.

Appendix 3—Notice template

Table 43. Template

Details	Response
To:	[insert name of registered native title claimant/s] on behalf of [insert name of native title claimant group], [insert address] OR [insert name of registered native title body corporate] on behalf of [insert name of native title claimant group], [insert address] OR [insert name of native title representative body], [insert address]
Date of issue:	
Section of Native Title Act:	
Department/Agency:	
Contact name:	
Email:	
Telephone number:	
Facsimile number:	
Reference number:	
An application has been received by the department/agency for the following approval:	[name of department/agency]
Type of approval/s:	
Under what state act:	
The approval, if granted, will permit the following activity to happen (state the nature of the activity):	
Nature of activity:	
The above activity will be located within:	
Location of activity:	
Maps/Plans:	

Details	Response
Name of registered native title claimant group/s or name of registered native title body corporate:	
Name of native title representative body:	
The activity, if approved, will commence only after notification and consideration of all comments. In addition, if approved, the activity will be approved for the following period of time:	
Duration of approval:	
You are invited to comment upon the proposed future act outlined above.	
Any comments must be in writing and must be received no later than [insert date].	
Please send your comments to:	[Include name, title and address]

Appendix 4—Sample title search

InfoTrack
An Approved LPI NSW
Information Broker

Title Search



LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 233/755552

SEARCH DATE	TIME	EDITION NO	DATE
-----	----	-----	----
7/9/2017	8:50 AM	-	-

VOL 10279 FOL 92 IS THE CURRENT CERTIFICATE OF TITLE

LAND

LOT 233 IN DEPOSITED PLAN 755552
LOCAL GOVERNMENT AREA BELLINGEN
PARISH OF NEWRY COUNTY OF RALEIGH
(FORMERLY KNOWN AS PORTION 233)
TITLE DIAGRAM CROWN PLAN 4040.1714

FIRST SCHEDULE

THE STATE OF NEW SOUTH WALES (AP T968176)

SECOND SCHEDULE (3 NOTIFICATIONS)

- 1 LAND EXCLUDES MINERALS AND IS SUBJECT TO RESERVATIONS AND CONDITIONS IN FAVOUR OF THE CROWN - SEE CROWN GRANT(S)
- 2 EXCEPTING LAND BELOW A DEPTH FROM THE SURFACE OF 15.24 METRES
- * 3 THE LAND IS A RESERVE WITHIN THE MEANING OF PART 5 OF THE CROWN LANDS ACT 1989 AND THERE ARE RESTRICTIONS ON TRANSFER AND OTHER DEALINGS IN THE LAND UNDER THAT ACT, WHICH MAY REQUIRE CONSENT OF THE MINISTER.

NOTATIONS

NOTE: RESUMED FOR STATE PLANNING AUTHORITY PURPOSES GOV GAZ 29-2-1980
FOL 909 & DECLARATION UNDER SEC 25A CLC ACT BY GOV GAZ 20-1-1984
FOL 238

UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

c1m03100577

PRINTED ON 7/9/2017

* Any entries preceded by an asterisk do not appear on the current edition of the Certificate of Title. Warning: the information appearing under notations has not been formally recorded in the Register. InfoTrack an approved NSW Information Broker hereby certifies that the information contained in this document has been provided electronically by the Registrar General in accordance with Section 96B(2) of the Real Property Act 1900.

Figure 6. Example of a title search