

# Module J

## *Sections 24JA & 24JB*

### *Dealings on continuing pre-Wik reservation and leases*

#### DOES THE PROPOSED FUTURE ACT FIT WITHIN THIS MODULE?

For this Module to apply, your proposed future act must **not** fall within an earlier Module.

**Especially check Module JAA if your proposed future act is on Indigenous land.**

This Module helps you assess whether your proposed future act –

- is being done on land or waters subject to a reservation or lease for a particular purpose, which came into existence on or before 23 December 1996;  
AND
- is an act that is in accordance with the purpose of the reservation or lease or is an act that will have no greater impact on native title than what is already allowed under the reservation or lease.

If your future act is **not** being done on land or waters subject to a pre-Wik reservation or lease, proceed to **Module K**.

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## Part 1 What is section 24JA?

Section 24JA deals with future acts done on land or waters subject to a reservation. A reservation could include a mining lease, a term lease, a Land Act reserve, a State Forest, etc (the reservation).

Section 24JA of the NTA applies to your proposed future act if it is to be done on land or waters subject to a reservation for a particular purpose, which came into existence on or before 23 December 1996,

AND is

- (a) an act that is in accordance with the purpose of the reservation;
- OR
- (b) an act that will have no greater impact on native title than that which is already allowed on the area covered by the reservation.

### Examples

Andrew Appleby, the President of the Sunnybank Soccer Club, has made an application to the Department of Environment and Resource Management for a lease to be granted to the Club for the construction of a clubhouse on a reserve for recreation purposes gazetted in 1968.



The grant of a sales permit to get quarry materials within an area covered by a mining lease that was granted on 20 December 1990.

## Part 2 What is the purpose of section 24JA?

The purpose of section 24JA is to allow particular lands or waters that were reserved, set aside or granted in the past for a particular purpose to be used in the future.

Section 24JA ensures such use is valid in relation to native title.

**This Module is set out in 3 divisions –**

- A. Requirements;
- B. Definitions and explanations; and
- C. Effect on native title, compensation and decision-making.

## A. Requirements

### Part 3 Does my future act satisfy the requirements of section 24JA?

Your proposed future act will fall within section 24JA if it satisfies ALL of the following requirements<sup>1</sup> –



#### Requirement 1

Your proposed future act will be done on an area of land or waters that is subject to a **reservation, dedication, condition, permission or authority** (“reservation”).

#### Examples

- Reserves gazetted under various land legislation, eg. the *Land Act 1962*. For example, a reserve for recreation purposes, reserve for education purposes, reserve for police station purposes, reserve for Aboriginal purposes, reserve for camping and water purposes, etc.
- National parks;
- Timber reserves;
- State forests;
- Marine parks;
- Leases for particular purposes, eg. a mining lease;
- Stock routes;
- Vested land. (If the area you are considering is land vested in fee simple, go back and consider **Module BA.**)



If the land is currently a **forest reserve**, then this Module cannot apply as forest reserves only came into existence after 23 December 1996.

**AND**

#### Requirement 2

The reservation of the land or waters must be for a **particular purpose**.

**Refer to Part 4** – This Part explains a “particular purpose”.<sup>2</sup>

**AND**

#### Requirement 3

The **act** containing, making or conferring the reservation was **valid**; AND

(a) was **done** by the **Commonwealth** or the **State**;

OR

<sup>1</sup> Photo - [http://www.epa.qld.gov.au/parks\\_and\\_forests/great\\_walks/](http://www.epa.qld.gov.au/parks_and_forests/great_walks/)

<sup>2</sup> *Erubam Le (Darnley Islanders) #1 v Queensland* [2003] FCAFC 227; (2003) 202 ALR 312 (14 October 2003).

- (b) was done by the making, amendment or repeal of **legislation** by the Commonwealth or the State.

**“the act”**

For example, such acts could be as follows –

- under section 31 of the *Land Act 1994*, the Minister, by gazette notice, may dedicate unallocated State land to be a reserve for a community purpose;
- under section 25 of the *Forestry Act 1959*, the Governor in Council may, by regulation, set apart and declare as a State forest any Crown land, or any land or part thereof which may then be a timber reserve.

**“valid”**

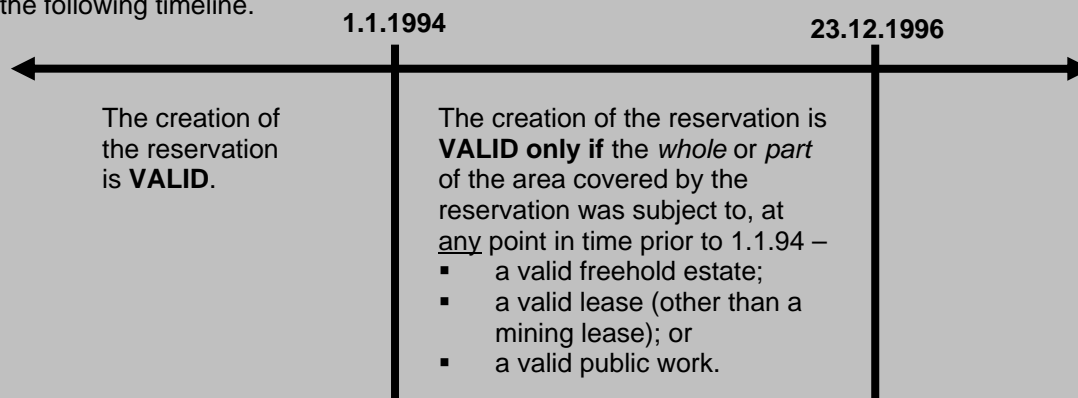
The reservation must be valid under State legislation and in relation to native title.

*State legislation*

The reservation will not be valid under **State legislation** if there was no power under legislation to make the reservation.<sup>3</sup> For example, under the *Land Act 1994* a reservation can only be made over unallocated State land. Therefore if a reservation was made over an area covered by a permit to occupy, then it would not be valid.

*In relation to native title*

In relation to whether the creation of the reservation is valid in relation to **native title**, consider the following timeline.



If it is **NOT** valid, you have not satisfied Requirement 3.

**AND**

**Requirement 4**

The act containing, making or conferring the reservation was done **on or before 23 December 1996**.

<sup>3</sup> However, an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate an act that fails to comply with the condition – McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] cited in *Neowarra v State of Western Australia* [2003] FCA 1402 at [436].

**Example** An area of land was dedicated as a timber reserve on 27 January 1984.

**AND**

### Requirement 5

Your proposed future act is done in **good faith**:

**“good faith”** – this means in relation to *Requirement 5* that your proposed future act is something that is in accordance with the purpose of the reservation or will not have a greater impact on native title than that which can be done under the reservation. You need to make a genuine and honest assessment.

- (a) **under or in accordance with** the reservation;

**“under or in accordance with the reservation”**

For an explanation of this term refer to **Part 5**.

OR

- (b) **in the area covered by the reservation**, so long as your proposed future act **does not have a greater impact** on native title than any act done in accordance with the purpose of the reservation.

**“does not have a greater impact”**

For an explanation of this term refer to **Part 6**.

**AND**

### Requirement 6

The proposed future act must not have the effect of cancelling the reservation.



#### **IMPORTANT**

The proposed future act must be carried out in the area that continues to be covered by the reservation. If the effect of the proposed future act is that the reservation is cancelled, then section 24JA cannot apply.

#### **Examples**

*Change of purpose of a reserve*

An example of an act that can meet Requirement 6 is the change of purpose of a Land Act reserve (subject to certain requirements), where the purpose is changed without cancelling the reserve - refer to **Part 8**.

### *Excision of part of a reserve for a road*

An example of an act which does NOT meet Requirement 6 is the excision of part of a reservation for a road dedication action.



Requirement 6 is not met as the part of the reservation to be dedicated as road is excised from the reserve and reverts to unallocated State land thereby removing the *on or before 23 December 1996* reservation.

This dealing should instead proceed under section 24KA of the NTA provided all of the requirements set down in **Module K** are satisfied.



If your proposed future act satisfies ALL of the above 6 requirements it may proceed under section 24JA of the NTA and is valid in relation to native title.

You now need to take the following steps –

### **Step 1**

Complete your Native Title Assessment Form – **Annexure 7.1**.

### **Step 2**

If your proposed future act consists of the **construction or establishment of a public work**, the person proposing to construct or establish the work must provide a notification and an opportunity to comment to the relevant native title parties in accordance with **Annexure 7.2 and Annexure 7.3**.

#### **Who carries out the notification process?**

It is the construction or establishment of the public work which triggers the notification process.

Therefore, it is the person constructing or establishing the public work who undertakes the notification process. Where a contractor is constructing the public work on behalf of the State, the State department or agency should carry out the notification process.

**IMPORTANT** - If a lease, for example, is first required to be granted to authorise the construction of the public work, there is **no** notification process as the future act is the **grant** of the lease to permit the construction of the work NOT the **construction** of the public work.

### “public work”

For a definition of *public work* refer to **Part 7**.

### Example

Before Education Queensland builds a school (ie. the public work) on a reserve for education purposes gazetted on 1 January 1970, it is responsible for providing the procedural rights to the relevant native title parties.

## Step 3

If your proposed future act is the **creation of a management plan for a protected area under the *Nature Conservation Act 1992*** or a **marine park under the *Marine Parks Act 1982***, the person proposing to create the plan must provide a notification and an opportunity to comment to the relevant native title parties in accordance with **Annexure 7.2 and Annexure 7.3** before the plan is finally approved. For example, the notification could be provided at the time the draft is released for public comment.



### IMPORTANT

For a management plan to be a future act the plan must actually have an impact upon native title rights and interests in the area, ie. it must for example restrict or prohibit access to an area or the doing of certain activities (eg. no camping is allowed in a particular area) that would be inconsistent with the exercise of native title rights and interests.

If the management plan is NOT a future act, then this Module does not apply and you can proceed without further reference to native title (subject to any consultation requirements under the relevant State legislation).

## Step 4

For all other future acts under this Division, there are **no procedural rights** that must be provided to the relevant native title parties.

### Examples

- The grant of a lease to a local hockey club on a reserve for recreation purposes.
- The grant of a sales permit for the getting of quarry materials on a reserve for gravel purposes.





If your proposed future act does not satisfy ALL of the above requirements in Division A, you must consider whether your proposed future act falls within **Module K**.

## B. Definitions and explanations

### Part 4 What does “particular purpose” mean?

Section 24JA requires that the reservation must provide that the land or waters are to be used for a **particular** purpose. This means that a purpose needs to be stated in the reservation.

#### Examples

If the act making, containing or conferring the reservation was –

- the grant of a lease – the purpose of the lease must be stated on the lease instrument;
- the gazettal of a reserve – the purpose must be stated in the Proclamation or Order in Council notified in the Government Gazette.



A deed of grant in trust for the benefit of Aboriginal or Torres Strait Islanders is NOT a reservation for a particular purpose and therefore does NOT satisfy Requirement 2. Therefore Module J cannot apply.


### Part 5 What does “under or in accordance with the reservation” mean?

Your proposed future act is done under or in accordance with the reservation if it is done pursuant to the purpose for which the land was reserved, set aside or granted.<sup>4</sup>

#### Examples

- The construction of a primary school, high school, kindergarten, TAFE or environmental education centre on a reserve for education purposes. As these facilities are for the purpose of education, then their construction is in accordance with the reservation.
- The grant of a lease for the construction of a soccer clubhouse on a reserve for recreation purposes. As a soccer clubhouse is for the purpose of recreation, the grant of the lease is in accordance with the reservation.

<sup>4</sup> Para [12.6], *Explanatory Memorandum to the Native Title Amendment Bill 1997*

- The grant of a camping permit under the *Nature Conservation Regulation 1994* on a national park. 
- The grant of a forestry licence to harvest timber on a State forest or timber reserve.
- The grant of a sales permit to extract gravel from a gravel reserve.
- Under section 59(1) of the *Land Act 1994*, reserves must be managed in a way that is consistent with their purpose. A trustee lease can be granted over a reserve where –
  - (a) it is consistent with the purpose of the reserve; and
  - (b) it would facilitate or enhance the purpose of the reserve.Such leases would be classified as leases that are under or in accordance with the reservation.

If you are unsure whether the proposed future act is under or in accordance with the reservation, then you should contact the person or department responsible for the reservation. For example, for a *Land Act* reserve contact the trustee of the reserve or the relevant regional office of the Department of Environment and Resource Management.

## **Part 6      What does “does not have a greater impact on native title” mean?**

To assess if your proposed future act would have no greater impact on native title, consider whether your proposed dealing will have the same or lesser physical impact as an act that could be done under or in accordance with the current reservation. If yes, then your proposed dealing would not have a greater impact on native title.

### **Examples**

- The NTA provides the example of where particular land has been reserved as a hospital site before 23 December 1996, and instead a school is later built on the land. In this case, the construction of a school would have no greater impact than that which a hospital would have had on that particular reservation and therefore on native title. *It is important to note that under current State legislation and policy this particular example cannot occur and is included to illustrate the phrase “does not have a greater impact”.*
- The grant of a sales permit for harvesting timber within an area covered by a mining lease (the reservation).

- The construction of a borrow pit by the Department of Transport and Main Roads to access quarry materials for the construction of a road from a pastoral lease where the lease permits the construction of a dam.
- Under section 59(3) of the *Land Act 1994*, a trustee lease inconsistent with the purpose of the reserve can be granted over a reserve where –
  - (a) the lease would not diminish the purpose of the reserve; AND
  - (b) no more improvements, other than improvements approved by the Minister, are built or placed by the lessee on the lease area.A lease that satisfied these two requirements would not have a greater impact.
- Refer to **Part 8** (change of purpose) and **Part 9** (mining) for some further examples in relation to whether your proposed dealing would have a greater impact.

#### **IMPORTANT – Conversion to freehold**

You cannot convert land which is subject to a reservation to freehold title, because freehold can only be granted over unallocated State land. Any reservation needs to be cancelled and therefore the *on or before 23 December 1996* reservation, required for this Module to operate, is lost.



## **Part 7 What is a “public work”?**

Your proposed future act is a public work if it satisfies **either** of the following definitions<sup>5</sup> -



Refer to **Division B of Module CA** for more examples of public works.

#### *Definition 1*

The work will be constructed or established **by** or **on behalf of**–

#### **“on behalf of”**

This means that the work can still be a public work even if the State does not physically construct the work. In some cases, the State may choose to use a contractor. In this case, the contractor is constructing the work on behalf of the State.

Where the State provides funding to a private organisation through a grant for a community facility, eg. a clubhouse, the work is NOT done *on behalf of* the State and therefore is not a *public work* for the purposes of the NTA.

- the State or Commonwealth in any of its capacities;
- a local government body; or

<sup>5</sup> Section 253, NTA

- other statutory authority of the State or Commonwealth.

**“statutory authority”** – in relation to the State or Commonwealth, means any authority or body (including a corporation sole) established by a law of the Commonwealth or State other than a general law allowing incorporation as a company or body corporate.<sup>6</sup>

N.B. Local authorities are also statutory authorities.

**AND WILL CONSIST OF -**

- (a) a building, or other structure (including a memorial), that is a fixture;

**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.<sup>7</sup> 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.<sup>8</sup>

**Example**

A demountable 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 and/or an electricity line/sewerage pipes/water pipes are attached to the demountable.

- (b) a road, railway or bridge;
- (c) a well, or bore, for obtaining water; or
- (d) any major earthworks;

<sup>6</sup> Section 253, NTA. In 2007, the *Government Owned Corporations Act 1993* was amended converting all statutory GOCs to company GOCs.

<sup>7</sup> *Ball-Guymer v Livantes* (1990) 102 FLR 327

<sup>8</sup> *Holland v Hodgson* (1872) LR 7 CP 328; [1861-73] All ER Rep 237

### Definition

Earthworks (other than in the course of mining) whose construction causes **major disturbance** to the land, or to the bed or subsoil under waters.<sup>9</sup> This means that excavation of the area is required by machinery in order to level the land and/or fill of the land. Please refer to the following photos showing what is and is not major earthworks.<sup>10</sup>



*Major earthworks*

*Major earthworks*

*NOT major earthworks*

### Examples

- The reclamation of a tidal area.
- Dredging of a river.

OR

### Definition 2

A building that is constructed on land other than on a lease with the authority of the State or Commonwealth.

### Example

The construction of an environmental educational centre on a reserve for education purposes by Education Queensland.

## Part 8 Can I change the purpose of a Land Act reserve under section 24JA?

You can change the purpose of a Land Act reserve under section 24JA provided that –

- (a) there is **no greater impact** on native title;

### Examples

The following are examples of where the development for either purpose would have a similar or lesser impact on native title –

<sup>9</sup> Section 253, NTA

<sup>10</sup> <http://www.clw.csiro.au/ImageGallery>

- The purpose of a reserve for showground purposes could be changed to a sport and recreation purpose.
- The purpose of a reserve for showground purposes could be changed to a parks and garden purpose.

However, you could NOT change the purpose of a reserve for scenic purposes to a showground purpose, as the latter purpose would allow a greater physical impact on the land than that allowed on a scenic reserve, eg. a showground reserve would allow, for example, the construction of ovals and pavilions, whilst the scenic reserve would not.

## AND

- (b) you **do not remove or cancel** the original reservation, ie. the act must be done in the area continued to be covered by the reservation.

Under the *Land Act 1994*, the purpose of a reserve may be changed by gazette notice. There are two scenarios as to how this can happen.

### Scenario 1 – Section 24JA does apply

The reserve **continues** but has undergone a change of purpose, eg. a name change.

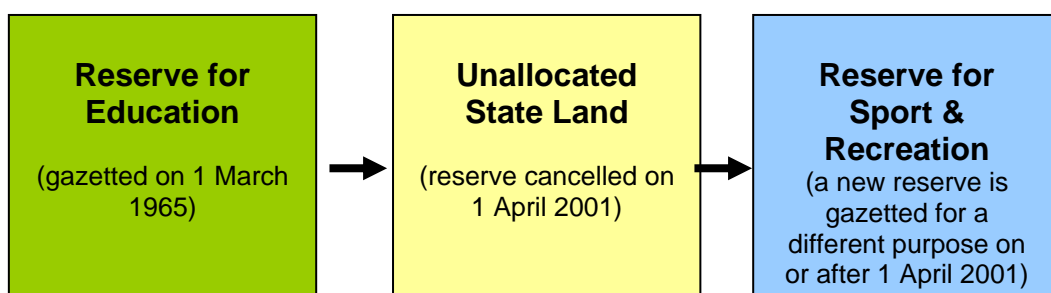


For example, on 1 April 2001, by notice in the Gazette, the reserve originally gazetted on 1 March 1965 for education purposes had its purpose changed to sport & recreation.

The reservation itself is still a 1965 reservation and therefore section 24JA can still apply.

### Scenario 2 – Section 24JA does NOT apply

The reserve is **cancelled**, reverting to unallocated State land, and a **new** reserve is gazetted for a new purpose.



Section 24JA does **NOT** apply in Scenario 2 above as the on or before 23 December 1996 reservation has been **removed** which is an essential requirement for section 24JA to apply. Therefore the gazettal of a new reserve (or any future dealings on the new reserve) where the original reserve is cancelled **cannot** proceed under section 24JA.

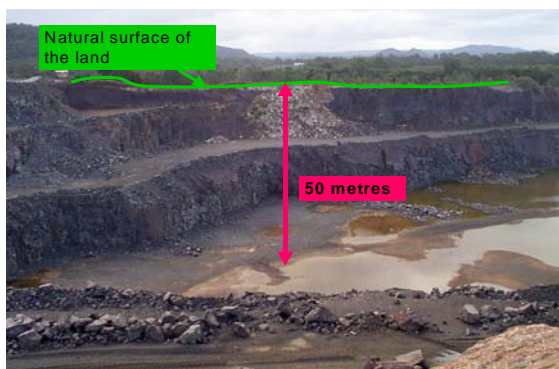


**How do I carry out a change of purpose of a reserve under the *Land Act 1994* which will satisfy the requirements of section 24JA of the NTA?**

Procedures for dealing with reserves are set out in Chapter 15 (Trust Land) of the State Land Practice Manual. The procedure for changing the purpose of a reserve is Procedure 15B (pp.9-15). The State Land Practice Manual can be accessed from the SLAM Home Page on the DERM Intranet.

## Part 9 Can section 24JA apply to mining?

Your proposed future act **can** constitute mining under section 24JA.



*Both these pictures fall within the definition of "mining" under the NTA.*

**Mining** is defined under the NTA as including –

- (a) explore or prospect for things that may be mined; or
- (b) extract petroleum or gas from land or from the bed or subsoil under waters; or
- (c) quarry;

but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:

- (d) extracting, producing or refining minerals from the sand, gravel rocks or soil; or
- (e) processing the sand, gravel, rocks or soil by non-mechanical means.

Whether your proposed future act is mining under the NTA, is relevant to defining whether your proposed future act is a public work, the effect on native title and if procedural rights must be provided to the native title parties.

Where your proposed future act constitutes mining, there are no procedural rights that must be provided to the native title parties, as mining is excluded from the definition of *public work*. Further, section 24JA/JB is not subject to the right to negotiate provisions as those provisions can only be reached through section 24IC (**Module IC**) and section 24MD (**Module M**).

**IMPORTANT**

As mining is excluded from the definition of a public work (refer to **Part 8**), the non-extinguishment principle will apply to the proposed future act and there are no procedural rights that must be provided to the relevant native title parties.

The mining must be either –

- (a) under or in accordance with the reservation;

**Example**

The grant of a sales permit under the *Forestry Act 1959* to allow quarrying on a reserve for quarry purposes or a reserve for gravel purposes.

OR

- (b) have no greater impact on native title than the impact that an act done under or in accordance with the reservation would have.

**Examples**

- The grant of an exploration permit under the *Mineral Resources Act 1989* on a reserve for abattoir purposes.
- The grant of a sales permit under the *Forestry Act 1959* to allow hard rock quarrying on a reserve for recreation and water purposes. As this reserve would allow substantial earthworks in the construction of recreation facilities and the construction of artificial lakes, then the activity of quarrying would not have a greater impact.

In contrast, the grant of a sales permit to allow hard rock quarrying on a scenic reserve would have a greater physical impact than that which was already allowed to occur on that reserve.

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

### Part 10 What is the effect of an act done under section 24JA on native title rights and interests?

If the future act is the construction or establishment of a public work, then it will wholly extinguish any native title rights and interests.<sup>11</sup> For all other future acts, the non-extinguishment principle will apply.<sup>12</sup>

#### Non-extinguishment principle

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 inconsistent with the future act are not able to be exercised or enjoyed.

#### Example

The grant of a lease to a local hockey club on a reserve for recreation purposes, does NOT constitute a public work and therefore the non-extinguishment principle applies.

#### Extinguishment

Extinguish means permanently extinguish. This means that after the extinguishment occurs the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases. For example, if a valid public work was constructed over the whole of Lot A on Plan 6789 and was later removed, the native title rights and interests cannot revive over Lot A.

#### IMPORTANT

Native title will be extinguished over the footprint of the public work and any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work ("section 251D area"). Refer to **Module CA** for examples of the section 251D area.

#### Example

If the future act is the construction of a fire station by the Queensland Fire Services on a reserve for fire station purposes then any native title rights and interests will be extinguished over the area covered by the fire station building and any adjacent area used during its construction or operation.

<sup>11</sup> Section 24JB(2), NTA

<sup>12</sup> Section 24JB(3), NTA

The following table shows the effect on native title and the procedural requirements for the different types of future acts done under section 24JA –

Type of future act	Effect on native title	Procedural requirements
Construction or establishment of a public work	Extinguishment	Notification and an opportunity to comment
Creation of a management plan	Non-extinguishment principle	Notification and an opportunity to comment
All other future acts under this Module (eg. a trustee lease over a <i>Land Act</i> reserve)	Non-extinguishment principle	No procedural requirements

### **Part 11 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 claim for compensation. Compensation is payable by the State where the act is attributable to the State.

### **Part 12 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.

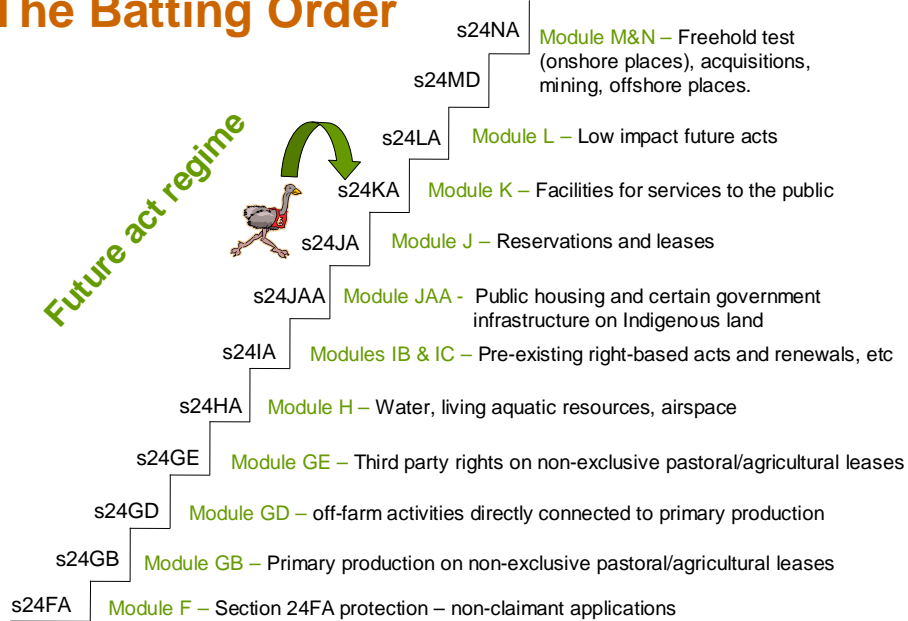
If the decision-maker is unsure how to proceed, your NTCO must be contacted for advice. If the NTCO is unsure how to proceed, the NTCO must contact Aboriginal and Torres Strait Islander Land Services for advice.

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

## The Batting Order

Invalid future acts – see Module O

Future act regime



Registered Indigenous land use agreements (see Module AC)