

Annexure 8.5

Consideration of Comments and Submissions in Response to Future Act Notifications

1. Purpose

The purpose of this Annexure is to provide you with guidance, as the decision-maker, on how to deal with any comments and submissions (“comments”) received, following a notification under a Module.

It has been adapted from provisions of the *Judicial Review Act 1991* and the Executive Summary of Departmental Standard AS.16.004 “Decision Making and Requests for Statements of Reasons under the Judicial Review Act 1991”.

IMPORTANT

This Annexure has been included in the Procedures to provide guidance to decision-makers. If unsure, decision-makers should seek guidance from your NTCO, Legal unit or Administrative/Judicial Review unit.

2. Checklist for Consideration of Comments and Submissions

Comments received in response to a notification under a Module should be considered by the decision-maker in accordance with the Checklist for the Consideration of Comments provided at the end of this section.

Are you the decision-maker? This will depend on whether you have been given the responsibility or delegation to make a decision under the Native Title Work Procedures in accordance with the “Responsibilities and Delegations” section of your department’s Native Title Work Procedures.

3. Consideration of Comments/Submissions

The purpose of the notification process is to provide native title parties with an opportunity to comment or make submissions about a proposed future act. These procedural rights give the notified party an opportunity to provide to the decision-maker argument and information known to the notified party about their native title interests, to ensure that any impact the

proposed future act may have on native title rights and interests is considered before a decision is made whether to proceed with the future act. The opportunity to comment or to make submissions does not itself constitute a right to object or a right of veto.

As a decision-maker you must take into account relevant considerations when making your decision. Therefore, when considering the comments or submissions, you must take into account any comments or submissions that are relevant to the proposed future act.

Example

The DEEDI is processing an application for a research permit in relation to the intertidal area of the Flamingo River adjacent to Lot 1 on RP78942. The research permit will allow the research unit at Flamingo University to study the mangrove habitat by taking soil samples, cuttings and fish. Mr Alfred Bird of the Flamingo people, who is a registered native title claimant, has been provided with a notification under section 24HA of the NTA. The Department receives comments from Mr Bird which states that –

- a dreaming path runs through that particular intertidal area; and
- the rainbow fish is of particular significance to his people.

The comment in relation to the dreaming path is a relevant consideration as there will be an impact on their native title rights and interests if the permit is granted. The comment in relation to rainbow fish is irrelevant, as the rainbow fish is not found in the Flamingo River although it is found in another river within the claim area.

4. Departmental/Agency Responses

Following the receipt of comments (if any) and your consideration of the comments, you must now decide whether the proposed future act will:

- (1) proceed;
- (2) not proceed; or
- (3) proceed in some modified way.

Example

In relation to the example above, you may decide to proceed in some modified way by authorising the research permit to be granted a little way upriver after consultation with the Flamingo People (to find out the exact location of the dreaming path) and the applicant (to ensure that a slightly different location will fulfil their research needs).

After you make your decision you should send a letter to those parties from whom you had earlier sought comment. The purpose of the letter is to inform the parties of your decision.

In circumstances where you receive a response of “no comment” or where the person notified fails to provide any response at all, it is recommended that you would still send a letter to them advising of your decision.¹

A sample letter, to be adapted as necessary, is provided below. The sample letter outlines those issues you should address in a letter responding to comments received.

4. Sample Letter

[Date]

***[Name and address of person
making comments]***

Dear *[Name]*

Comments on *[insert details of proposed dealing]*

I refer to your letter of *[date]*, which was received at this office on *[date]*, commenting on *[insert details of proposed dealing, eg. the application for temporary closure of the stock route adjoining Lot 12 on Wd4215 made by AB & C Danley to facilitate the construction of an irrigation channel]*.

Decision

After consideration of all matters pertaining to this application, including your comments, it has been *[insert details of decision eg approved to seek Executive Authority for the temporary closure of the area of stock route as shown indicated on the attached plan and for the subsequent grant of a Road Licence over such area in favour of AB & C Danley upon the terms and conditions as set out on the attached schedule. A copy of the offer is attached for your information]*.

Explanation of the decision as it relates to the comments

If subsequent to receiving the comments negotiations have taken place with the person making the comment, it may be necessary to make reference to them here.

¹ Although NTS recommends that a letter be sent in this particular case, it will be a matter for each department or agency whether they adopt this recommendation.

eg. I note that in your original comments you objected to the activity on the grounds of "cultural heritage issues". Following receipt of these comments a joint inspection was carried out on 12 October 2010 when it was agreed that you would withdraw your objection providing that an area within a 10 metre radius of the tree as shown marked "X" on the attached plan is not disturbed and that suitable measures are taken to prevent erosion within 10 metres of the tree.

Reason for decision

If objections were received or comments made they should be addressed, ie. give reasons for the decision made.

eg. The activity is a permitted off-farm activity in accordance with section 24GD of the Native Title Act 1993 (Cth). The applicants seek a timely decision in respect of this application in order that they may take advantage of recent heavy rain falls. As your concerns have been addressed, I have approved the application and have made the appropriate offer accordingly. Please note that the conditions of the proposed Road Licence provide for:

(1) no disturbance of any of the land within 10 metres of the tree marked "X" on the attached plan and that suitable measures be taken to prevent erosion in respect of the total length of the licensed area; and

(2) native title holders not being prevented from having reasonable access to the subject area, except where the use of the channel for the provision of water would take precedence.

Yours sincerely

*[insert name and
position of decision maker]*

5. Checklist for Consideration of Comments and Submissions

- Are you the lawful decision-maker under an Act, statutory instrument, policy, program or departmental instruction?
- Have you been delegated the authority to make the decision?
- Are you qualified to make the decision?
- Does any legislation, statutory instrument policy or program place any constraints upon you as the decision-maker?
- What information is available to you?
- Have you perused all relevant departmental documents?
- Is there a need to make further enquiries?
- Have you enquired into relevant issues raised by a person, particularly where the person has submitted evidence that conflicts with any initial findings of the decision-maker?
- Do persons affected by your decision need to be consulted so they have an opportunity to comment (procedural fairness)?
- Have you considered the decision in a comprehensive manner? - explore both sides.
- Have you individually assessed each side on its respective merits?
- Do not disregard the merits of the particular case.
- Do not make a decision in narrow accordance with a rule or policy without regard to the merits of the particular case.
- Do not jump to conclusions.
- Has all available essential evidence been collected?
- Do not use evidence selectively unless you can objectively justify such use.
- Consider the weight to be attached to the evidence, or why evidence has been accepted or rejected.
- If there is no evidence to support the comments, then those comments will have no weight.
- Further, if other factors outweigh the comments, those comments will have little weight.
- Make your determination of the facts based on the evidence.
- Beware of the status and quality of evidence. Is the evidence provided direct testimony; is it fact; or is it opinion; how well is it verified?
- When your decision is based on some adverse findings of fact, those findings must not be based on mere suspicions, but rather on reliable logical conclusions.
- Ensure your decision making process is logical and lawful.
- Ensure that your decision is lawful and objective.
- Do not take an irrelevant consideration into account.
- Do not fail to take a relevant consideration into account.
- Do not make a decision for a purpose other than required under the Procedure.

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- Do not make a decision that is so unreasonable that no reasonable person could so decide. ie. Consider what is reasonable on the evidence before you.
 - Do not make a decision in such a way that it is an abuse of your power.
 - Exercise your decision making power independently and personally - do not make a decision at the direction of someone else.
 - Record your decision. Be prepared to review the decision if it involves an error of law.
 - When recording your decision use plain and clear language.