

Module H

Section 24HA: Management or Regulation of Surface and Subterranean Water, Living Aquatic Resources and Airspace

DOES THE PROPOSED FUTURE ACT FIT WITHIN THIS MODULE?

This Module will help you assess whether your future act is caught by section 24HA of the NTA.

If your future act falls within section 24HA, then your future act is either –

1. the making, amending or repealing of legislation that relates to the management or regulation of surface or subterranean water, living aquatic resources or airspace – section 24HA(1); OR
2. the grant of a new permit, lease, licence or authority that is granted under legislation that relates to the management or regulation of surface or subterranean water, living aquatic resources or airspace – section 24HA(2).

Both sub-sections need to be considered, ie. if the proposed future act does not fit within section 24HA(1) then you need to consider whether the proposed future act fits within section 24HA(2).

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Part 1 What is section 24HA?

Section 24HA focuses on future acts that involve legislation that relates to the management or regulation of –

- surface and subterranean water;
- living aquatic resources; and
- airspace.

Your future act is caught by section 24HA, if it is either –

1. the making, amending or repealing of legislation that relates to the management or regulation of surface or subterranean water, living aquatic resources or airspace - s24HA(1);

OR

2. the grant of a new permit, lease, licence or authority that is granted under legislation that relates to the management or regulation of surface or subterranean water, living aquatic resources or airspace - s24HA(2).

IMPORTANT

If your future act is the **renewal, regrant, remake or extension of the term of a valid permit, lease, licence or authority** that was originally granted -

- ◆ on or before 23 December 1996; **OR**
- ◆ after 23 December 1996 and before 30 September 1998 and would have been caught by section 24HA (if section 24HA had been included in the original NTA) ¹; **OR**
- ◆ under s24HA of the NTA,

then it may be able to be renewed, regranted, remade or the term extended under section 24IC of the NTA. **However, you must satisfy all the requirements set down in Module IC of this Chapter before proceeding with the proposed future act. Proceed to Module IC.**

¹ Under the transitional provisions of the NTA, future acts that would have fallen within section 24HA but took place between 23.12.96 and 30.9.98, are considered to have been done under s24HA (as if s24HA was included in the original NTA) provided they were considered permissible future acts under the original NTA.

This Module is divided into the following divisions –

- A. Legislative Acts
- B. Granting Leases, Licences, Permits or Authorities
- C. Defining Management or Regulation of Water, Living Aquatic Resources or Airspace
- D. Effect on native title, Compensation and Decision-Making

A. Legislative Acts

Part 2 Is my proposed future act the making, amending or repealing of legislation – section 24HA(1)?

For your future act to be a Legislative Act under section 24HA(1) it must be –

Please refer to the accompanying flowchart.

1. the making or amending or repealing of legislation

Legislation

The term “legislation” includes the following –

- ◆ Acts, eg. *Fisheries Act 1994*; and
 - ◆ Subordinate Legislation, ie. Regulations, statutory instruments. For example, the *Marine Parks Regulation 2006* made under the empowering Act, ie. *Marine Parks Act 2004*.
1. **making of legislation** – the enactment of a Bill as an Act OR the making by the Governor in Council of subordinate legislation.
 2. **amending of legislation** - changes are made to existing legislation by the enactment of an amending Bill OR the amending by the Governor in Council of subordinate legislation.
 3. **repealing of legislation** - existing legislation ceases to have effect.

Example of making legislation that relates to...

The making of new water legislation such as the *Water Act 2000*. The *Water Act 2000* is legislation that relates to the management or regulation of water.

AND

2. legislation that **relates to** the management or regulation of -

- surface or subterranean water – Refer to Parts 4 and 5;
- living aquatic resources - Refer to Parts 4 and 6; or
- airspace - Refer to Parts 4 and 7.

IMPORTANT

The use of the expression **relates to** in the point above does not mean that the legislation must state that it is about the management or regulation of water, living aquatic resources or airspace. If the effect of the legislation is the management or regulation of water, living aquatic resources or airspace, then the legislation relates to the management or regulation of water, living aquatic resources or airspace.

Examples

- For an example of where the legislation states that it is about the management of water – please see the *Marine Parks Regulation 2006* example below.
- For an example of where the legislation is in effect about the management of water – please see the *Land Act 1994* example below.



If your future act, satisfies ALL of the above criteria then it is a legislative act under section 24HA(1) of the NTA and will be valid in relation to native title. There are no procedural rights that must be provided to the native title parties. You should now complete your Native Title Assessment Form.

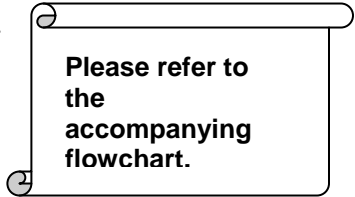


If your future act does not satisfy ALL of the above criteria you must consider whether your future act is caught by section 24HA(2).

B. Granting Leases, Licences, Permits or Authorities

Part 3 Is my proposed future act the grant of a permit, lease, licence or authority - section 24HA(2)?

For your future act to be caught by section 24HA(2) it must be –



Please refer to the accompanying flowchart.

1. the **grant** of a **permit, lease, licence** or **authority**;

IMPORTANT

The use of the word “grant” means that you must be granting a new interest to the applicant. For example, the grant of a fishing licence to an applicant that has never held a fishing licence, is the grant of a new interest. In contrast, amending a fishing licence to restrict the area in which the permit holder can fish, is not the grant of a new interest as it does not create additional rights and is simply an amendment of the terms. Such an amendment would not constitute a future act.

AND

2. done under **legislation** that **relates to** the management or regulation of-
 - surface or subterranean water – Refer to Parts 4 and 5-;
 - living aquatic resources - Refer to Parts 4 and 6; or
 - airspace - Refer to Parts 4 and 7.

IMPORTANT

The use of the expression **relates to** in the point above does not mean that the legislation must state that it is about the management or regulation of water, living aquatic resources or airspace. If the effect of the legislation is the management or regulation of water, living aquatic resources or airspace, then the legislation relates to the management or regulation of water, living aquatic resources or airspace.

Examples

- For an example of where the legislation states that it is about the management of water – please see the *Marine Parks Regulation 2006* example below.
- For an example of where the legislation is in effect about the management of water – please see the *Land Act 1994* example below.

Example of a grant of a permit under legislation that relates to...

The grant of a permit to allow a tourist program in the waters of the marine park (eg. snorkelling, fish feeding, glass-bottom boat viewing, whale watching, etc), under the *Marine Parks Regulation 2006*.

Reasoning

The *Marine Parks Act 2004* and the *Marine Parks Regulation 2006* (made under that Act) are legislation that relate to the setting apart of tidal lands and waters as marine parks and the management of those areas. The grant of a marine park permit for a tourist program within the waters of the marine park, is in effect granting access to the water of the marine park. Therefore, the permit is caught by s24HA(2).



If your future act, satisfies ALL of the above criteria then it may proceed under section 24HA(2) of the NTA and will be valid in relation to native title.

You will now need to take the following steps –

1. Complete your Native Title Assessment Form – **Annexure 7.1**.
2. Provide a notification and an opportunity to comment to the relevant native title parties, in accordance with **Annexure 7.2 and Annexure 7.3**.



If your future act does not satisfy ALL of the above criteria you must consider whether your future act is caught by Module IB.

C. Defining Management or Regulation of Water, Living Aquatic Resources and Airspace

Part 4 What is management or regulation?

The Macquarie Dictionary defines –

- **management** as the act or manner of managing; handling, direction or control. “Manage” is defined as including to take charge or care of and to handle, direct, govern or control in action or use;
- **regulation** as a rule or order, as for conduct, prescribed by authority; a governing direction or law; the act of regulating. “Regulate” is defined as including to control or direct by rule, principle or method; to adjust to some standard or requirement.

Example

The *Water Act 2000* is legislation that relates to the management or regulation of water. For example, one of its purposes is to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water. Another of its purposes is to provide for a regulatory framework to provide water in Queensland. Therefore, the *Water Act 2000* is controlling and directing how the State’s water resources should be used.

Part 5 What is water?

Water means water in all its forms –

- liquid;
- ice; and
- steam.²

² Explanatory Memorandum to the NTA, p. 117

The water can either be –

- surface water, ie. water on the earth's surface such as rivers, sea, ocean, lakes, streams, creeks; or
- subterranean water, ie. water existing below the surface of the earth such as bore water, artesian water.

Management or Regulation of Water

Legislation relating to the management or regulation of water is legislation that directs and/controls the use of water.

Section 24HA also states that the management or regulation of water includes **granting access to water** or **taking water**.

Example – taking water

The *Water Act 2000* is legislation that relates to the management of water. A permit may be granted under the *Water Act 2000* that authorises the taking of water from a watercourse.

Therefore, this permit is caught by section 24HA(2).

Examples – access to water

The *Land Act 1994* is in part legislation that relates to the management or regulation of water in that it covers the management of non-freehold land, which includes land below the high water mark. For example, a lease over land below the high water mark granted under the *Land Act 1994* in effect grants access to the water covered by the lease area and therefore is caught by section 24HA(2).

The *Sustainable Planning Act 2009* is legislation that relates in part to the management or regulation of water in that it covers tidal works. For example, to carry out tidal works, e.g. a wharf, below the high water mark in a navigable river, a development approval is required to be granted which in effect permits access to water and therefore falls within section 24HA(2).

Part 6 What is living aquatic resources?

The term **living aquatic resources** includes fish, marine mammals, shellfish, coral, aquatic plants, etc.³ Aquatic plants could include seagrasses, algae and mangroves.

As the term “**living**” is used, the grant of a permit to allow the processing or selling of fish that have already been caught and killed, for example, is not captured by this term.

Management or Regulation of Living Aquatic Resources

Legislation relating to the management or regulation of living aquatic resources is legislation that directs and/ controls the use of living aquatic resources.

Example

The *Fisheries Act 1994* is legislation relating to the management of living aquatic resources in that it covers the management of fisheries resources, fish habitats and aquaculture activities. For example, a licence granted under the *Fisheries Act 1994* for commercial fishing will be caught by section 24HA(2).

Part 7 What is airspace?

The Explanatory Memorandum to the NTA describes airspace as –

- ◆ having its ordinary meaning;
- ◆ as the atmosphere above the land or waters of Queensland; and
- ◆ the air available for aircraft to fly in.⁴

As the definition of airspace is very broad, it can be difficult to ascertain whether the use of airspace is actually an act that affects native title, ie. a future act. For the use of airspace to be a future act it must affect the use or enjoyment of land or water by native title holders/claimants over which the airspace is located.

³ Explanatory Memorandum to the NTA, p. 117

⁴ Explanatory Memorandum to the NTA, p. 117

Example

The *Land Act 1994* is in part, legislation relating to the management or regulation of airspace in that it covers non-freehold land which includes layers and strata above and below the surface of the land. For example, the construction of a bridge over a creek, where the footings will be located outside the creek area and the bridge is fully suspended over the airspace above the creek, requires a permit to be granted under the *Land Act 1994* for the occupation of that airspace. This permit would be caught by section 24HA(2).

D. Effect on Native Title, Compensation and Decision-making

Part 8 Does the non-extinguishment principle apply?

Yes. The non-extinguishment principle applies to all future acts done under section 24HA.

This means that native title rights and interests affected by the doing of the future act continue to exist and are not extinguished. However, while the future act exists, those native title rights and interests have no effect on the future act.

IMPORTANT

As the non-extinguishment principle applies to grants made under section 24HA, a lease with a view to the freeholding of the lease area cannot be issued.

Part 9 Is compensation payable for the doing of the future act?

Compensation for the effect of the future act on native title rights and interests is payable under this section if there is a successful determination of native title and a claim for compensation. Compensation is payable by the State where the act is attributable to the State.

Part 10 Who makes the decision whether this module applies?

There are no actual delegations to make decisions in relation to native title under the Native Title Work Procedures, the NTA or the NTQA.

The native title assessment process is just one part of your decision-making process when making your decision under your legislation, eg. a decision to grant a permit. By carrying out a native title assessment, you are ensuring your decision complies with the NTA.

If the decision-maker is unsure how to proceed, your NTCO must be contacted for advice. If the NTCO is unsure how to proceed, the NTCO must contact Aboriginal and Torres Strait Islander Land Services for advice.

