

FACT SHEET

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The non-extinguishment principle

Future acts don't always extinguish native title. Most future acts just suppress it so that the native title rights can't be exercised or used for the duration of the future act – this is called the non-extinguishment principle. Once the future act has finished then the native title returns with all its original rights and interests.

However, some future acts do extinguish native title. These include building public works on land reserved for a public purpose and the compulsory acquisition of native title by the government.

Future acts for PBCs*

A future act is an act done now which extinguishes or otherwise 'affects' native title rights and interests. An 'act' can be something that is done on native title land or water, or it can be the authorising of these kinds of activities. An act 'affects' native title if it is at least partly inconsistent with its existence, enjoyment or exercise. State or Territory governments are responsible for most future acts because of their responsibility for land management.

Future acts are only valid (can legally be done) if they follow the future act regime in the *Native Title Act 1993 (NTA)*. This means that, in some cases, certain procedures must be followed by those seeking to do the future act.

They might include:

- making legislation
- granting a licence, permit or authority
- creating any right which is recognised by the law
- other government acts, such as making proclamations or regulations.

They do not include:

- acts that are 'past acts'
- acts on land where native title has already been extinguished.

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* PBCs are Prescribed Bodies Corporate. Once registered with the NNTT, they are also called Registered Native Title Bodies Corporate (RNTBCs).



Australian Government

Department of Families, Housing,
Community Services and Indigenous Affairs



Categories of future acts

The *NTA* sets out the categories of future acts in a particular order.

The order for the different types of future acts in the *NTA* is:

- Indigenous land use agreements (ILUAs) [s 24EB] – see *ILUAs Fact Sheet*
- Procedures indicating absence of native title [s 24FA] – non-claimant applications
- Primary production on pastoral leases [s 24GB] – includes cattle farming, agriculture, aquaculture
- Off-farm activities directly connected to primary production [s 24GD] – includes grazing and taking water on areas adjacent to pastoral leases
- Third party rights on pastoral leases [s 24GE] – includes taking timber or sand, gravel, rocks etc
- Management of water and airspace [s 24HA] – includes licences to take water or fish
- Renewals and extensions [s 24ID] – includes exercising rights that existed before 23/12/1996, and extending some leases
- Public housing etc [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land
- Acts under reservations and leases etc [s 24JA] – includes the creation of national park management plans and the grant of forestry licences
- Facilities for services to the public [s 24KA] – includes building roads, power lines, water and gas pipelines
- Low impact future acts [s 24LA] – does not include things done on land subject to determined native title (not relevant for PBCs)
- some acts that pass the **freehold test** [s 24MD] - (including acts subject to the right to negotiate – see *Right to Negotiate Fact Sheet*). The freehold test means that it would be possible to do the act on land held under freehold title
- Offshore acts [s 24NA] – includes oil rigs, fishing rights.

The order is important because the future act must be dealt with under the first provision that applies to it, even if a later provision is also relevant.

For example, if an ILUA deals with a future act, then the terms of the ILUA apply, not any other later provision in the *NTA*.

Another example is the construction of a road under a law governing the management of a national park. In that case, Subdivision J (dealing with acts done under a reserve) would apply, not Subdivision K (dealing with the construction of things that service the public), and the procedural rights and the effect on native title would be different.



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Procedural rights

Native title holders have certain rights when someone wants to do a future act. They do not have a right of veto (the right to say 'no' to a future act). They can have 'procedural rights' where a future act will impact on their native title. These include the:

1. right to comment
2. right to be consulted
3. rights of ordinary title holder
4. right to have an objection heard
5. right to negotiate - see *Right to Negotiate Fact Sheet*.

Not all categories of future acts have the same procedural rights. Also, the government can go ahead with some future acts without following the procedures in the Future Act Regime.

The government must comply with the requirements for building public housing etc (24JAA) and with the right to negotiate in order for those future acts to be valid.

1. Right to comment

Native title holders (through their PBC) usually have a right to comment for future acts that involve:

- Primary production on pastoral leases [s 24GB] – includes cattle farming, agriculture, aquaculture
- Off-farm activities directly connected to primary production [s 24GD] – includes grazing and taking water on areas adjacent to pastoral leases
- Management of water and airspace [s 24HA] – includes licences to take water or fish
- Renewals and extensions [s 24ID] – includes exercising rights that existed before 23/12/1996, that grant freehold or other exclusive rights

- Some acts under reservations and leases etc [s 24JA] – includes the creation of national park management plans.

These future acts are valid (they can be done), even if the government doesn't give the native title holders (through their PBC) the chance to make comments about them.

Native title holders always have a right to comment for future acts that involve:

- Public housing etc [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land.
- Third party rights on pastoral leases [s 24GE] – includes taking timber or sand, gravel, rocks etc



2. Right to be consulted

Native title holders (through their PBC) have a right to be consulted for certain types of future acts that involve:

- some renewals of non-exclusive agricultural and pastoral leases [s 24ID], where the term of the renewed lease is longer than that of the original lease
- public housing etc. [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land

- acts that pass the freehold test [s 24MD] – includes acts that could be done on land held under freehold.

This is a right to be consulted about ways of minimising the future act's impact on native title, access to the land, and the way in which the future act might be done. It is not a right of veto (the right to say 'no' to a future act).



3. Rights of ordinary title holder

Native title holders (through their PBC) have the same procedural rights as any other title holder for future acts that involve:

- facilities for services to the public [s 24KA] – includes building roads, power lines, water and gas pipelines etc
- some Acts that pass the freehold test [s 24MD] – includes acts that could be done on land held under freehold (including acts subject to the right to negotiate)

- offshore acts [s 24NA] – includes oil rigs, fishing rights.

The nature of these rights depends on the Federal, State or Territory law under which the government is doing the future act. There might be rights to comment, rights to be consulted, rights to have an objection heard, or maybe no rights at all.



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4. Right to have an objection heard

Native title holders (through their PBC) have a right to object to the future act, and to have that objection heard by an independent body, for future acts that involve:

- some renewals of non-exclusive agricultural and pastoral leases [s 24ID], where the term of the renewed lease is longer than that of the original lease
- some acts that pass the freehold test [s 24MD].



5. Right to Negotiate

Please see the separate *Right to Negotiate Fact Sheet* for more information about this more complicated process.

This Fact Sheet contains general information only and is not a substitute for getting legal advice. Aurora does not accept liability for any action taken based on this Fact Sheet or for any loss suffered because someone relied on it. We urge native title holders and PBCs to get legal advice on any matter which may impact on their native title rights and interests.