

## APPENDIX 5

### The Future Act Regime

#### ***Introduction***

A5.1 The 'future act regime' in the *Native Title Act 1993* (the Act) seeks to specify the conditions under which governments can impinge upon native title and the procedures that must be followed before such an act may be undertaken. The future act regime seeks to answer the question:

What can governments do in the future which affects native title, and how can they do it?<sup>1</sup>

The regime concerns only acts that affect native title rights. These include grants of rights by governments to third parties in relation to land or water subject to native title, or actions by governments themselves on such land or water.<sup>2</sup> For each type of future act, the Act:

- provides validity, if specified conditions are met;
- determines the effect on native title;
- generally provides a right of compensation to native title holders; and
- generally provides procedural rights to native title holders.<sup>3</sup>

#### ***What is a Future Act?***

A5.2 Section 233 of the Act defines a 'future act' as an act which either consists of the making, amendment or repeal of legislation which takes place on or after 1 July 1993 or is any other act that takes place on or after 1 January 1994, which affects native title to any extent.

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<sup>1</sup> Australian Government Solicitor *Commentary on the Native Title Act 1993* Commonwealth of Australia Canberra 1998, p.C26.

<sup>2</sup> Ibid.

<sup>3</sup> Australian Government Solicitor, p.C27.

As section 227 provides, an act affects native title if it extinguishes native title rights or is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise. Such acts may include for example, the extension in term of an exploration licence over land subject to a registered native title claim<sup>4</sup>, the grant of a fishing licence or a compulsory acquisition. It should be noted however that *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* held that only extinguishment (whether whole or partial) of native title, rather than *any* effect on it, is subject to the future act process.<sup>5</sup>

A5.3 Technically past acts are not future acts, but intermediate period acts are (s.233(1)(b)).

A5.4 An act transferring lands or waters to or for the benefit of Aboriginal peoples or Torres Strait Islanders under Aboriginal land rights legislation of the Commonwealth or South Australia or which affect such land or waters is not a future act (s.233(3)).

#### **Authorisation under the Native Title Act: Valid Future Acts**

A5.5 Where covered by certain provisions, Part 2 Division 3 of the Act validates certain future acts that affect native title rights (each discussed below). These include those:

- pursuant to a registered agreement with a native title party (an ILUA) (Subdivisions B, C, D and E);
- where procedures indicate an absence of native title (Subdivision F);
- in relation to pastoral lease land, and other co-existing tenures (Subdivision G);
- in relation to water and living aquatic resources (Subdivision H) or offshore places (Subdivision N);
- which are pursuant to a pre-existing right or renewals of existing interests (Subdivision I), or pursuant to existing reservations or leases (Subdivision J);

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<sup>4</sup> *Mineralogy Pty Ltd v NNTT* (1997) 150 ALR 467 at 484- 6 Per Carr J.

<sup>5</sup> Bartlett R H *Native Title in Australia* Butterworths 2000, p 327. *Ward on behalf of the Miriuwung and Gajerrong People v Western Australia* (1998) 159 ALR 483 at 509.

- which provide facilities for services to the public (Subdivision K), or which have a low impact (Subdivision L); or
- which pass the freehold test (Subdivision M).<sup>6</sup>

*If Procedures Indicate Absence of Native Title (Subdivision F)*

A5.6 Where governments or others have an interest in an area, section 61 allows them to apply for a determination as to whether native title exists over the area. Where there is no relevant native title claim within the 3 month period of the 'non-claimant application' or there is a determination that native title does not exist in relation to the area, any future act in relation to the land or waters is valid (s.24FA). It is possible for a future determination of native title to remove protection, but not retrospectively.<sup>7</sup>

*Primary Production (Subdivision G)*

A5.7 According to the Commentary prepared by the Australian Government Solicitor, one of the Act's main functions was:

... to put in place a new future act regime where native title co-exists with other tenures.<sup>8</sup>

Similarly point 4 of the *Ten Point Plan* declared:

All activities pursuant to, or incidental to, 'primary production' would be allowed on pastoral leases (ie the right to negotiate in relation to such activities would be completely removed), including farmstay tourism, even if native title exists, provided the dominant purpose of the use of the land is primary production.<sup>9</sup>

Section 24GB provides that lessees of non-exclusive agricultural and pastoral land can be granted additional rights to carry on a 'primary production activity', or an

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<sup>6</sup> Australian Government Solicitor, pp.C26-27.

<sup>7</sup> Australian Government Solicitor, p.C30.

<sup>8</sup> Ibid.

<sup>9</sup> Bartlett R H *op.cit.*, p.330.

associated or incidental activity. This is the case even where native title may exist and may be affected by the grant of additional rights.<sup>10</sup>

A5.8 Thus, in subdivision G the Act permits:

- primary production activities, or associated or incidental activities, on non-exclusive agricultural and pastoral leases (Primary production is not limited to pastoral activities, but includes cultivating land, catching fish, carrying on forest operations and engaging in horticulture);
- farmstay tourism on non-exclusive agricultural and pastoral leases;
- activities directly connected with primary production on freehold or agricultural and pastoral leases that take place off the freehold, agricultural or pastoral lease land; and
- taking timber, gravel, rocks, sand, soil and other resources (except those that constitute mining) on non-exclusive agricultural and pastoral leases.

The native title holders and registered native title claimants have a right to be notified and to comment on some of these activities.<sup>11</sup>

A5.9 The non-extinguishment principle applies to the validation of acts permitting or requiring primary production and other activities under the Act.<sup>12</sup> Native title rights and interests are suspended to the extent of inconsistency but revive once the acts cease to operate.<sup>13</sup> In addition in the case of off-farm activities, the activity must not prevent native title holders from having reasonable access to the area.<sup>14</sup>

#### *Water and Airspace (Subdivision H)*

A5.10 The Act validates any future act consisting of the making, amending or repealing of legislation in relation to the management or regulation of surface and subterranean water, living aquatic resources, or airspace.<sup>15</sup> This includes the grant of any lease, licence, permit or authority under that legislation regarding the

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<sup>10</sup> Ibid.

<sup>11</sup> *Native Title Act 1993* ss.24GB(9), 24GD(6), 24GE(1)(f).

<sup>12</sup> *Native Title Act 1993* ss.24GB(6), 24GC(2), 24GD(3), 24GE(3).

<sup>13</sup> *Native Title Act 1993* s.238.

<sup>14</sup> *Native Title Act 1993* s.24GD(1)(e)(iv).

<sup>15</sup> *Native Title Act 1993* s.24HA(1).

management or regulation of water, living aquatic resources, or airspace.<sup>16</sup> An example of such an act is legislation providing for the diversion, use and taking of water from above and below ground sources.

A5.11 The validation of acts with respect to water and airspace arose from Point 8 of the *Ten Point Plan* which provided:

The ability of governments to regulate and manage surface and subsurface water, off-shore resources and airspace, and the rights of those with interests under such regulatory or management regime would be put beyond doubt.<sup>17</sup>

A5.12 The non-extinguishment principle applies to all such future acts<sup>18</sup> and compensation is payable to native title holders.<sup>19</sup> Native title parties must be notified and given the opportunity to comment before any lease, licence, permit or authority, or class of interests is granted.<sup>20</sup> This provision has been criticised as:

...permit[ting] regulation and management of waters and aquatic resources in a manner which can be used to destroy and extinguish traditional fishing rights.<sup>21</sup>

#### *Renewals and Extension (Subdivision I)*

A5.13 Sections 24IB and 24ID allow certain 'pre-existing right-based' future acts to be done:

- in exercise of a legally enforceable right created on or before 23 December 1996; or
- in good faith in giving effect to an offer, commitment, arrangement, or undertaking made in good faith on or before 23 December 1996 of which there is written evidence.

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<sup>16</sup> *Native Title Act 1993* s.24HA(2).

<sup>17</sup> Bartlett R H *op.cit.*, p.337.

<sup>18</sup> *Native Title Act 1993* s.24HA(4).

<sup>19</sup> *Native Title Act 1993* s.24HA(5).

<sup>20</sup> *Native Title Act 1993* s.24HA(7).

<sup>21</sup> National Indigenous Working Group in Bartlett R H *op.cit.*, p.338.

A5.14 Sections 24IC and 24ID allow renewals of leases, licences, permits or authorities granted on or before 23 December 1996, and those granted after that date and covered by Subdivisions G or H, provided certain conditions are met.<sup>22</sup> Such conditions may include notification and an opportunity to comment (s.24ID(3)) and may, for some renewals of mining leases, require the right to negotiate process.<sup>23</sup>

#### *Reservations (Subdivision J)*

A5.15 Where land was subject to a reservation for a particular purpose prior to 23 December 1996, and the reservation was valid, a later act done in good faith and in accordance with the reservation is validated by the Act.<sup>24</sup> The reservation could however involve a wide variety of purposes, for example:

- the creation of National Park management plans where the land was reserved for the establishment of the park before 23 December 1996; and
- the grant of forestry licences under a forestry reservation made before 23 December 1996.

A5.16 Generally the non-extinguishment principle applies to the act unless the act consists of the construction or establishment of a public work.<sup>25</sup> In general no procedural rights are provided unless the act consists of construction or establishment of a public work or creation of a plan of management for a national, State or Territory park. In those two circumstances, native title parties must be notified and given the opportunity to comment.<sup>26</sup>

#### *Facilities for services to the public (Subdivision K)*

A5.17 Subdivision K allows for the construction, operation, use, maintenance or repair of facilities for services to the public including roads, railways, bridges,

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<sup>22</sup> Australian Government Solicitor, p.C32.

<sup>23</sup> *Native Title Act 1993* ss.24ID(1)(a), 26(1A), 26D(1).

<sup>24</sup> *Native Title Act 1993* ss.24JA, 24JB.

<sup>25</sup> *Native Title Act 1993* ss.24JB(2), 24JB(3).

<sup>26</sup> *Native Title Act 1993* ss.24JB(6), 24JB(7).

wharves, transmission facilities, irrigation channels, pipelines and communication facilities.<sup>27</sup>

A5.18 Native title holders and registered claimants are entitled to the same procedural rights in relation to these acts as they would have if they held instead an ordinary title to the land concerned or, if the land is subject to a non-exclusive agricultural or pastoral lease, the procedural rights they would have if they held such a lease.<sup>28</sup>

A5.19 As the Native Title Amendment Bill 1997 Explanatory Memorandum explained:

... native title, should not inhibit the provision of these services where they are for the general public, including native title holders, no matter who provides them, provided that the effect on native title is minimal.<sup>29</sup>

#### *Low Impact Future Acts (Subdivision L)*

A5.20 Low impact future acts are regarded as having little effect on any native title.<sup>30</sup> They include such activities as tree lopping, clearing exotic species, foreshore reclamation and environmental protection activities. Excluded are grants of freehold and leases, the conferral of rights of exclusive possession, excavation, clearing, mining, construction of fixtures, and disposal or storage of any garbage or any poisonous toxic or hazardous substance.<sup>31</sup>

A5.21 Upon validation, the non-extinguishment principle applies and native title rights and interests are suspended to the extent of any inconsistency.<sup>32</sup>

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<sup>27</sup> *Native Title Act 1993* s.24KA(2).

<sup>28</sup> *Native Title Act 1993* s.24KA(7).

<sup>29</sup> *Native Title Amendment Bill 1997: Explanatory Memorandum* Parliament of the Commonwealth of Australia 1996-97-98, p.133.

<sup>30</sup> *Native Title Amendment Bill 1997: Explanatory Memorandum*, p.139.

<sup>31</sup> *Native Title Act 1993* s.24LA(1)(b).

<sup>32</sup> *Native Title Act 1993* s.24LA(4).

*Freehold Test (Subdivision M)*

A5.22 Where an act affects native title, but does not fall under any of the specific tests outlined above, to be validated it must pass the general ‘freehold test’.<sup>33</sup> This applies to onshore places, meaning land or waters located within the limits of a State or Territory, generally including the intertidal zone.<sup>34</sup>

A5.23 The freehold test reflects the notion that:

... for the purposes of providing equality before the law, future acts should only be valid over native title lands or water if they could also be done over freehold and subject to similar conditions and procedural requirements.<sup>35</sup>

A5.24 The making of new legislation is valid only if it affects native title holders in the same way that it affects ordinary title holders or puts native title holders in no worse position than ordinary title holders.<sup>36</sup>

A5.25 Non-legislative future acts are also validated on these terms provided a law of the Commonwealth, State or Territory provides for the preservation or protection of areas or sites of particular traditional significance to Aboriginal peoples or Torres Strait Islanders.<sup>37</sup>

A5.26 Where the whole or part of native title rights and interests are compulsorily acquired, along with the acquisition of the whole or equivalent part of all non-native title rights and interests, then the native title rights and interests acquired are extinguished.<sup>38</sup> A condition of such extinguishment is that the practices and procedures adopted in the acquisition do not cause any greater disadvantage to the

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<sup>33</sup> Australian Government Solicitor, p.C33.

<sup>34</sup> *Native Title Act 1993* s.24MC.

<sup>35</sup> Bartlett R H *op.cit.*, p.345.

<sup>36</sup> *Native Title Act 1993* s.24MA.

<sup>37</sup> *Native Title Act 1993* s.24MB.

<sup>38</sup> *Native Title Act 1993* s.24MD.

native title holders than is caused to the holders of non-native title rights and interests.<sup>39</sup>

#### *Offshore (Subdivision N)*

A5.27 All future acts which apply to offshore places will be valid, including those requiring the acquisition of native title rights (s.24NA(2)). An 'off-shore place' is any place beyond the limits of the State. The limits of the State extend 3 nautical miles from the low tide mark. Thus, grants of interests, such as mining and petroleum licences and permits, to submerged lands located offshore are to be validated. However, native title can only be extinguished by a compulsory acquisition which meets the same requirements as those in the freehold test regime outlined above.<sup>40</sup>

#### *Hierarchy within the Future Act Regime*

A5.28 Section 24AB provides that if an act is subject to more than one of the listed subdivisions, the subdivision higher in the order of the list will apply.

A5.29 A future act will be valid if the parties to an Indigenous Land Use Agreement consent to it being done. Under subsection 24AB(1), it will not be covered by any other validating provisions, within the future act regime.<sup>41</sup> Further, a future act (other than an intermediate period act) that has already been done invalidly may also be validated as a result of such agreements.<sup>42</sup>

#### ***Invalid Future Acts***

A5.30 Where a future act does not fall within one of the above provisions it will be invalid, but only to the extent that it affects native title.<sup>43</sup> Injunctive or other relief may be available against planned acts, which are invalid under the Act, and where the act has already taken place, non-injunctive relief may be ordered.<sup>44</sup>

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<sup>39</sup> *Native Title Act 1993* s.24MD(2)(ba).

<sup>40</sup> *Native Title Act 1993* s.24NA(3).

<sup>41</sup> *Native Title Act 1993* s.24AB(1).

<sup>42</sup> *Native Title Act 1993* s.24AA(3).

<sup>43</sup> *Native Title Act 1993* s.24OA.

<sup>44</sup> Bartlett R H *op.cit.*, p.328.

## **Compensation**

A5.31 The future act provisions have varying requirements for compensation. Some provide a general right of compensation, others provide a right only where ordinary title holders would receive compensation or the act could not be done over ordinary title land, and others provide a right if the relevant State or Territory law does not provide a sufficient compensation right.

A5.32 Subsection 51(1) provides that native title holders are entitled to just terms so as to compensate them for any loss, diminution, impairment or other effect on their native title rights and interests. Where the native title rights have been compulsorily acquired, subsection 51(2) allows for regard to be had to any principles or criteria set out in the legislation under which the acquisition takes place. Similarly, in a situation where ordinary title holders would have compensation rights, the principles and criteria set out in the law providing those rights must be applied to the native title holders.<sup>45</sup>

A5.33 Where native title has been extinguished, subsection 51A(1) states that compensation must not exceed the amount that would be payable for the compulsory acquisition of a freehold estate.<sup>46</sup>

A5.34 Compensation can also be granted as a condition for determination that a future act may be done. However the Tribunal has shown considerable reluctance to impose such conditions because:

- it would be more appropriate for compensation to be assessed at a later stage, when the extent of mining operations or industrial development becomes more apparent;
- compensation may have an uncertain effect upon the rights and interests of the native title parties;
- numerous overlapping claims may make the award of compensation to be held on trust for particular groups difficult;

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<sup>45</sup> *Native Title Act 1993* ss.51(3), 240.

<sup>46</sup> Australian Government Solicitor, pp.C36-7.

- where a government is a party, its undoubted ability to meet a final determination of compensation if subsequently made; and
- of the uncertain state of the law in relation to the acquisition of native title rights and interests and in particular the impact of the non-extinguishment principle on its assessment.<sup>47</sup>

### **The Registration Test**

A5.35 In order to gain the protection of any aspect of the future act regime, a native title determination application must be on the Register of Native Title Applications. This requires applicants to provide information, including: boundary details, searches in relation to non-native title interests in land, a detailed description of native title rights and interests and a general description of the factual basis of the claim. The Registrar must be satisfied that certain conditions in relation to the merits of the claim and procedural matters are met before accepting the application for registration for the purposes of access to the right to negotiate.<sup>48</sup>

A5.36 In general, at least one member of the native title group must have or have had a traditional physical connection to the claimed area. Further the application cannot be for ownership of minerals, petroleum or gas, or exclusive possession of waters in offshore places.<sup>49</sup>

### **Future Acts and the Right to Negotiate (Subdivision P)**

A5.37 The right to negotiate is a special statutory procedural right given to registered native title bodies corporate and registered native title claimants in the Act in relation to certain kinds of future acts.

A5.38 The right to negotiate now generally applies to future acts that:

- pass the freehold test or opal/gem mining test;
- are done by the Commonwealth, a State or Territory; and

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<sup>47</sup> Bartlett R H *op.cit.*, pp.426-7.

<sup>48</sup> *Native Title Act 1993* ss.190B, 190C.

<sup>49</sup> Frith A 'The effect of the 1998 Amendments on the Native Title Act 1993' at <http://www.whoseland.com/paper12.html>.

- involve the compulsory acquisition of native title or the creation or variation of a right to mine.<sup>50</sup>

A5.39 If the right to negotiate applies in relation to a future act but is not complied with, the act will be invalid to the extent that it effects native title.<sup>51</sup> However, where the right to negotiate applies, it will only be available once for all future acts within the same project.<sup>52</sup>

A5.40 The right to negotiate no longer applies to any of the future acts listed in ss.24AA(4)(a) – (i) or an act validated under an ILUA.<sup>53</sup> A range of other acts are excluded pursuant to s.26. These include:

- compulsory acquisition of native title rights where the purpose of acquisition is to confer rights on a government party, for the purpose of providing an infrastructure facility, or of land or waters wholly within a town or city;
- the grant of mining rights for the sole purpose of constructing an infrastructure facility associated with mining;
- exploration, prospecting or fossicking grants and small scale gold, tin, opal or gem mining grants where the State or Territory has sought and been granted an exemption by the Commonwealth Minister;
- the renewal, re-grant, re-making or extension of a previous right to mine created on or before 23 December 1996;
- the upgrading of an exploration tenement to a mining tenement in such situations where the original grant was subject to a right to negotiate and a negotiated agreement or determination was made which included a statement that there would be no right to negotiate if an upgrade to mining occurred.<sup>54</sup>

A5.41 For some future acts, despite the removal of the right to negotiate, governments must comply with other procedural rights before the act may be done. Such rights may include the right to comment as in s.24HA(7) and s.24GB(9), the

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<sup>50</sup> *Fifteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund* Commonwealth of Australia September 1999, p.50. *Native Title Act 1993* s.26.

<sup>51</sup> *Native Title Act 1993* s.25(4).

<sup>52</sup> *Native Title Act 1993* s.42A.

<sup>53</sup> *Native Title Act 1993* s.26(2)(a).

<sup>54</sup> *Fifteenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, pp.50-51.

right to be notified and consulted or the right to have an objection heard by an independent body.

A5.42 Acts which must meet the freehold test but are not subject to the right to negotiate are only valid if registered native title claimants or registered native title bodies corporate are extended the same procedural rights as if they held freehold or ordinary title.

A5.43 The amendments also provide that state and territory governments may establish an alternative regime which will apply in place of the right to negotiate in relation to certain future acts. The alternative regime must be determined by the Commonwealth Minister before it will have application.<sup>55</sup> Either House of Parliament can disallow such a determination.<sup>56</sup>

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<sup>55</sup> *Native Title Act 1993* s.43A.

<sup>56</sup> *Native Title Act 1993* s.214.

