

Schedule 1

1910, the Brigalow and Other Lands Development Act 1962, the Irrigation Areas (Land Settlement) Act 1962 or the Land Act 1962.

26 Perpetual lease selections

A perpetual lease selection under the *Land Act 1897, the Closer Settlement Act 1906, the Land Act 1910, the Discharged Soldiers' Settlement Act 1917, the Upper Burnett and Callide Land Settlement Act 1923, the Sugar Workers' Perpetual Lease Selections Act 1923, the Tully Sugar Works Area Land Regulations Ratification Act 1924, the Irrigation Acts Amendment Act 1933, the Brigalow and Other Lands Development Act 1962, the Irrigation Areas (Land Settlement) Act 1962 or the Land Act 1962.*

27 Perpetual town leases

- (1) A perpetual town lease, including an auction perpetual lease that is a perpetual town lease, under the *Closer Settlement Act 1906, the Land Act 1910, the Discharged Soldiers' Settlement Act 1917, the Workers' Homes Act 1919, the Tully Sugar Works Area Land Regulations Ratification Act 1924, the Irrigation Acts Amendment Act 1933, the State Housing Act 1945, the Irrigation Areas (Land Settlement) Act 1962 or the Land Act 1962.*
- (2) A perpetual town lease without competition under the *Land Act 1910, the Irrigation Areas (Land Settlement) Act 1962 or the City of Brisbane (Flood Mitigation Works Approval) Act 1952.*
- (3) A perpetual town lease (non-competitive lease) under the *Irrigation Areas (Land Settlement) Act 1962 or the Land Act 1962.*

28 Perpetual suburban leases

- (1) A perpetual suburban lease, including an auction perpetual lease that is a perpetual suburban lease, under the *Closer Settlement Act 1906, the Land Act 1910, the Discharged Soldiers' Settlement Act 1917, the Workers' Homes Act 1919, the Tully Sugar Works Area Land Regulations Ratification Act 1924, the State Housing Act 1945, the Irrigation Areas (Land Settlement) Act 1962 or the Land Act 1962.*
- (2) A perpetual suburban lease without competition under the *Land Act 1910, the Irrigation Areas (Land Settlement) Act 1962 or the City of Brisbane (Flood Mitigation Works Approval) Act 1952.*

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- (3) A perpetual suburban lease (non-competitive lease) under the *Irrigation Areas (Land Settlement) Act 1962* or the *Land Act 1962*

29 Perpetual country leases

- (1) A perpetual country lease, including an auction perpetual lease that is a perpetual country lease, under the *Closer Settlement Act 1906*, the *Land Act 1910*, the *Tully Sugar Works Area Land Regulations Ratification Act 1924*, the *Irrigation Areas (Land Settlement) Act 1962* or the *Land Act 1962*.
- (2) A perpetual country lease without competition under the *Land Act 1910* or the *City of Brisbane (Flood Mitigation Works Approval) Act 1952*.
- (3) A perpetual country lease (non-competitive lease) under the *Irrigation Areas (Land Settlement) Act 1962* or the *Land Act 1962*.

30 Prickly pear-related interests

- (1) A prickly pear frontage selection under the *Land Act 1897*.
- (2) A prickly pear infested selection under the *Land Act 1897*.
- (3) A prickly-pear selection under the *Prickly Pear Selections Act 1901* or the *Land Act 1910*.
- (4) A perpetual lease prickly-pear development selection under the *Land Act 1910* or the *Prickly-pear Land Acts Amendment Act 1930*.
- (5) A prickly-pear development selection under the *Land Act 1910* or the *Prickly-pear Land Acts Amendment Act 1930*.

31 Leases under agreements given the force of law

- (1) Any special lease granted to Amoco Australia Pty Limited under clause 3 of the Agreement that is given the force of law by section 3 of the *Amoco Australia Pty Limited Agreement Act 1961*.
- (2) The lease granted to Austral-Pacific Fertilizers Limited under clause 4(b) or 4(c) of the Agreement that is given the force of law by section 3 of the *Austral-Pacific Fertilizers Limited Agreement Act 1967*.
- (3) Any special lease granted to Austral-Pacific Fertilizers Limited under clause 4(d) of the Agreement that is given the force of law by section 3 of the *Austral-Pacific Fertilizers Limited Agreement Act 1967*.

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- (4) The special lease granted to the Gateway Bridge Company Limited under clause 1(5) of Part III of the Agreement that is given the force of law by section 4 of the *Gateway Bridge Agreement Act 1980*.
- (5) The special lease granted to the Sunshine Motorway Company Limited under clause 1(4) of Part III of the Agreement that is given the force of law by section 4 of the *Motorways Agreements Act 1987*.

32 Various interests

- (1) A lease under the *Leasing Act 1866*.
- (2) A lease under the *Gold Fields Homestead Act Amendment Act 1880*.
- (3) An unconditional selection under the *Crown Lands Act 1891*, the *Land Act 1897*, the *Closer Settlement Act 1906* or the *Land Act 1910*.
- (4) A designed agricultural selection under the *Land Acts Amendment Act 1952*.
- (5) A perpetual lease under section 8 of the *Clermont Flood Relief Act 1917*.
- (6) A sugar workers' agricultural farm under the *Tully Sugar Works Area Land Regulations Ratification Act 1924*.
- (7) A lease under section 64A of the *Harbours Act 1955*.
- (8) A purchase lease under the *Brigalow and Other Lands Development Act 1962*.
- (9) An auction purchase freehold under the *Land Act 1962*, including a lease under section 176 of that Act.
- (10) A special lease purchase freehold under the *Land Act 1962*, including a lease under subsection 207(7) of that Act.
- (11) A sub-lease under subsection 6A(2) of the *Industrial Development Act 1963*.
- (12) A lease under paragraph 24(b) of the *Industrial Development Act 1963*.
- (13) A mining titles freeholding lease under the *Mining Titles Freeholding Act 1980*.

C. Types of Leases

Part 5 What is a commercial lease?

A commercial lease is a lease (other than a mining lease) that allows the lessee to use the land or waters covered by the lease *solely or primarily for business or commercial purposes*.¹¹

“solely or primarily”

This means that the lease must be used only or mainly for business or commercial purposes.

There must not be another purpose or use (eg. residential or grazing) that is noted–

- on the lease document; or
- within the conditions of the lease,

as it could not be said that the lease was solely or primarily for business purposes.

For example, if the lease was for business and grazing purposes then it cannot be a commercial lease, as it cannot be said that the lease is primarily or solely for business purposes as grazing is listed also.

Examples of commercial leases

- A lease that permits the construction of a building to be used for business or commercial purposes, or of a hotel, motel or tourist resort.
- A lease that permits the use of a building on land for business or commercial purposes, or the operation of a hotel, motel or tourist resort on land.
- A lease that states that the purpose of the lease is for business or commercial purposes.

¹¹ Section 246, NTA

Part 6 What is an exclusive agricultural lease and an exclusive pastoral lease?

Agricultural Leases ¹²

A lease is an agricultural lease if it –

- (a) allows the lessee to use the land or waters covered by the lease solely or primarily for agricultural purposes (which includes the planting and growing in the land of trees, vines or vegetables;
- OR
- (b) 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.

NB. An agricultural lease also includes a lease that permits the lessee to use the land or waters covered by the lease solely or primarily for aquacultural purposes.

An exclusive agricultural lease is a lease that:

- (a) gives a right of exclusive possession over the land or waters covered by the lease; or
- (b) is a *Scheduled Interest*.¹³

Pastoral Leases ¹⁴

A lease is a pastoral lease if it –

- (a) allows the lessee to use the land or waters covered by the lease solely or primarily for:
 - (i) maintaining or breeding sheep, cattle or other animals; or
 - (ii) any other pastoral purpose;
- OR
- (b) contains a statement to the effect that it is solely or primarily a pastoral lease or that it is granted solely or primarily for pastoral purposes.

¹² Section 247, NTA

¹³ Section 247A, NTA

¹⁴ Section 248, NTA

An exclusive pastoral lease is a pastoral lease that:

- (a) gives a right of exclusive possession over the land or waters covered by the lease; or
- (b) is a *Scheduled Interest*.¹⁵

“solely or primarily”

This means that the lease must be used only or mainly for -

- a. agricultural purposes, in the case of an agricultural lease; or
- b. pastoral purposes, in the case of a pastoral lease.

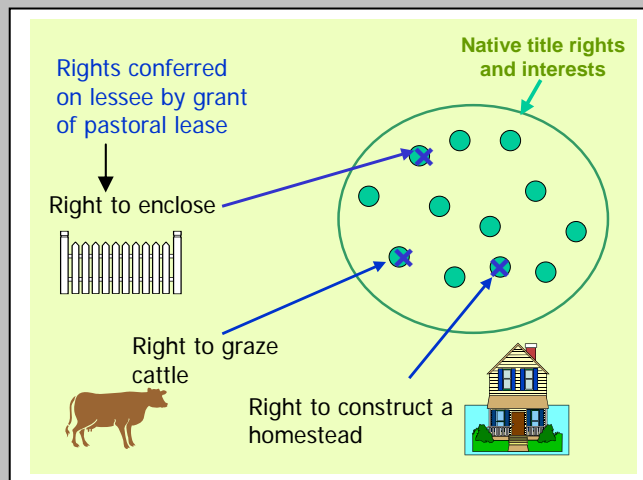
There must not be another type of purpose or use that is noted on –

- the lease document; or
- within the conditions of the lease,

as it could not be said that the lease was solely or primarily for agricultural or pastoral purposes.

IMPORTANT

Where these leases are not a Scheduled Interest, these types of leases will generally be **previous NON-exclusive possession acts** which either extinguish native title to the extent of the inconsistency where the rights granted under the agricultural or pastoral lease extinguish at common law, (ie. there is partial extinguishment of native title as can be seen in the below diagram), or causes the affected native title rights and interests to be suspended whilst the lease is in force.¹⁶



To work out which native title rights and interests have been extinguished requires an in depth analysis of the rights granted under the lease and the rights and interests held by native title holders. Therefore, in this case as any native title will not have been wholly extinguished, you will not be able to rely on this lease to complete your native title assessment.

¹⁵ Section 248A, NTA

¹⁶ Section 23F, NTA; section 23, NTQA

Part 7 What is a residential lease?

A residential lease is a lease that allows the lessee to use the land or waters covered by the lease solely or primarily for constructing or occupying a private residence.¹⁷

“solely or primarily”

This means that the lease must be used only or mainly for the purpose of constructing or occupying a private residence. There must not be another type of purpose or use (eg. business or grazing) that is noted-

- on the lease document; or
- within the conditions of the lease,

as it could not be said that the lease was solely or primarily for residential type purposes.

For example, if the lease was for residential and grazing purposes then it cannot be a residential lease, as it cannot be said that the lease is primarily or solely for residential purposes as grazing is listed also.

Examples

The construction of a house or a unit on land for a person to live in is an example of use of land for constructing a private residence.

The use of a house or unit on land that is leased out to a person to live in is an example of use of the land for occupying a private residence.

A lease that states the purpose of the lease is for residential purposes.

A lease for the purpose of a hotel, motel, caravan or tent on land is an example of something that is **not** use of land for occupying a private residence and is therefore not a residential lease.

¹⁷ Section 249, NTA

Part 8 What is a community purposes lease?

A community purposes lease is a lease that:

- (a) allows the lessee to use the land or waters covered by the lease solely or primarily for community, religious, educational, charitable or sporting purposes;
- OR
- (b) contains a statement to the effect that it is solely or primarily a community purposes lease or that it is granted solely or primarily for community, religious, education, charitable or sporting purposes.¹⁸

“solely or primarily”

This means that the lease must be used only or mainly for community, religious, educational, charitable or sporting purposes. There must not be another purpose (eg. business or grazing), that is noted –

- on the lease document; or
- within the conditions of the lease,

as it could not be said that the lease was solely or primarily for one of the listed community purposes.

For example, if the lease was for community and grazing purposes then it cannot be a community purpose lease, as it cannot be said that the lease is primarily or solely for a community purpose as grazing is listed also.

Examples

- A trustee lease on a reserve to the local softball association for the construction of a clubhouse.
- A lease to the Catholic church for the construction of a church.
- A lease to the Save the Wombat environmental group for an environmental education centre.

¹⁸ Section 249A, NTA

Part 9 What is a mining tenement and what does a dissection of a mining tenement mean?

Native title is only wholly extinguished by the grant of a mining tenement but only on those parts of the mining tenement on which towns, cities or private residences or related buildings or works are constructed.¹⁹ Where there is no such development, native title is not extinguished by the grant of the mining tenement. Therefore for the purpose of this Module, the mining tenement is in effect dissected or divided into two areas (please see the below diagram).

To apply this Part -

- (a) there must have been the grant of a mining tenement which satisfies the below definition which was in force as at 24 December 1996;

Definition

A mining tenement permits the holder to use the land or waters concerned by the lease solely or primarily for mining. A mining tenement includes –

- a prospecting permit;
- a mining claim;
- an exploration permit; mining development licence; and
- a mining lease.

AND

- (b) the mining tenement needs to be dissected in accordance with the criteria below.

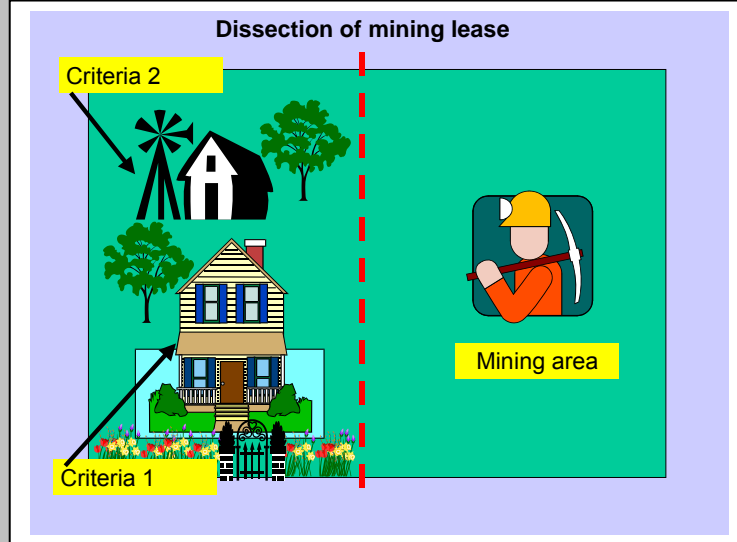
Dissection of the mining tenement

If the following criteria applies²⁰, the tenement is taken to consist of separate grants in respect of:

- (a) the part of the land or waters in respect of which **Criteria 1** and or **Criteria 2** are satisfied;
AND
(b) the remainder of the land or waters.

¹⁹ Section 23B(2)(c)(vii) and section 245(2)-(4) of the NTA

²⁰ The Commonwealth Minister may, in writing, determine that a specified city, town, residence, building or works is not to be taken into account. At the date of the release of this Module, there had been no regulations made.



Native title is only wholly extinguished over the area of the lease to which Criteria 1 and Criteria 2 applies. The dissected area should be drawn on to a plan and attached to your native title assessment form.

Criteria 1

- (a) the tenement was in force at the beginning of 24 December 1996 (“the test time”)
- (b) the city, town or private residences had been wholly or partly constructed at the test time on a part of the land or waters covered by the tenement;
- (c) the construction was permitted by the tenement; and
- (d) in the case of any private residences – they had been, or were being, constructed as fixtures²¹ and it was reasonably likely at the test time that, if mining under the tenement were to cease at any later time, they would continue to be used as private residences.

²¹ **Definition – Fixture** A fixture is an item attached to the ground other than under its own weight. An item which is a fixture ceases to be the personal property of the person who attached it to the land as the item becomes part of the land.

It is difficult to always know whether something is a fixture. For example, office partitions which were not just sitting on the floor by their own weight but were secured to the floor and walls by nails and bolts were held by the Federal Court not to be a fixture.²¹ However, the general rule in relation to fixtures is where something is affixed to the land even slightly it is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue as a personal possession.²¹

Example A demountable, eg. a ranger’s hut, is a building that just sits on the ground and therefore is unlikely to be a fixture as it is not attached to the ground. It is likely to be considered a fixture when it is attached to the ground by cementing the stumps to the ground and/ an electricity line/sewerage pipes/water pipes are attached to the demountable.

Criteria 2

1. the tenement was in force at the beginning of 24 December 1996 (“the test time”);
2. other buildings had been wholly or partly constructed as fixtures²² at the test time, on a part of the land or waters covered by the tenement, for carrying on an activity in connection with any city, town or private residences covered by Criteria 1;
3. the construction was permitted by the tenement; and
4. it was reasonably likely at the test time that, if mining under the tenement were to cease at any later time, the buildings or works would continue to be used to carry on the same activity, in connection with any city, town or private residences mentioned in Criteria 1.

Part 10 What is a lease that confers a right of exclusive possession?

A lease that confers a right of exclusive possession is a lease that gives the lessee a right of possession against all others. This is a right that is wholly inconsistent with native title rights and interests.

Example

Please refer to the example beginning on page 18 at Part 4.

IMPORTANT

As it is difficult to analyse or determine whether a lease confers a right of exclusive possession, if you are of the view that a particular lease may be an exclusive possession lease you will need to provide all details to ATSILS through your NTCO.

²² Refer to the above footnote.

C. Effect on native title, compensation and decision-making

Part 11 What is the effect of a PEPA on native title rights and interests?

A PEPA will wholly extinguish any native title rights and interests over the area covered by the PEPA.²³ Native title remains extinguished by a PEPA even though it may not be currently in existence.

Part 12 Is compensation payable for the grant or vesting of a previous exclusive possession act?

Compensation is payable by the State (where it is attributable to the State) if there is a successful claim for compensation for the extinguishment of native title rights and interests caused by a PEPA. The payment of compensation is subject to the requirements in section 27 of the NTQA.

Part 13 Who makes the decision whether this Module applies?

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 or agency’s Native Title Work Procedures.

If the decision-maker is unsure how to proceed, your NTCO must be contacted for advice. If the NTCO is unsure how to proceed, ATSILS must be contacted for advice.

E. Checklist

To help you in ensuring that you have satisfied each and every requirement in Part 3 of this Module, the following checklist can be used to tick off each requirement as you go through Part 3.

²³ Section 20, NTQA



Module BA Checklist

Requirement No.	Requirement	Satisfied	Not satisfied
1	<p>The proposed dealing area was or is covered by one or more of the following interests -</p> <ul style="list-style-type: none"> a. a freehold estate; b. a Scheduled interest; c. a lease that is – <ul style="list-style-type: none"> (i) a commercial lease that is neither an agricultural lease nor a pastoral lease; (ii) an exclusive agricultural lease or exclusive pastoral lease; (iii) a residential lease; (iv) a community purposes lease; (v) a mining tenement over land or waters only to the extent it relates to land or waters on which towns, cities or private residences or related buildings or works are constructed; or (vi) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters. d. or vesting of certain lands or waters in any person by or under legislation which expressly or impliedly conferred a right of exclusive possession of the land or water on the person. 		
2	<p>The conditions of the lease do not alter how you would assess the purpose of the lease. (NB. Ignore this requirement if your interest is a freehold estate or a vesting.)</p>		
3	<p>The interest was granted or the vesting occurred on or before 23 December 1996.</p>		
4	<p>The grant or vesting of the interest was valid.</p>		
5	<p>None of the exclusions at Requirement 5 apply.</p>		
<p>The extinguishing effect of the PEPA can be relied upon (Module BB)</p>			

If this Module does not apply, please proceed to the next Module.