

DEPARTMENT OF STATE DEVELOPMENT

PROPERTY SERVICES GROUP

NATIVE TITLE WORK PROCEDURES

Approved for operation use as at 16 August 1999

COPY

Approved by:

Mr. Ross Rolfe
Director General
Department of State Development

Date:

Paul Smith
Director
Native Title Services
Dept of the Premier and Cabinet

Date:

Issued by:

Maurice Harvey
Director
Property Services Group
Department of State
Development

Date:

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Date:

AMENDMENTS

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| This Attachment is relevant to a decision about whether it is appropriate to proceed with the recommended Future Act Option. In the unlikely event this Attachment needs to be used, please phone DP&C who will talk you through the requirements. | |
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- **Please note that the attachments not listed under Work Instructions 3.0 and 4.0 have not been included in this set of procedures. However, to ensure compatibility across government the original numbering of the attachments has been preserved.**

1.0 INTRODUCTION

The Commonwealth's *Native Title Act 1993* (NTA) recognises and protects native title. Amongst other things, it establishes a regime under which dealings, in land and natural resources which may affect native title, must occur in order to be valid. Following the High Court's *Wik* decision, which established that native title might exist more widely than was previously believed, native title procedures were introduced into most State government departments. These were essentially aids to decision making and were designed to allow the business of departments to proceed while appropriately considering native title and satisfying the requirements of the NTA.

The Commonwealth has legislated to amend the NTA. To ensure the legality of its decisions the State is required to operate in accordance with the provisions of the amended NTA. A number of the amendments impact upon the State's administration of land and natural resources and the use of land (such as reserves) for public purposes. As an example, in certain circumstances, they impose additional requirements for the notification of registered native title holders, registered native title claimants and Aboriginal and Torres Strait Islander Representative Bodies before departments can undertake certain types of permissible future acts. In addition, the NTA has scheduled certain valid leasehold tenures as grants that provide rights of exclusive possession which extinguish native title. Where any of these tenures currently exist or where they existed in the past, the State will normally be free to deal in land and natural resources without further reference to native title. There is one exception - extinguishment is to be disregarded where land is occupied by indigenous people and the current tenure of the land is unallocated State land or the land is held by or used for the benefit of Aboriginal people or Torres Strait Islanders. This is discussed in detail in Work Instruction 2.0; Attachment 2.1.

The amendments also introduce some new concepts into the NTA, such as the concept of intermediate period acts. Grants were made by the State to private parties between 1 January 1994 (the commencement of the NTA) and 23 December 1996 (the *Wik* decision). In some cases, these grants were made on the assumption that native title did not exist; that it had been extinguished by the grant of a pastoral lease, for example. This assumption was open to challenge following the *Wik* decision, which held that native title is not necessarily extinguished by the grant of a pastoral lease. Particular amendments provide for the validation of those intermediate period acts that might otherwise have been invalid following the *Wik* decision.

These procedures are based on the following understanding of the key dates relevant to the development of native title legislation:

26/1/1788

European settlement commenced at Botany Bay

Valid acts

31/10/1975

Racial Discrimination Act 1975 commenced

Valid acts and past acts which were invalid because of the Racial Discrimination Act and which have subsequently been validated by the Native Title Act 1993 (Cth)

30/6/1993

Prior Commitments, Earlier Authorities, Legally Enforceable Rights

Valid acts and past acts which were invalid because of the Racial Discrimination Act and which have subsequently been validated by the Native Title Act 1993 (Cth)

1/1/1994

Native Title Act 1993 (Cth) commenced

Valid acts and invalid intermediate period acts which have been validated by the Native Title Amendment Act 1998 - procedural rights apply to certain validations.

23/12/1996

Latest date applicable to validation of invalid intermediate period acts including grants, prior commitments, earlier authorities and legally enforceable rights

31/3/1998

Latest date for certain legislative amendments to be validated (eg. NTA 24GB(1)e & 24GC (1) (d))

30/09/1998

Native Title Act 1993 (Cth) Amendments proclaimed by Native Title Amendment Act 1998.

Future acts which affect native title and to which procedural rights apply

NOW

1.1 PURPOSE

This Procedure provides a mechanism for appropriately incorporating consideration of native title into land and natural resource management decisions. In doing so, it satisfies the requirements imposed by the NTA and ensures that dealings in land and natural resources are made validly.

1.2 SCOPE

This Procedure applies to all dealings in land and natural resources undertaken by the Property Services Group for the Department of State Development. Please contact Robyn Potter or Pat Vidler if you are unsure as to which set of procedures to adopt.

1.3 OVERVIEW

This Procedure provides a flow chart (Attachment 1 - Page 16) that sets out sequentially, the broad questions that must be asked when assessing native title implications for a dealing. Once a decision to proceed has been made to proceed with a dealing in accordance with the steps in the flow chart there is no need to continue to work through the chart.

The remainder of the document is comprised of 5 Work Instructions (which consist of various Attachments) and a number of separate Attachments (Attachments 100+,) that deal with various, mostly administrative, matters. Each flow chart box directs the user to a specific Work Instruction (one of Work Instructions 1 - 5). In turn, the Work Instructions contain specific Attachments that set out relevant considerations and actions in detail. The Work Instructions and their Attachments support and expand the flow chart. They provide information that must be applied when determining whether or not a dealing may proceed.

All decisions (see some exceptions - Work Instruction 1.0) made under this Procedure must be appropriately supported, recorded and filed. Attachment 100 sets out in some detail the type of documentation that could be used to support a decision. Decisions must be recorded in the Department's files.

Amongst other things, the procedure also defines relevant terms and sets out the levels of responsibility and authority for decision making. Authority and responsibility can be delegated, when appropriate, as set out in Work Instruction 3.0.

2.0 REFERENCES

Legislation

Acquisition of Land Act 1967

Forestry Act 1959

Land Act 1962

Land Act 1994
Land Regulation 1995
Native Title Act 1993 (Cth)
Native Title Amendment Act 1998
Native Title (Queensland) Act 1993
Racial Discrimination Act 1975 (Cth)
River Improvement Trust Act 1940
Statutory Instruments Act 1992
Transport Infrastructure Act 1994
Water Resources Act 1989

3.0 RESPONSIBILITIES AND DELEGATIONS

This Procedure is **NOT** designed to avoid or ignore native title issues. On the contrary, it is specifically designed to enable native title considerations to be embedded within the administrative process.

The following delegations will apply to decisions made under this procedure:

- Property managers are responsible for decisions made under Work Instructions 1-3; and
- the Director of Property Services Group will be responsible for decisions made under Work Instructions 4-5.

Within the scope of this Procedure the Property Services Group is responsible for deciding:

- in accordance with Work Instructions 1 - 5, whether or not a dealing should proceed;
- in accordance with Work Instruction 4, what procedural rights should be provided to registered native title holders or registered native title claimants and Aboriginal and Torres Strait Islander Representative Bodies and what action should be taken to consider any comments that may arise from the provision of procedural rights. In this regard, the normal requirements of judicial review will apply;
- in accordance with Work Instruction 5, when recommendations for the use of a Future Act Option will be made;
- in land or natural resources, or any of the matters considered in these Procedures.

The issues may be identified by unusual aspects such as the extent or complexity of an issue or known indigenous interests.

If any issue arises in regard to the need for clarification or suggested changes to this procedure, refer to Attachment 103.

4.0 WORKPLACE HEALTH AND SAFETY

Workplace health and safety issues have been considered for the operations contained in this procedure; no specific workplace health and safety practices

apply. For any issues of concern please refer to the appropriate DSD Workplace Health and Safety procedures.

5.0 CLIENT SERVICE STANDARDS

Flow chart Step 1 - 1 week from the date of commencement of Step 1.

Flow chart Step 2 - 1 month from the date of commencement of Step 2.
If NTS research is required, 3 months from the date of their commencement of native title considerations.

Flow chart Step 3 - 1 week from the date of commencement of Step 3.

Flow chart Step 4 - 1 week from the date of commencement of Step 4.

Flow chart Step 5 - 1 month from the date of receipt of all material from the relevant region.

Flow chart Step 6 - 1 month from the date of receipt of all material from the relevant region.

6.0 DEFINITIONS

The following definitions are provided to assist in the application of this procedure and for no other purpose.

DO NOT rely on the definitions provided here when giving effect to a dealing under a piece of legislation other than the one from which the definition has been taken. Please check all definitions against those provided in the legislation that is being dealt with.

Agricultural Activity involves the cultivation of land, including crop-raising and the planting and growing in the land of trees, vines or vegetables. For this Procedure, agricultural activity does not include development of areas for improved pasture.

Aquacultural Activity involves the breeding, keeping and harvesting of fish or shellfish and the propagation, maintenance, cultivation and harvesting of aquatic plants. (As explained in the Explanatory Memorandum to the *Native Title Amendment Bill 1997*)

Dealings is used to collectively describe, amongst other things, approval of grants, leases, licences etc relating to land and natural resources.

DP&C means the Department of the Premier and Cabinet

Englobo land is defined as broad hectare land that has the potential for higher intensity use.

Forest Operations is the planting or tending, in a plantation or native forest, of trees intended for felling or the felling of such trees. (s.253 NTA)

Future Act Options are compulsory acquisition, right to negotiate, ILUA and non-claimant application.

Horticultural Activity means commercial cultivation of fruit, vegetables and flowers (The Macquarie Concise Dictionary). Under the NTA this includes propagation or maintenance, as well as cultivation. It also includes propagation, maintenance or cultivation of seeds, bulbs, spores or similar things or of fungi and extends to horticulture in environments other than in soil, whether natural or artificial. (s.253 NTA)

Indigenous Land Use Agreement (ILUA) is a registered agreement with indigenous people regarding particular dealings in land and resources. (See. NTA Sec 24 B,C and D)

Industrial Lease is a lease which may be used for industrial purposes.

Just Terms section 51 of the NTA states that native title holders are entitled to compensation on just terms for any loss, diminution, impairment or other affect of the act on their native title rights and interests (s.51 NTA).

Major Earthworks means earthworks (other than in the course of mining) whose construction causes major disturbance to the land, or to the bed or subsoil under waters (s.253 NTA).

Mine includes:

- a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or
- b) extract petroleum or gas from land or from the bed or subsoil under waters; or
- c) quarry. (see the definitions of quarry)

Native Title or Native Title Rights and Interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- c) the rights and interest are recognised by the common law of Australia (s.223 NTA).

Examples of native title rights and interests include hunting, gathering, or fishing. In the case of the Murray Islands, the native title found to be held by the Meriam People was the entitlement as against the whole world to

possession, occupation, use and enjoyment of most parts of the Island of Mer.

Native Title Assessment is an assessment of whether a proposed dealing can proceed after considering native title implications in accordance with the Process Flow Chart (Attachment 1).

Native Title Holder means:

- a) if a prescribed body corporate is registered on the National Native Title Register as holding the native title rights and interest in trust - the prescribed body corporate;
- or
- b) in any other case - the person or persons who hold the native title (s.224 NTA).

NTS means Native Title Services

NTA is the Commonwealth *Native Title Act 1993* and includes amendments under the NTAA.

NTAA is the *Native Title Amendment Act 1998*.

NNTT is the National Native Title Tribunal.

NT(Q)A is the *Native Title (Queensland) Act 1993*.

Natural Resources includes the land, quarry materials, water, forest products and the like for which the Department of State Development has administrative responsibility.

Non-proprietary Interest means an interest of any person or entity which is not a proprietary interest (eg. a member of the public who may have a right to access a beach or a park).

Offshore Place means any lands or waters other than land or waters in an onshore place. (s.253 NTA).

Onshore Place means land or waters within the limits of Queensland (s.253 NTA).

Ordinary Title means freehold title other than that granted by or under a law that grants freehold title only to or for the benefit of Aboriginal Peoples or Torres Strait Islanders (s.253 NTA).

Pastoral Lease means:

- a) a lease that permits the lessee to use the land or waters covered by the lease solely or primarily for maintaining or breeding sheep, cattle or other animals or any other pastoral purpose (other than agricultural, etc).

- b) a lease that 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. (Commonwealth *Native Title Act 1993 s.248*).

A list of these leases would include:

Pastoral Holdings
Pastoral Development Holdings
Preferential Pastoral Holding
Stud Holdings
Term Leases for Pastoral Purposes
Term Leases for Grazing Purposes including leases over Reserves and State Forests
Term Leases for Grazing and "Horticultural" Purposes and the like where the predominant use of the land is grazing ie. the lease does not fit the requirements of an Exclusive Tenure
Special Leases for Grazing Purposes including leases over Reserves and State Forests.

Primary Production Activity means:

- a) cultivating land
- b) maintaining, breeding or agisting animals
- c) taking or catching fish or shellfish
- d) forest operations (defined above)
- e) horticultural activities defined above
- f) aquacultural activities (defined above)
- g) leaving fallow or de-stocking any land in connection with the doing of any thing that is a primary production activity.

but does not include mining.

Proprietary Interest any person or interest with established legal rights such as a lessee, permittee, licensee.

PSG is the Property Services Group

Public Purpose means a purpose for (as defined by Land Act 1994) which land may be taken under the "*Acquisition of Land Act 1967*" or a community purpose.

Public Work means a building, or other structure, that is a fixture; or a road, railway or stock route; or any major earthworks; constructed or established by or on behalf of the Crown, or a statutory authority of the Crown, in any of its capacities (*Commonwealth Native Title Act 1993 s.253*).

Quarry 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:

- a) extracting, producing or refining minerals from the sand, gravel, rocks or soil; or

- b) processing the sand, gravel, rocks or soil by non-mechanical means (see also definition of “mine”)

Railway Corridor is an area of land on or within which rail transport infrastructure is situated. (Rail transport infrastructure is defined under Schedule 3 of the *Transport Infrastructure Act 1994*).

Residential Lease is a lease that permits the lessee to use the land or waters covered by the lease solely or primarily for constructing or occupying a private residence. (s.249 NTA).

Road means an area of land, whether surveyed or unsurveyed:

- a) dedicated, notified or declared to be a road for public use; or
- b) taken under an Act, for the purpose of a road for public use.

The term includes:

- a) a street, esplanade, reserve for esplanade, highway, pathway, thoroughfare, track or stock route; and
 - b) a bridge, causeway, culvert or other works in, on over or under a road; and
 - c) any part of a road.
- (*Land Act 1994* s.93).

Routine Management means those activities associated with tree management as referred to in Sections 268 and 269 of the *Land Act 1994* and as prescribed in Sections 24I, 24J and 24K of the *Land Regulation 1995*.

State means the Queensland government and all of its emanations such as Local Authorities, Statutory Authorities, Statutory Corporations and State Instrumentality’s, which include Government Owned Corporations (for example QRAIL, Port of Brisbane Corporation, ENERGEX, the Water Boards, the Sugar Corporations, etc).

Stock Route means a road or route ordinarily used for traveling stock or declared under an Act to be a stock route - schedule 6 dictionary of the *Land Act 1994*.

Subterranean Water see underground water.

Tenure History Investigations are those activities undertaken to investigate the history of a parcel of land to allow assessment of any implications the dealing may have for native title. A tenure history investigation may also include investigation of present and historical usage of the land.

Underground water means water that occurs naturally or is introduced artificially below ground level (*Water Resources Act 1989* s.2).

Valid means valid in every respect, including native title; a dealing is presumed to be valid unless it is evident from the relevant file, work procedure or from other sources that the dealing is not valid. If in doubt, refer to the MANAGER ASSET AND BUILDING SERVICES.

Waters includes:

- a) sea, a river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters; or
- b) the bed or subsoil under, or airspace over, any waters (s.253 NTA)**

7.0 PROCESS

Whilst as at 30 September 1998, the date of the commencement of these procedures, there are no Indigenous Land Use Agreements (ILUA's) they may be expected to be developed in the near future. Consequently, it is important to note that it will be necessary to ensure that no ILUA, relevant to the dealing under consideration, applies prior to working through the flow chart. Staff involved with processing land and resource dealings will need to be informed of the terms of any such agreements which may impact on their areas of responsibility. Provision of information in regard to ILUA's is the responsibility of DP&C.

The flow chart (Attachment 1) is the key element of this procedure. It sequentially sets out what considerations must be made to arrive at an appropriate decision. It has six parts (each numbered in bold at the left of the chart) comprised of flow chart boxes. Part 2 is not a pre-requisite for Part 3 (that is, Parts 2 and 3 may be used as alternatives). Each of flow chart boxes 1 - 5 calls for a specific decision to be made and is directly linked to one or more related Work Instructions and associated Attachments that provide the detailed information that may be needed in reaching a decision or providing procedural rights.

Accordingly, the flow chart should be used to determine whether or not a dealing can proceed given appropriate considerations of native title and the operation of the NTA. Start with the first part and work down the chart until directed to a course of action. Courses of action are either to:

- proceed with the dealing; or
- proceed with the dealing following provision of appropriate procedural rights and consideration of any comments received as a result of providing those rights; or
- recommend a Future Act Option to DP&C
- refuse the dealing.

Once you have been directed to a course of action, there is no need to continue to work through the chart. All that remains is to appropriately document your decision and put that course of action in place. Certain dealings under Work Instruction 1.0 do not require documentation for this procedure.

Using the flow chart (that is, when deciding whether or not a dealing should proceed) the following information may need to be considered:

- Tenure information (to determine if native title has been extinguished or impaired, current tenure information or the tenure history of the subject parcel may be required);
- The terms of any current tenure (so as to identify any rights which may be inconsistent with the continued existence of native title);
- Any known Aboriginal or Torres Strait Islander interest (in particular, whether Aboriginal people or Torres Strait Islanders occupy or use the land);
- Land use information (to determine the affect of current or previous uses of the land on native title; ie, to determine if native title has been extinguished or impaired);
- Whether the use of a Future Act Option is appropriate.

It is essential that the relevant documentation and factual information relied upon in making the decision is appropriately filed at the time the decision is made. The type of documentary evidence required in supporting decisions is outlined in Attachment 100. The decision must be recorded in DSD records. Attachment 101 is to be used for this purpose.

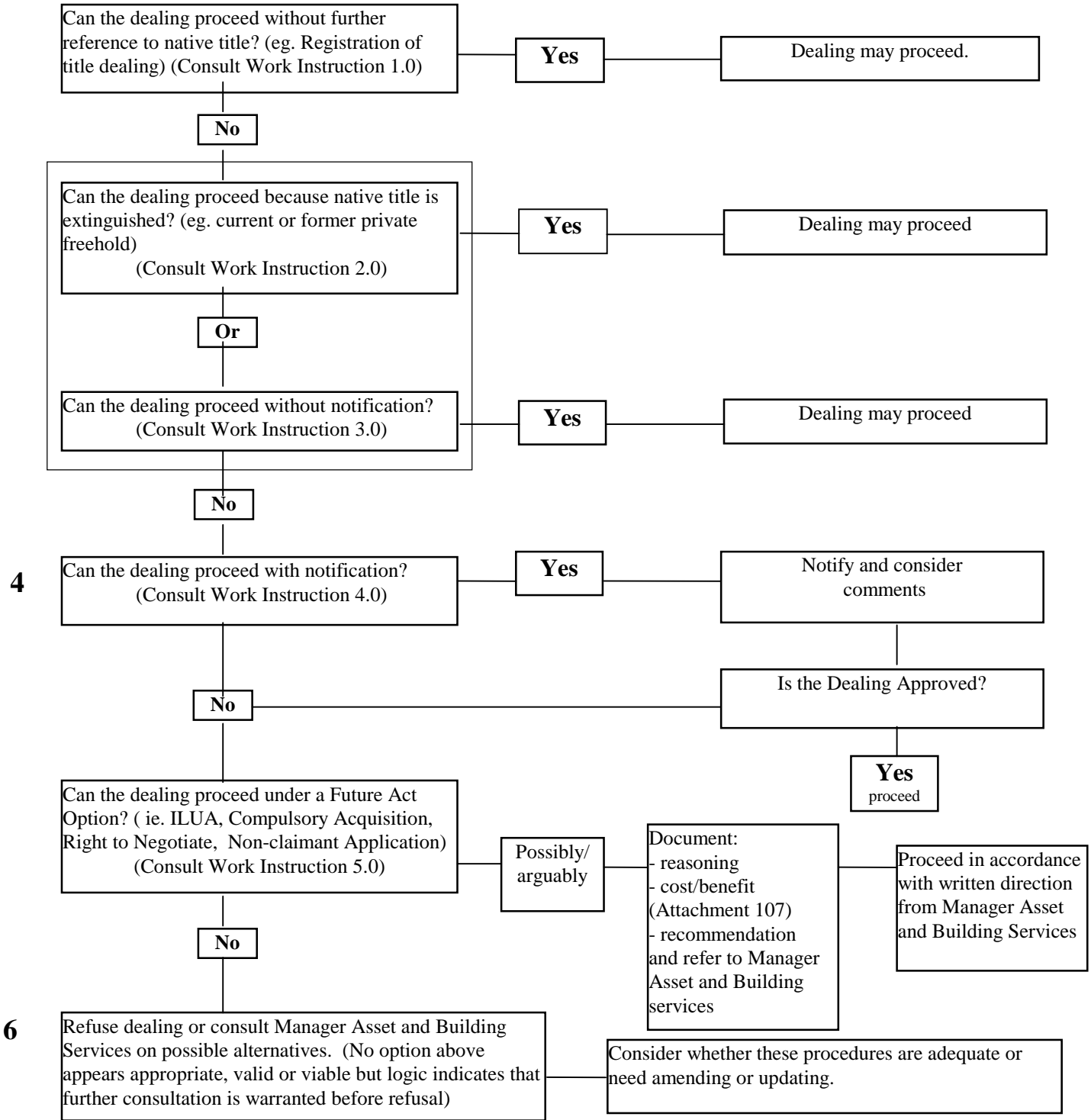
If the dealing is such that it is not clearly catered for by this procedure the dealing must be referred to DP&C, with recommendation and supporting material, for advice. Further, any dealing to which Work Instructions 3, 4 or 5 apply must be referred to DP&C for consideration before approval if the total proposed project value is in excess of \$10M.

PROCEDURE AUDITS:

The DP&C will carry out both random and prearranged audits of the implementation and applications of the Native Title Work Procedure. Appropriate systems should be maintained to simplify audit requirements.

ATTACHMENT 1 - PROCESS FLOW CHART

ILUA
Check to see if an Indigenous Land Use Agreement has been registered over the area



Note: In every case where a decision is made, that decision must be recorded and any documentation or relevant information that formed the basis of that decision must be appropriately recorded and filed. The decision should be recorded in DSD files unless it is an exception in accordance with Work Instruction 1.0. (See also Attachment 100). Use Box 2 or 3 as alternatives as required

Work Instruction 1.0: Dealings That May Proceed Without Reference to Native Title

This Work Instruction has one Attachment:

- Attachment 1.1 - Dealings That May Proceed Without Further Reference to Native Title. The attachment deals with those activities which either have no impact or effect on native title or are necessary for public health and safety, environmental protection or to deal with emergency situations.

ATTACHMENT 1.1 - DEALINGS THAT MAY PROCEED WITHOUT FURTHER REFERENCE TO NATIVE TITLE

The following dealings may proceed without further reference to native title:-

- private sale or transfer of a property;
- registration or release of mortgage over a property;
- renewal of valid tenures but only on the same terms and conditions and under the following circumstances:
 - a) where the renewal creates an interest in:
 - the same person; or
 - another person who has acquired the interests of the first person (by assignment, succession or otherwise); and
 - in relation to the whole or part of the land or waters to which the earlier act relates; AND
 - b) where the renewal commences before or immediately after the interests created by the earlier dealing cease; AND
 - c) where the renewal only allows activities of a similar kind to those permitted by the earlier dealing.

Renewals are considered in more detail in Work Instruction 4.0; Attachment 4.6. That Attachment considers some variation in terms and conditions at renewal.

- subdivision and/or amalgamation of equivalent tenures where no upgrading occurs (that is, where the rights and interests relating to any resultant leases are no greater than for the existing leases);
- maintenance of existing valid improvements regardless of tenure;
- River Improvement Trust Works to protect against flooding and erosion;
- creation or maintenance of a firebreak to protect life, property or the environment;
- any emergency action required to protect life, property or the environment;
- excavation or clearing that is reasonably necessary for the protection of public health or public safety; or
- tree lopping, clearing of noxious or introduced animal plant species, foreshore reclamation, regeneration or environmental assessment or protection activities.

- walking tracks constructed to protect the environment and to ensure personal safety which involves minimal clearing and/or disturbance while ensuring that the immediate, surrounding area is protected;
- sale or utilisation of defined or undefined reservations within private freehold grants or other exclusive tenures;
- sale of forestry entitlement areas within exclusive tenures;
- routine management under ss 268 and 269 of the *Land Act 1994* and ss 24I, 24J and 24K of the *Land Regulation 1995* - where no formal approval of the Department is required.
- Certain Crown to Crown grants or transfers (refer to Attachment 109)

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| <i>Work Instruction 2.0: Dealings That Can Proceed Because Native Title is Extinguished</i> |
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This Work Instruction has four Attachments:

| | | | |
|---|----------------|---|---|
| • | Attachment 2.1 | - | When Previous Extinguishment is to be Disregarded. |
| • | Attachment 2.2 | - | Previous Grants of Exclusive Possession that Extinguish Native Title. |
| • | Attachment 2.3 | - | Previous Uses and Developments that Extinguish Native Title. |
| • | Attachment 2.4 | - | Other Previous Grants that Extinguish Native Title. |

Where native title has been extinguished, dealings will normally be able to proceed without any further consideration of native title. However, there is an exception. Extinguishment is to be disregarded when the land is occupied by indigenous people and the current tenure of the land is unallocated State land or the land is held or set aside or used by or for the benefits of indigenous people.

Under the NTA, native title has been extinguished where a grant of tenure before 24 December 1996 provided rights of exclusive possession or where extensive use or development of land for public purposes has occurred (that is, by a previous exclusive possession act). The extinguishment will only apply where these dealings, uses or developments are valid (refer Attachments 2.2 and 2.3). In addition, the NTA provides that the grant of certain tenures that do not provide rights of exclusive possession will also have extinguished native title but only in specific circumstances (refer Attachment 2.4).

The key factors in determining whether or not native title has been extinguished are:

- the date the grant, use or development occurred;
- the validity of the grant, use or development. The NTA **validates any of these done before 24 December 1996 where native title was affected by the grant, use or development and native title holders were not treated as if they instead held freehold. Native title can be considered to have been affected by the grant of tenure if the rights granted were more than those rights applicable to the regrant or renewal of a tenure that had previously existed over the land;**
- **whether the grant, use or development was a previous exclusive possession act;**
- whether the grant of tenure did not convey rights of exclusive possession but met other specific criteria for extinguishment set out in the NTA (See Attachment 2.3);
- whether the land is unallocated State land ('USL') or land held or set aside or used by or for the benefit of indigenous people and whether indigenous people occupy the land.

Information relied upon to decide that native title no longer exists must be documented and placed on file at the time a decision is made. Attachment 101 is to be used for this purpose. A synopsis of the major reasons for the decision only needs to be provided.

ATTACHMENT 2.1 - WHEN PREVIOUS EXTINGUISHMENT IS TO BE DISREGARDED

Please note that the below section can only be invoked if there is a native title claim over the land.

The NTA (s.47B) sets out particular circumstances where prior extinguishment is to be disregarded. In this regard, there are three important criteria that must be met, these being, that the land must be:

- (1) the subject of a native title claim; AND,
- (2) unallocated State land; AND,
- (3) occupied by Aboriginal people or Torres Strait Islanders.

Please note the following:

- only **one** member of the native title claim group needs to occupy the area in order to invoke the section;
- maintenance of a traditional connection to the land is required, although frequency is not;
- to occupy the area can mean to live in the area for a sustained period although it is not necessary to live in the area on a permanent basis;
- there is authority to suggest that the physical connection test need not be demonstrated in respect of each parcel of land or waters comprising the claim area;
- a relevant analogy – “No-one would describe a bombed site or an empty unlocked house as “occupied” by anyone: but everyone would say that a farmer “occupies” the whole of his farm even though he does not set foot on the woodlands within in it from one year’s end to another.”
- occupation can mean just the occasional exercise of control over the land.

Where these criteria are met it is possible that, despite anything that has occurred, native title is not extinguished. **Accordingly, before proceeding with any dealing over land referred to above, the matter should be referred to the DP&C.**

Note: Where people who claim to be, or allege that they are, native title holders and are occupying unallocated State Land, any proposal to initiate action which may lead to their removal requires the approval of DP&C. Submissions for approval must be coordinated by DP&C.

Information required by DP&C to determine occupation

To determine whether occupation exists, the following steps would need to be followed:

- paper search – tenure history, inspection reports, etc.
- physical search – the most effective way to determine occupation would be to carry out a physical search of the land under claim to look for signs of occupation, eg. the claimants themselves, dwellings, campsites, evidence of clearing, food & clothes storage points, personal belongings, paintings, etc...(NB. this is not an exhaustive list)
- statutory declaration – a statutory declaration would need to be signed by the person who physically searched the area, stating the following:

I _____ of _____ in the State of Queensland, [occupation], do solemnly and sincerely declare that –

On the [date], I carried out a physical search of [description of land] which is the land currently under claim by [native title claimant group]. I searched for signs of [List signs. See above physical search list as a guide]. I found that there were no signs of occupation on the above mentioned land by the native title claimant group.

Declared at
in the State of Queensland
this.....day of.....
1999, before me:

..... [signature of witness]

[full name and address of witness]
[title/qualification of witness]

ATTACHMENT 2.2 - PREVIOUS GRANTS OF EXCLUSIVE POSSESSION THAT EXTINGUISH NATIVE TITLE

The following valid private freehold and leasehold grants of exclusive possession act to extinguish native title. However, it should be noted that:

- **extinguishment will not apply in all circumstances as previously discussed (Attachment 2.1); and**
- **grants of freehold, leasehold, vested land or reserves granted by the State to the various Departments, Statutory Boards, Government owned Corporations or Local Governments do not affect or extinguish native title (refer Attachment 109).**

2.2.1 Valid Freehold Grants

The following valid private freehold grants extinguish native title:

- Private freehold land granted prior to 31 October 1975;
- Private freehold land granted on or after 31 October 1975 and before 1 January 1994 and still in existence as at 1 January 1994;
- Private freehold land granted on or after 1 January 1994 and before 24 December 1996 and still in existence on 23 December 1996.

2.2.2 Valid Leasehold Tenures Granting Rights of Exclusive Possession.

Valid leasehold grants (listed below) in 2.2.3 extinguish native title if they were granted:

- prior to 31 October 1975;
- on or after 31 October 1975 and before 1 January 1994 and still in existence at 1 January 1994;
- on or after 1 January 1994 and before 24 December 1996 and still in existence on 23 December 1996.

2.2.3 INDEX TO EXCLUSIVE LEASEHOLD TENURES

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In the list of purposes under Item A9, “grazing and horticulture” is listed as an exclusive tenure purpose. This relates to leases which are primarily for a horticultural purpose with incidental grazing, not leases which are primarily for grazing purposes.

In the list of purposes under Item A9, purposes which are exclusive include those which are obviously the same even though there may be a slight typographical variation. For example “Boy Scouts hall” is listed but would also include purposes shown as “Boy Scout hall” and “boyscouts hall”. Purposes which are exclusive also include those which are obviously the same even though a different word may be used. For example, ‘church’ is listed but would also include a purpose shown as “religious building”.

Similarly, the generic terms of “tourism” and “recreation” are not on the list as there are passive or community uses such as parks including national parks and environmental parks which may be used for such purposes. Those specific purposes which are considered as exclusive are listed and specifically stated.

It is important to consider every lease individually.

Some leases are granted for one or more of the purposes listed under Item A9, as well as for a purpose which is not listed under Item A9. For example, a lease granted for the purpose of “Manufacturing, industrial, residential or business” purposes. Whilst, “manufacturing”, “industrial” and “residential” purposes are listed under Item A9 (that is, grants of exclusive possession), “business” is not. Therefore, if a lease is for business purposes it will also be necessary for it to have ONE of the alternative purposes (ie manufacturing, residential or industrial) in order for it to be a grant of exclusive possession and thereby extinguish native title.

It is also important to note that the conditions of a lease must be read as part of the purpose of the lease to establish what the real purpose is. For example, a Special Lease for the purpose “Industrial, manufacturing, residential or business” which also has a condition requiring that it be used for “Grazing purposes only” is a Special Lease for “Grazing Purposes” which is not listed on the schedule of exclusive purposes under Item A9 and therefore does not extinguish native title or is not an exclusive tenure. The lease must genuinely be an exclusive tenure when the purpose and conditions are considered as a whole in accordance with the list of purposes under A9.

As with other dealings, it is important to record in DSD Central Filing System that the dealing is over a current or historical “exclusive tenure”. A copy of the instrument of lease evidencing the exclusive tenure should be made available on the relevant file.

A. Leases under various Land Acts etc.

1. A lease under section XII of the *Alienation of Crown Lands Act 1860*.
2. A lease under section 51 of the *Crown Lands Alienation Act 1868*.
3. A special lease under section 69 of the *Crown Lands Alienation Act 1868*, section 70 of the *Crown Lands Alienation Act 1876* or section 188 of the *Land Act 1897*.
4. A lease under the *Gold Fields Town Lands Act 1869*.
5. A lease under section 28 of the *Crown Lands Alienation Act 1876*.
6. A perpetual town allotment lease under the *Land Act 1897*.
7. A perpetual suburban allotment lease under the *Land Act 1897*.
8. A lease under section 119A of the *Land Act 1910*.
9. A lease under subsection 185(2) of the *Land Act 1910*, section 343 of the *Land Act 1962* or subsection 57(1) of the *Land Act 1994*, a special lease under the *Land Act 1910* or the *Land Act 1962*, a lease for a term of years or a perpetual lease under section 22B of the *State Housing Act 1945*, or a term lease or perpetual lease under the *Land Act 1994*, that permits the lessee to use the land or waters covered by the lease solely or primarily for any of the following:

[A] abattoir; accommodation; accommodation paddock adjoining an abattoir; aerodrome; aeromodellers club; aged persons' home; agricultural and horticultural society showground; agriculture; air traffic control facilities; aircraft hangar site; aircraft hangar, repair and administration building; aircraft landing ground; airfield; airstrip; airstrip and terminal; all sports complex; amphitheatre; amusement and entertainment park and pub; animal refuge boarding kennel; animal refuge home; Apex club; archery club; archery range; arts and craft centre; automatic telephone exchange; aviation building;

[B] band hall site; bank; basketball; basketball club; basketball court; beacon; boat building; boat hire; boat pilot base and wharf; boat ramp; boat repair, boat sales; boat shed; boating and fishing club; bowhunting; bowhunting club; bowhunting range; bowling club; bowling green; bowls club; Boy Scouts hall; Boys Brigade hall; British Australian club; broadcasting tower, mast or facility; building encroachment; building or repairing boats; bulk fuel depot; bulk storage; bulk storage depot; burning of sawmill waste; bus depot; butchery;

[C] cafe; cafeteria; cane employees' accommodation; car parking; car storage; car wrecking yard; caravan park; catamaran club; cattle transport depot or yard; causeway; change rooms and associated facilities; charitable organisation; child care centre; church; church and church hall; church school; city band hall; civil aviation anemometer site; civil aviation visual omni range; clubhouse; clubhouse for the Grand Lodge of the Royal Antediluvian Order of Buffaloes; coast guard facilities; coffee growing; coffee shop; coke works; commercial building development; communal bore; communal dam; communal storage building; communal tank; community centre; compressor station site; concrete batching plant; concrete manufacturing and storage of

earthmoving equipment; conservatorium of music; coral art display and sales shop and residence; coral art display and sales shop or centre; crane hire; cricket; cricket club; cricket ground; cricket ground and grandstand; crocodile farm; croquet club; croquet pitch; culture centre;

[D] dairy; dam; dam site and agriculture; dance hall; dart playing hall; delicatessen-snack bar; depot; development office; dining hall; dip site; dog training; drive-in picture theatre; driver training; drug and alcohol rehabilitation centre; dry dock;

[E] educational institution; electricity generator and depot; electricity substation; electricity transmission tower; elevated passenger cable way pylons and building; Endeavour workshop; engineering workshop; equestrian and general sporting purposes; equestrian club; equestrian field; equestrian or pony field; explosive magazine; explosive manufacture, testing and storage; export game meat receival and kangaroo pet food depot;

[F] fast food outlet; feed lot; ferry terminal; fertiliser storage depot; fibre board plant; field archery range; fire brigade station; fire observation tower; fish depot; fishing club; flood mitigation dam or canal; flying field and soaring/gliding building; football; football club; football ground; freight terminal and barge ramp; fruit growing; fruit storage; fuel and garage facilities; fuel depot; fuel storage;

[G] game collection centre; game fishing club; garage; gas compressor; gas offtake and pressure regulating system; gas storage tank; gas treatment plant; general engineering workshop; general store; Girl Guides hall; golf club; golf course; golf links; grain handling facilities; grain storage depot; gravel treatment; grazing and horticulture; grocery shop; gun club;

[H] heavy engineering and fabrication; helipad site; historical museum; hockey club; hockey pitch; holiday unit; home unit; horse and pony club; horse stabling; horticulture; hostel; hotel; hotel-casino; housing purposes;

[I] indoor sports centre; industrial development; industrial purposes;

[J] Jaycees room; jetty; judo;

[K] kindergarten; kiosk; knackery;

[L] land-based aquaculture; land-based aquaculture inlet canal; land-based mariculture; licensed club; light industrial purposes; lighthouse; line depot; log storage; lot feeding;

[M] machinery shed; maintenance depot; manufacturing; marina; marine stadium; marine workshop and slipway; market garden; market gardening; Masonic lodge; mechanical workshop; medical centre; memorial club; metal fabrication; microwave radio feeder station; microwave radio tower, mast or building; microwave repeater station; milk depot; mobile telecommunications tower, mast or building; mobile two way radio tower, mast or building; monorail train operation; motel; motocross track; motorbike sales and service; motorbike track; motor club; motorcycle club; motorcycle raceway; motor raceway; motor racing; motor sports; multi-unit residential development; multi-purpose family centre; music hall;

[N] netball; netball club; netball court; newsagency; nursery;

[O] office; offtake and pressure regulating station; oil depot; on-shore boat house; optical fibre repeater station; orchard;

[P] pharmacy; piggery; pine plantation; pipe band hall; pistol club; pistol range; plant nursery; playground; Police Citizens Youth Club; polocrosse; polocrosse club; polocrosse field; pony club; pony field; post office; pottery club; power and sailing boat club and launching, storage and preparation area; power station; power substation; prawn receiving depot; pre-school;

preparation and distribution of meals; private school; produce store; professional fishing base, building and wharf; Progress Association hall; pump site and agriculture; pump station; pumping plant; pumping station;

[Q] quarry depot;

[R] racecourse; racecourse and showground; radio communication tower, mast or building; radio station; radio telephone station; radio transmitter; radio-telephone transmitter; rail transport infrastructure; railway; railway loop and train loading facilities; reclamation; repeater station; residential building development; residential flats; residential purposes; restaurant; restoration of historical structure and tourist accommodation and facilities; retail liquor outlet; retail shopping; retail shops and/or commercial office; retirement village; Returned Services League club; rice growing and small crops; rifle club; rifle range; roadhouse; roadside stall; rodeo ground; rowing club; rugby league clubhouse; rural training school; rural youth hall;

[S] sailing club; saleyard; salt production; sand blasting workshop; sawmill; sawmill products storage; school; school playground; sea cadets hall; secondary school; seed storage; service and maintenance depot; service station; settling pond; sewage disposal; sewage treatment plant; sewage treatment works; shed; shooting range; shop premises; shopping centre; shopping complex; shop; show society and associated sporting ground; showground; showroom; single person's quarters; skating rink; skeet shooting range; ski club; slaughterhouse; sleeper sawmill; slipway and associated facilities; small bore rifle range; soccer club; speedway and associated purposes; sporting complex; sporting field; sports club or complex; sports ground, field, pitch, stadium or oval; spray painting and mechanical repair; spraypainting; squash court; State Emergency Service purposes; stockpiling gravel; stockpiling sand and gravel; stock trucking yard; storage and milling of rice; storage of boats; storage of containers; storage of electrical equipment; storage of ilmenite; storage of plant and machinery; storage shed; sugar cane growing; sugar mill pumping site; sugar storage; supermarket; surf life saving facility; swimming club; swimming pool;

[T] tank site; tannery; tannery and knackery; target bowhunting; telecommunications tower, mast or building; telephone optical fibre repeater site; television tower site; television translator; television transmitting tower, mast or building; tennis club; tennis court; theatre; theatre or hall; timber storage; timber yard; tobacco growing; toll bridge; tourist accommodation; tourist accommodation and facilities; train loading facilities; tramway; tramway loading siding; transformer site; translator broadcasting station; transport depot; transport terminal; travel agency; tropical science field station; truck and machinery depot; trucking depot; trucking yard;

[U] union office and associated facilities;

[V] vehicle parking; vehicle service and maintenance; vehicle traffic ramp and loading dock; vehicle wrecking yard; vehicles and machinery depot; vineyard; voltage regulator site;

[W] war graves; war veterans' home; warehouse; warehouse storage; water activity centre for Scouts; water bore site; water dissipation plant; water pumping station; water ski club; water storage facilities; waterfront shop; weighbridge; welding workshop; well site; wheat storage and handling depot; wheat storage shed or silo; wholesale plant nursery; workers' accommodation and marshalling yard; workshop; workshop for handicapped persons;

[Y] yacht club; youth hall.

10. A development lease under the *Crown Land Development Act 1959* or the *Land Act 1962* that permits the lessee to use the land or waters covered by the lease solely or primarily for manufacturing, business, industrial, residential or tourist and recreational purposes.

B. Freeholding Leases

1. A freeholding lease under the *State Housing Act 1945*.
2. A grazing homestead freeholding lease under the *Land Act 1962* or the *Land Act 1994*.
3. A freeholding lease as defined in Schedule 6 to the *Land Act 1994*.

C. Homestead Interests

1. A homestead lease under the *Gold Fields Homestead Act 1870*, the *Gold Fields Homestead Leases Act 1886* or the *Mineral Homesteads Leases Act 1891*.
2. A homestead selection under the *Homestead Areas Act 1872* or the *Crown Lands Alienation Act 1876*.
3. An agricultural homestead under the *Land Act 1897*, the *Special Agricultural Homesteads Act 1901* or the *Land Act 1910*.
4. A free homestead under the *Land Act 1897* or the *Land Act 1910*.
5. A miner's homestead perpetual lease under the *Miners' Homestead Leases Act 1913*.
6. A miner's homestead lease under the *Miners' Homestead Leases Act 1913*, the *Mining Act 1898* or any Act repealed by the *Mining Act 1898*.
7. A grazing homestead under the *Upper Burnett and Callide Land Settlement Act 1923*.
8. A grazing homestead perpetual lease under the *Land Act 1962*.

D. Settlement Farm Leases

1. A settlement farm lease under the *Closer Settlement Act 1906*, the *Land Act 1910*, the *Brigalow and Other Lands Development Act 1962*, the *Land Act 1962* or the *Irrigation Areas (Land Settlement) Act 1962*.
2. A designed settlement farm lease under the *Land Act 1910*.

E. Agricultural Farms

1. An agricultural farm under the *Crown Lands Act 1884*, the *Agricultural Lands Purchase Act 1894*, the *Agricultural Lands Purchase Act 1897*, the *Land Act 1897*, the *Special Agricultural Selections Act 1901*, the *Closer Settlement Act 1906*, the *Land Act 1910*, the *Brigalow and Other Lands Development Act 1962*, the *Irrigation Areas (Land Settlement) Act 1962* or the *Land Act 1962*.

F. Perpetual Lease Selections

1. 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*.

G. 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 1933*, 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*.

H. 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 1933* or the *City of Brisbane (Flood Mitigation Works Approval) Act 1952*.
3. A perpetual suburban lease (non-competitive lease) under the *Irrigation Areas (Land Settlement) Act 1962* or the *Land Act 1962*.

I. 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*.

J. 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*.

K. 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 Fertilisers 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 Fertilisers Limited Agreement Act 1967*.
3. Any special lease granted to Austral-Pacific Fertilisers Limited under clause 4(d) of the Agreement that is given the force of law by section 3 of the *Austral-Pacific Fertilisers Limited Agreement Act 1967*.
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*.

L. 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*.

Tenure information relied upon to decide that native title no longer exists must be documented and placed on DSD Central Filing System at the time a decision is made. Attachment 101 is to be used for this purpose. A synopsis of the major reasons for the decision need only be provided.

ATTACHMENT 2.3 - PREVIOUS USES AND DEVELOPMENTS THAT HAVE EXTINGUISHED NATIVE TITLE

2.3.1 PUBLIC WORKS

The NTA provides that in certain specific circumstances, constructed or established public works, extinguish native title. For extinguishment to occur the public work must:

- be valid (as discussed in Work Instruction 2.0, this would include those uses or developments validated by the NTA); and
- were constructed or commenced to be constructed or established before 24 December 1996.

Native title will be extinguished only over the area affected by, used for or incidental to the public work which has been constructed or developed (that is, on the area of land or waters on which the work was or is situated with surrounding incidental development if any - see NTA s251D). **Note that extinguishment will not apply in all circumstances; see Attachment 2.1.**

Under the NTA public works are defined as:

- a) any of the following that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:
 - a building, or other structure (including a memorial), that is a fixture; OR
 - a road, railway or bridge; OR
 - a well, or bore, for obtaining water; OR
 - any major earthworks; OR
- b) a building that is constructed with the authority of the Crown, other than on a lease. For these procedures this is taken to mean public buildings such as schools, hospitals and court houses. It does not mean a private sporting club house.

By way of providing examples, native title has been extinguished on/by:

- a hospital built on a hospital reserve. Native title is extinguished over the area of the hospital buildings and curtilage area including the carpark, walk ways, surrounding lawns and gardens which is ordinarily enclosed with a fence but may continue to exist over any undeveloped part of the hospital reserve;
- those parts of the area of a Crown to Crown freehold grant which have been extensively developed through the construction of public works and used in a manner inconsistent with the continued existence of native title eg. the construction of buildings or other fixtures;

- those parts of the area of a road, either dedicated or otherwise legally available for public use which have been extensively developed and used for road purposes and/or related incidental purposes where these are inconsistent with the continued existence of native title. For these purposes, roads must be formed . Road verges including associated drains, etc within the 60m boundary are included for example;
 - a) Where the width of the road is up to 60 metres, it is considered that if developed for road purposes inclusive of infrastructure services then the whole of the road from boundary to boundary is inconsistent with the continued existence of native title and all dealings may proceed.
 - b) A stock route, on the other hand may be quite different - native title is considered to be extinguished over the areas used in a manner inconsistent with the continued existence of native title (ie road formation) usually up to 60 metres wide - not from boundary to boundary. For example, if there is a constructed road within the boundaries, then native title is extinguished over the area of construction and over the necessary area adjacent (eg. 30m each side of centre line) to each side of the constructed road because of use during construction and maintenance of the formation.
- the construction of railways;
- the construction of artificial harbours, (eg. constructed with break walls, dredging and filling) and canals;
- the valid development of urban allotments – urban residential, industrial or commercial allotments which have been validly developed prior to 24 December 1996 as part of an estate or subdivision of similar allotments may be dealt with in accordance with the purpose for which the land has been developed (ie. constructing buildings or the selling of the land).
 - (a) Evidence that an allotment has been developed would be that it has been surveyed as part of an urban subdivision, that the allotment had been prepared for sale (eg. levelled, cleared as necessary) that the road and drainage has been constructed and that all applicable services such as water, power and sewerage are connected to the land.
 - (b) Englobo land is “not” to be considered as a developed urban allotment. Having services simply available in the vicinity or passing by the land does not mean that the land has been developed.

2.3.2 OTHER DEVELOPMENTS

Native title may also be extinguished by extensive valid private development. For example, developments which by their nature prohibit or substantially restrict public access or use will extinguish native title **except in the circumstances outlined in Attachment 2.1.**

Broad scale clearing and/or the conduct of agriculture on a non-exclusive lease IS NOT sufficient to extinguish native title. The construction of buildings (homestead, quarters, etc) will only extinguish over the areas used for the buildings.

DSD staff must not assess whether or not valid private development has been sufficient to extinguish native title. If it is believed that native title has been extinguished by valid private development the relevant supporting evidence, including photographs, should be sent to the DP&C for consideration and recommendation and if appropriate, to the DP&C NTS for assessment.

ATTACHMENT 2.4 - OTHER PREVIOUS GRANTS THAT EXTINGUISH NATIVE TITLE

There may be a small number of non-exclusive pastoral leases and agricultural leases which extinguish native title.

These are pastoral leases or agricultural leases:

- granted after 30 October 1975 and before 1 January 1994; and
- which were still in existence as at 1 January 1994; and
- which were invalid because of the existence of native title but validated by the past act provisions of the NTA.

The lease will be “invalid” provided that the grant of that lease had a greater affect on native title than any previous grant over that land. This will require full historic tenure research to establish.

Some examples to illustrate:

- if , for example, there was no grant other than a reserve previously over the land, then the grant of a lease is invalid;
- if there was a prior lease granted on identical or similar terms, then it is doubtful that the lease has had any greater affect on native title - the grant of the lease is not invalid;
- if there was no previous grant greater than an occupation licence ever granted over the land then the lease is invalid.

As such cases will be uncommon and involve legal interpretation refer the matter to DP&C enclosing a copy of the lease and copies of all previous tenures over the land for cases where such assessment is considered appropriate and necessary. A copy of any decision to assess native title as extinguished in accordance with this attachment must be referred to the DP&C & C NTS for comment before approval.

Note that extinguishment will not apply in all circumstances; see Attachment 2.1.

Work Instruction 3.0: Dealings That Can Proceed Without Notifying Native Title Holders

This Work Instruction has one (1) Attachment:

| ATTACHMENT | Type of Activity |
|------------------|--|
| • Attachment 3.1 | - Certain Low Impact Future Acts |
| • Attachment 3.2 | - Certain Primary Production Activities on Certain Pastoral Leases |
| • Attachment 3.3 | - Dredging to obtain sand and gravel |
| • Attachment 3.4 | - Sale of forest products (timber & gravel etc.). From reserves granted for that purpose |
| • Attachment 3.5 | - Legally enforceable rights, offers, |

* Row shaded in grey means Attachment is included.

One of the key functions of the NTAA is to provide clarity in relation to the conduct of activities on land or water in which native title may co-exist with other rights and interests. Consequently, some activities which were previously thought to be permissible future acts on the basis that they were low impact future acts may now only proceed after providing potential native title holders with notification of the proposal to do an activity and after providing an opportunity for them to comment on that activity (refer Work Instruction 4.0).

Care must be taken when considering whether or not an activity can proceed as a low impact future act. Attachment 3.1 outlines the hierarchy by which the NTA requires specific dealings to be considered. If the dealing you are considering is listed on the hierarchy before (ie, above) low impact future acts the process described in the Attachment relevant to that dealing MUST BE followed regardless of whether or not you consider the dealing to be a low impact future act.

In addition, certain dealings can proceed without notification even where native title is not extinguished. For example,

- the carrying out of certain primary production or related activities on leases for pastoral purposes that do not extinguish native title (preferential pastoral holding, pastoral holding, pastoral development holding, stud holding and special and term leases for grazing or pastoral purposes) may proceed without notification as outlined in Attachment 3.2.

ATTACHMENT 3.1 - CERTAIN LOW IMPACT FUTURE ACTS

Officers should note that certain acts defined as “Low Impact” might not necessarily be viewed as “low impact” by the Indigenous community. However, the NTA provides that you can carry out the activities in this attachment provided the activity meets the definition.

One of the key functions of the NTA is to provide clarity in relation to the conduct of activities on land or water in which native title may co-exist with other rights and interest. Consequently, some activities which were previously thought to be permissible future acts on the basis that they were low impact future acts may now only proceed after providing potential native title holders with notification of the proposal to do an activity and after providing an opportunity for them to comment on that activity (refer Work Instruction 4).

Care must be taken when considering whether or not an activity can proceed as a low impact future act. This outlines the hierarchy by which the NTA requires specific dealings to be considered. If the dealing you are considering is listed on the hierarchy before (ie above) low impact future acts the process described in the Attachment relevant to that dealing MUST BE followed regardless of whether or not the dealing may be classified as a low impact future act.

HIERARCHY OF ACTIVITIES

| NTA SECTION | ATTACHMENT | TYPE |
|-------------|-------------|--|
| 24FA | | future acts where procedures indicate absence of native title - eg non claimant process previously applied |
| 24GB | 3.2 and 4.2 | primary production activities eg. a tree clearing permit for the purpose of developing cash crop agriculture (eg. wheat, sorghum, sunflower etc) on a pastoral lease |
| 24GD | 3.2 and 4.3 | acts permitting off-farm activities directly connected to primary production activities eg permit to graze on adjoining area |
| 24GE | 4.4 | granting rights to third parties (including lessees) on non-exclusive agricultural or pastoral leases eg permit to take timber |
| 24HA | 4.5 | management of water and airspace eg granting water licences. |
| 24IA | 4.6 | renewals, extensions, etc of leases, licences permits or authorities |
| 24JA | 4.7 | development and maintenance of reserves, leases, etc for public purposes |
| 24KA | 4.8 | facilities for services to the public |

If the activity you are contemplating is NOT identified on the above list but meets the requirements of a low impact future act as outlined below, it may proceed without notification. Generally, low impact future acts are dealings which

- have a minimal impact upon native title; AND
- are capable of being stopped when a determination of native title is made.

Exceptions to the requirements outlined below which are also considered as low impact acts are:

- excavation or clearing that is reasonably necessary for the protection of public health or public safety; or
- tree lopping, clearing of noxious or introduced animal plant species, foreshore reclamation, regeneration or environmental assessment or protection activities.

Dealings can proceed as low impact future acts **without** providing notification to registered native title holders, registered native title claimants or Aboriginal and Torres Strait Islander Representative Bodies where native title has not been extinguished provided they do **NOT** consist of, authorise or otherwise involve any of the following:

- the grant of a freehold estate in any of the land or waters;
- the grant of a lease over any the land or waters;
- the conferral of a right of exclusive possession over any of the land or waters;
- the excavation or clearing of any of the land or waters concerned **(with two exceptions which are permitted to occur under the NTA:**
 - i) excavation or clearing that is reasonably necessary for the protection of public health or safety; and**
 - ii) tree lopping, clearing of noxious or introduced animal or plant species, foreshore reclamation, regeneration or environmental assessment or protection activities);**
- mining (other than fossicking by using hand-held implements);or
- construction or placing on the land, or in the waters of any building, structure or other thing (other than fencing or a gate) that is a fixture; or
- disposal or storage, on the land or in the waters, of any garbage or any poisonous, toxic or hazardous substance; or
- an act permitting primary production on non-exclusive agricultural or pastoral leases (See Work Instruction 3.0, Attachment 3.2 and Work Instruction 4.0, Attachment 4.2); or
- an act permitting off-farm activities directly related to primary production activities (See Work Instruction 4.0, Attachment 4.3); or
- an act granting rights to third parties including lessees, etc on non-exclusive agricultural or pastoral leases (See Work Instruction 4.0, Attachment 4.4); or
- an act relating to the management of water and air space (See Work Instruction 4.0, Attachment 4.5); or
- upgrades of tenure; or

- an act involving the development of reservations or other lands for public purposes (See Work Instruction 4.0, Attachment 4.7) or the development of facilities for services to the public (See Work Instruction 4.0, Attachment 4.8).

It is important to note that any licence, permit or authority issued as a low impact future act must be terminable at will (as it may be required to cease once there is an approved determination of native title over the subject area). In this regard, any improvements may then be required to be removed. In order to make this position clear when granting permission for a dealing to proceed as a low impact future act the following wording may be added to the authorisation:

Should it be determined at some future date by any Court or Tribunal that native title exists over the subject land or waters, this licence etc. may be terminated and the licensee (or any subsequent licensee) may be required to remove any works established under this licence at the licensee's (or any subsequent licensee's) own cost, expense and risk. In that event, no compensation for works, development costs or loss of income shall be payable to the licensee (or any subsequent licensee) by the State of Queensland.

ATTACHMENT 3.5 - LEGALLY ENFORCEABLE RIGHTS, OFFERS, ETC.

Under the NTA, some dealings may proceed as an exercise of a legally enforceable right or because of a previous written offer, arrangement or undertaking made or given in good faith.

The NTA imposes particularly tight restrictions on the use of such legally enforceable rights or offers. Amongst other things, these restrictions impose particular time periods that must be satisfied and additional requirements that relate to the validity of the dealing and/or the effect of the dealing on native title.

A legally enforceable right consists of either of the following:-

- a right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994; OR,
- a right created by an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time; OR,
- where there is a non-claimant application; notice has been given; the period of notice has ended (3 months); there has been no relevant native title claim (noted on Register of Native Title Claims) covering the area; application has not been withdrawn, dismissed or finalised; there is no entry on National Native Title Register specifying that native title exists → s24FA protection arises, thus creating a right to carry out any future act at that time (and validating that future act) over that particular area.

Evidence as to what constitutes an offer, commitment, arrangement or undertaking would include:

- letters by PSG;
- actions taken by PSG in order to give effect to an offer, etc;
- aerial photographs with overlays on photo;
- reports to Parliament;
- Statutory Declarations;
- map showing a conceptual layout (tentative plans)
- annual reports;
- response to a Parliamentary question;
- reports to the Director-General;
- long-term plans;
- brochures and publications (eg. showing intention to use land for industrial purposes);
- photographs; and,
- media reports.

Also note, that there needs to have been communication of this offer, commitment or undertaking, to the person/company you were making this offer, commitment, undertaking to, eg. an internal commitment is not enough if it not communicated to the person you were making the commitment to.

Because the question of whether or not a legally enforceable right, or an offer, arrangement, commitment or undertaking exists it may be difficult to determine and in most cases will involve legal interpretation. Officers should not proceed with a dealing on the basis of this Attachment without first obtaining the agreement of the DP&C.

Work Instruction 4.0: Dealings That Require Notification and Consideration of Responses or Other Procedural Rights Before Proceeding

This Work Instruction deals with activities which can proceed on non-exclusive tenures after providing notification or affording other procedural rights to native title holders. The process required for notifying native title holders is explained in Attachment 104.

Non-exclusive tenures include pastoral or other leases which are NOT listed in Work Instruction 2.0, Attachment 2.2 (2.2.3) as an exclusive leasehold tenure.

This Work Instruction has nine (9) Attachments.

| | ATTACHMENT | NTA Section | | Type of Activity |
|---|----------------|-------------|---|--|
| | | | | |
| • | Attachment 4.2 | 24GB | - | Primary production activities on non-exclusive pastoral leases which require notification; |
| • | Attachment 4.3 | 24GD | - | Acts permitting off farm activities which are directly connected to primary production activities (eg activities on adjoining reserves, stock routes etc); |
| • | Attachment 4.4 | 24GE | - | Granting rights to third parties (including lessees) on non-exclusive agricultural or pastoral leases; |
| • | Attachment 4.5 | 24HA | - | Management of water and air space; |
| • | Attachment 4.6 | 24IA | - | Renewals, extensions, etc of leases, licences, permits or authorities; |
| • | Attachment 4.7 | 24JA | - | Development of reservations or leases, etc for public purposes; |
| • | Attachment 4.8 | 24KA | - | Facilities for services to the public; |
| • | Attachment 4.9 | | - | Activities where adjoining owners have a procedural right to be notified; |

* Row shaded in grey means Attachment is included.

How to Apply This Work Instruction

The above list of activities is in effect a hierarchy established by the NTA that MUST be used for the processing of dealings. In considering whether or not a dealing can occur, an officer MUST begin at Attachment 4.1 and progress down the list of Attachments until an appropriate course of action is determined. The first attachment which applies is to be used if arguably two or more attachments may apply.

ATTACHMENT 4.6 - RENEWALS, EXTENSIONS ETC OF LEASES, LICENCES, PERMITS OR AUTHORITIES

Renewal of tenures on the same terms and conditions is considered briefly in Work Instruction 1.0, Attachment 1.1. This Attachment (4.6) also deals with renewals. It deals with:

1. renewals on the same terms and conditions; and
2. extensions of terms and changes of conditions.

of a lease, licence, permit or authority.

A lease, licence, permit or authority can be;

- renewed;
- re-granted or re-made; or
- extended,

without notification, provided that ALL of the following five conditions are met.

1. The original lease, licence, permit or authority (“the original act”) was valid.

- This includes those original acts made valid by the past act or intermediate period act provisions of the NTA; **AND**

Note: Any permit, licence etc. which was issued for the first time post 23 December 1996 without the appropriate notification required by this procedure would not be classed as valid when it is due for renewal. In that case notification will be required for the renewal as if it were being issued for the first time.

2. The original act:

- **was created prior to 24 December 1996; or**
- **complies with these provisions itself; or**
- **was a “PRE-EXISTING RIGHTS BASED ACT” (see below); or**
- **was created by an act covered by Attachments 4.2, 4.3, 4.4 and 4.5.; AND**

PRE-EXISTING RIGHTS BASED ACTS are an extension of the previous “legally enforceable right” and “prior commitment” provisions of the NTA. An act is a pre-existing rights based act if it takes place:

- in the exercise of a legally enforceable right created by any valid act done before 24 December, 1996; or
- in good faith in giving effect to an offer, commitment, arrangement or undertaking made or given to a private party before 24 December, 1996 (evidenced in writing).

3. The renewal, re-grant, etc (“the new act”) does not:

- confer a right of exclusive possession; or

- create a proprietary interest in the land or waters larger than that created by the original act; or
 - create a proprietary interest in the land or waters where the original act did not confer a proprietary interest. (In the case of a pastoral lease of more than 5000 hectares it must not permit more than half of the new lease to be used for non-pastoral purposes.); **AND**
4. **If there was a reservation or condition in the original act for the benefit of indigenous people, that reservation or condition must be repeated in the new act; AND**
 5. **If the original act did not permit mining then the new act must not permit mining.**

Other changes which can also be made between the original act and the new act WITHOUT NOTIFICATION are as follows:

- the new act can cover the same or a smaller area; and
- the new act can be for a longer term.
- the original act can be subdivided (eg. creating two leases out of one)
- in the case of non-exclusive pastoral leases, the new act can authorise additional primary production activities, or activities incidental to it, provided the majority of the area is used for pastoral activities. If the activities relate to agriculture, aquaculture or horticulture native title holders still need to be notified (as set out in Attachment 4.2).

Changes which can proceed BUT NATIVE TITLE HOLDERS MUST BE NOTIFIED are as follows:

1. If the “new act” is a non-exclusive pastoral lease and the additional primary production activities involve agriculture, aquaculture or horticulture, native title holders must be notified in accordance with Attachment 104.
2. Where the “new act” is giving effect to a right to a grant of freehold or the conferral of a right of exclusive possession as a “pre-existing rights based act” (see previous page), then notification as per Attachment 104 must be provided.
3. Where the “new act” is in relation to a non-exclusive pastoral lease or a non-exclusive agricultural lease and the new lease will be for a longer term, or will be upgraded to a perpetual lease, then special notification is required. This notification is more extensive than what is required under Attachment 104.

The required notification is given to:

- any representative body in the area;
- all registered native title bodies corporate;
- all registered native title claimants; and
- any native title claimants whose claim has been accepted by the NNTT.

Those notified have 2 months to object to the doing of the act so far as it affect their interests. The State must then consult with all objectors in order to try to minimise the impact of the act on native title and access to the land or waters concerned. The objector can require the matter to be heard by an independent body, whose determination can only be disregarded if:

- the State Minister who has responsibility for Indigenous Affairs is consulted and that Minister's views are taken into account; and
- it is in the interest of the State not to comply with the determination.

ATTACHMENT 4.7 DEVELOPMENT OF RESERVES OR LEASES FOR PUBLIC PURPOSES

This Attachment deals with land held by the State, Statutory Authorities, Government Owned Corporations and Local Government for a particular purpose by way of:

- reservation,
- proclamation,
- dedication,
- condition, permission or authority (including roads),
- lease; or
- vesting.

Examples of these would be State Forests and National Parks or land otherwise vested for a particular purpose. All of these will be referred to as Reserves for the purposes of this Attachment.

Normal maintenance of existing valid improvements on a Reserve can proceed because such activities would have no greater affect on native title.

4.7.1 Development of a Reserve

A Reserve can be developed provided the following conditions are met :

- I. the Reserve was created (either by gazettal etc or by legislation) before 24 December 1996;
- II. the Reserve was valid (this includes it being validated by it being a past act or intermediate period act);
- III. the development of the Reserve is done in good faith under or in accordance with the reservation.

Note: New Development of Reserves where native title has not previously been extinguished will require notification: eg construction of public works such as a new hospital on a hospital reserve, or a cricket field on a recreation reserve, will require notification (see Attachment 104).

The NTA states a PUBLIC WORK, means:

- any of these works that are constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:
 - a building, or other structure (including a memorial), that is a fixture; or
 - a road, railway or bridge; or
 - a well, or bore, for obtaining water;
 - any major earthworks (this will include dredging for shipping channels/navigational purposes).

Or

- a building that is constructed with the authority of the Crown, other than on a lease.

Notification must be provided in accordance with Attachment 104. Any relevant comments received in response to the notification must be considered before the activity proceeds.

Additionally, with regard to Aboriginal and Torres Strait Islander DOGITs and Reserves, an attempt should be made in good faith to obtain consensus amongst the residents, the relevant Community Council (if any) **and** native title holders.

A few points to note:

- Existing valid improvements on reserves may be maintained without notification.
- No reference is made to reserves, etc created after 23 December, 1996. The NTA does not provide any authority to use these reserves without full and proper consideration of native title. Such reserves should not be used or developed unless native title has been considered.
- In relation to Crown vested land or leasehold, the purpose of any relevant vesting or lease must be **evidenced in writing prior to 24 December, 1996**. The purpose of most leases will be evidenced in writing about the time the lease is granted. There may be a rare occasion where the lease is drawn up after the date it commences. If any doubt exists the matter should be referred to the DP&C.
- With regard to Crown Freehold there is a need to consider the circumstances of each case to ensure that authority exists for the development as proposed (see Attachment 109).
- Reserved or vested land may only be Converted to Crown Freehold or Crown Leasehold, or disposed of if native title has been extinguished (refer to Attachment 109 for more details in regard to dealing with Reserves and Work Instruction 2.0 in regard to extinguishment of native title).
- With regard to State Forests, National Parks and Timber Reserves, appropriate notification should be given as a matter of courtesy for planned fuel reduction controlled burning. This would not apply to emergency situations such as back burning to fight bush fires.

4.7.2 Activities which can proceed without notification

Activities which DO NOT involve construction or establishment of public works or structures or major earthworks may proceed on a Reserve as long as they are in keeping with the purpose for which the area was set aside. (Structures and major earthworks would include sporting club houses, fields, ovals etc). The activities which do not require notification involve use rather than development.

4.7.3 Informal Tenancies and Notification

The current practice of the PSG entering into informal tenancy agreements must be noted. At present informal tenancies –

- are not registered;
- are not carried out pursuant to legislation (internal dealing);
- are granted for the purposes of sporting clubs, pony clubs, skydiving, emu farming, model plane clubs, grazing, etc;
- include a Deed of Indemnity and public liability insurance;

- are terminated by giving the tenant 30 days notice;
- typically short term (up to 12 months); and,
- the tenant must be incorporated.

Due to the risk of a native title claim determination being approved, informal tenancies **must, from now on, be terminable at will** (no more than 30 days notice to terminate).

Please note that informal tenancies will normally only become an issue as to notification when they –

- are granted over USL, as opposed to an industrial estate owned by PSG; and,
- allow the building of improvements (fixtures) on the land, eg. racetrack, factory, etc. NB. a fence is technically a fixture but if it is low level fencing, then notification will not be required.

The test for whether notification will be required will be if the Property Services Group considers that the proposed improvement would require Local Government approval. If an informal tenancy gives the right to do major earthworks, then notification is required.

ATTACHMENT 4.8 - FACILITIES FOR SERVICES TO THE PUBLIC

The NTA provides a mechanism whereby public infrastructure and facilities for services to the public can be established relatively quickly without the need for compulsory acquisition. Facilities and infrastructure established under this Attachment **WILL NOT** extinguish native title. Native title will be suppressed while the facility or infrastructure exists and is in use. It will revive when it is removed. Native title holders must be provided with reasonable access to the area concerned.

This Attachment should **NOT** be used where the intention is to acquire all interests in land (including native title interests) in order to build a public work. If any interests are being acquired for a public purpose then native title interests must also be acquired. Compulsory acquisition is considered in Work Instruction 5.0. In most circumstances (particularly for major works such as roads or railways) compulsory acquisition may be the most appropriate option.

This Attachment permits the construction, operation, use, maintenance or repair of any of the facilities listed below constructed by the Crown or on behalf of the Crown by any person so long as:

- they are to any extent located on an onshore place;
- such facilities are to be operated for the general public;
- native title holders are not prevented from having reasonable access to such land or waters in the vicinity of the facility except while the thing is being constructed or for reasons of health and safety; and
- State or Commonwealth legislation (such as the Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987) makes provision for the protection of any areas or sites that may be in the area in which the act is to be done and are of particular significance to Aboriginal or Torres Strait Islander people.

Facilities which may be constructed etc are:

(Note: That not all “public works” are included as “Facilities”. “Facilities” are generally transport facilities such as pipes, cables and roads)

- a road, railway, bridge or other transport facility (other than an airport or port);
- a jetty or wharf;
- a navigation marker or other navigational facility;
- an electricity transmission or distribution facility;
- lighting of streets or other public places;
- a gas transmission or distribution facility;
- a well, or a bore, for obtaining water;
- a pipeline or other water supply or reticulation facility;
- a drainage facility, or a levee or other device for management of water flows;
- an irrigation channel or other irrigation facility;
- a sewerage facility, other than a treatment facility;
- a cable, antenna, tower or other communication facility; or
- any other thing that is similar to any one or more other things mentioned above.

Notifying Native Title holders or affording Procedural rights:

If any of the above facilities are to be constructed, etc on land that is covered by a non-exclusive pastoral lease native title holders must be afforded the same procedural rights as those afforded to such a lease holder. In all other cases, native title holders or registered native title claimants must be afforded the same procedural rights as if they were ordinary title holders (that is, freehold title holders) of any land or any adjoining land concerned.

If the only right that would exist is a right to be notified, this can be satisfied as outlined at Attachment 104.

Prior to a decision being made as to whether or not the activity can proceed consideration **MUST** be given to any relevant comments received in response to the notification.

ATTACHMENT 4.9 - ACTIVITIES WHERE ADJOINING OR CO-EXISTING OWNERS HAVE A PROCEDURAL RIGHT TO BE NOTIFIED

If adjoining or co-existing owners or the public at large have a procedural right to be notified of an activity;

- whether the activity is being considered for approval; or
- whether approval is subject to notification,

similar procedural rights should be provided to native title holders. Accordingly, where notification is required, use Attachment 104 in addition to any other notification processes that may exist.

Work Instruction 5.0: Other Future Act Options

This work instruction deals with the following Future Act options:

- Indigenous Land Use Agreements (Attachment 5.1)
- Right to Negotiate (Attachment 5.2)
- Non Claimant Application (Attachment 5.3)
- Compulsory Acquisition of native title rights and interests (Attachment 5.4)

The NTA provides these options to allow certain dealings to proceed subsequent to following the prescribed process.

Compulsory acquisition, if appropriate, may be carried out with the approval of the DP&C. The remaining three options (Right to Negotiate, Non-claimant Application and Indigenous Land Use Agreement) however, will involve issues relevant to other departments and may only be commenced with the approval and co-ordination of DP&C. Attachment 107 sets out the information which may be required by the DP&C when it determines whether or not a Future Act option should be undertaken.

Indigenous Land Use Agreements. These may be useful in relation to major developments, issues of regional importance or those that cut across the responsibilities of a number of departments. They will, therefore, not be available for all circumstances and will be coordinated by the DP&C, NTS.

In the cases where acquisition may be for the benefit of a private or third party, the Right to Negotiate will probably apply. As explained above, approval and co-ordination of the DP&C, NTS will be required in such cases.

Right to Negotiate This will apply in certain circumstances (for example, compulsory acquisitions for the benefit of a private party and for mining including where quarrying is defined as mining).

Under the NTA mining “does not include extracting, obtaining or removing 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.”

Accordingly, hard rock quarrying involving cutting and blasting is mining.

Non-claimant Application. This option is applicable only where there is no native title claim or determination over the land. In practice it will generally only be an effective option where there has been prior consultation with the representative body and/or potential native title claimants and such consultation indicates a reasonable prospect of a successful process.

Compulsory Acquisition (See Attachment 5.4). This option is available only if there is relevant State legislation which would permit compulsory acquisition if the land were instead private freehold land. In general, this applies only to acquisitions for public works and not to acquisitions for private or third parties.

ATTACHMENT 5.4 - DEVELOPMENTS FOR A PUBLIC PURPOSE - COMPULSORY ACQUISITION

Native title rights and interests may be compulsorily acquired by the State of Queensland where the acquisition is for a public purpose. For the purposes of the NTA, the “State” means the Queensland Government and all of its emanations such as Local Authorities, Statutory Authorities, Statutory Corporations and State Instrumentalities, which include Government Owned Corporations (for example QRAIL, Port of Brisbane Corporation, ENERGEX, the Water Boards, the Sugar Corporations, etc).

In some cases, it is possible to establish public works without using a compulsory acquisition process. However, such opportunities are limited and restricted under the NTA (See Work Instruction 4.0, Attachment 4.7). Some works may be established without resorting to the compulsory acquisition process but only under very restricted circumstances (see Work Instruction 4.0, Attachment 4.8).

Section 24MD of the NTA provides for the compulsory acquisition of native title rights and interests. As with freehold, it is generally not lawful to compulsorily acquire native title rights and interests, or indeed any interest, where the purpose of the acquisition is for other than a public purpose.

Where it would not be possible to compulsorily acquire freehold land for a particular purpose it would similarly not be possible to compulsorily acquire native title rights and interests for that purpose.

The *Acquisition of Land Act 1967* allows interests in land to be compulsorily acquired by the Crown, a local authority or a constructing authority for a variety of purposes listed in Schedule 2 of that Act. The NT(Q)A provides an additional power whereby native title interests may be similarly acquired. Accordingly, native title rights and interests may be compulsorily acquired for those public purposes.

Under the *Acquisition of Land Act 1967* landholders must be notified of the proposed acquisition and have a right to object and be heard in relation to that objection and to compensation for the loss of their interest in the land. Accordingly, native title holders must be notified of the proposed acquisition, be allowed to object and be heard and compensation must be paid for any acquisition of their native title rights and interests.

Upon the taking, the interest is converted to a right to claim compensation.

If the constructing authority is normally responsible for the payment of compensation for a compulsory acquisition of freehold, the constructing authority will similarly be responsible for the payment of compensation for the compulsory acquisition of native title rights and interests.

Section 23HA of the NTA provides that, where there has been no approved determination of native title in relation to the area, one way a person may give the required notification to native title holders for a compulsory acquisition of their rights and interests is by doing all of the following:

- notifying, in the way determined in writing by the Commonwealth Minister, any representative Aboriginal body for the area concerned that the act is to take place; and
- notifying, in the way determined in writing by the Commonwealth Minister, any occupier of the land concerned that the act is to take place; and
- placing notices in the way determined in writing by the Commonwealth Minister on any land concerned that the act is to take place; and
- notifying the public in the determined way (see section 252 of the NTA) that the act is to take place.

Once this procedure, together with the procedure outlined by the *Acquisition of Land Act 1967* for the acquisition of land from freeholders have been followed, the acquisition for the public purpose may proceed.

The *Native Title (Notices) Determination No.1 of 1996* outlines the procedures to be followed to ensure that proper notification has been given in accordance with the above.

Failure to follow these steps will leave the acquisition at risk of invalidity.

To ensure a coordinated Queensland approach to the compulsory acquisition of native title rights and interests, please contact the DP&C to discuss the proposed acquisition.

Practice Attachments

ATTACHMENT 100 - EXAMPLES OF DOCUMENTATION WHICH MUST BE OBTAINED TO SUPPORT DECISIONS (DEALING APPROVED OR NOT APPROVED)

It is **ESSENTIAL** that the relevant documentation and factual information relied upon in making the decision is noted and recorded on DSD Central Filing System. Attachment 101 is to be used for this purpose. In some instances a statutory declaration or other written statements may also be required. A synopsis of the major reasons for the decision need only be provided.

Documentation to support the evaluation may include:

- a copy of the title from the Automated Titling System;
- a copy of the lease document;
- a copy of a permit or licence document;
- an inspection report describing the nature and extent of development;
- aerial photographs or a sketch plan of the development;
- a copy of a gazettal notice or other documentation proving the dedication of a road;
- a copy of the gazettal notice proving the reservation of a reserve;
- any other evidence attesting to the restricted or controlled use of the area;
- statutory declarations or statements of known interests in the land, connection to the land and past or present usage; and
- description of any Aboriginal or Torres Strait Islander interest, if relevant.

Attachment 101 Native Title Work Procedures – Documented Decision

SUBJECT PARCEL:

| | |
|-------------------------------|------------------|
| Lot/Plan: _____ | Area: _____ |
| Local Authority: _____ | Commenced: _____ |
| Current Tenure/Licence: _____ | |

PROPOSED DEALING:

| |
|-------|
| _____ |
| _____ |

DECISION made under Work Instruction 1 2 3 4 5

| |
|---|
| proceed <input type="checkbox"/> notify and consider any comments <input type="checkbox"/> recommend Future Act Option <input type="checkbox"/> |
| dealing refused <input type="checkbox"/> refer to DP&C <input type="checkbox"/> |
| BASIS FOR DECISION: |
| _____ |
| _____ |
| _____ |
| _____ |

Name of Delegated Officer: _____

Position: _____

Signature: _____ **Date:** _____

RESULT OF CONSIDERING ANY COMMENTS – AND REASONING:

| |
|--|
| proceed <input type="checkbox"/> proceed with modification <input type="checkbox"/> recommend Future Act Option <input type="checkbox"/> |
| dealing refused <input type="checkbox"/> refer to DP&C <input type="checkbox"/> |
| BASIS FOR DECISION: |
| _____ |
| _____ |
| _____ |

Name of Delegated Officer: _____

Position: _____

Signature: _____ **Date:** _____

NB. This Attachment may be used in its current form or incorporated with another approval document used by the Department. If more space is required enlarge the appropriate area or attach additional pages.

ATTACHMENT 103 - PROPOSED AMENDMENTS FORM

To: Director
Native Title Services
Department of the Premier and Cabinet
Level 1, 61 Mary Street
Brisbane

DETAILS OF PROPOSED AMENDMENTS

Document No.

Work Instruction No. and/or Attachment No. & Title:

Name of Officer Submitting Amendment:.....

Position of Officer:.....

Date:.....

Contact Telephone No.:.....

Name and position of reviewing officer: _____

Feedback provided to submitting officer: YES / NO

ATTACHMENT 104 - NOTIFYING NATIVE TITLE HOLDERS

The amendments to the NTA require that, before a decision is made as to whether or not some activities can occur on non-exclusive tenures, native title holders must be notified of the proposed activity or class of activity and provided with an opportunity to comment on the activity.

In order to fulfil this requirement, notifications must be made in writing and sent by post to:

- any Representative Body in the area;
- all registered native title bodies corporate;
- all registered native title claimants ; and
- any native title claimants whose claim has been accepted by the NNTT.

The Notification Provisions in the Act

| SECTION | | REP BODY | BODY CORP | REG'D CLAIMANTS | PUBLIC |
|--|-------------------|----------|-----------|-----------------|--------|
| Acts permitting primary production on non-exclusive agricultural and pastoral leases | 24GB(9) (a) & (b) | ■ | ■ | ■ | |
| Acts permitting off-farm activities | 24GD (6) | ■ | ■ | ■ | |
| Granting of rights to third parties etc on non-exclusive agricultural or pastoral leases | 24GE | ■ | ■ | ■ | |
| Management of regulation of water and airspace | 24HA (7) | ■ | ■ | ■ | |
| Exclusive possession grant as a result of a legally enforceable right etc. | 24ID (3) | ■ | ■ | ■ | |
| Reservations - development of public works, leases etc | 24JB (6) | ■ | ■ | ■ | |
| Reservations preparation of management plans for national and State parks | 24JB(7) | ■ | ■ | ■ | |
| Facilities for service of public | 24KA (8) | ■ | | ■ | |
| Acts that pass the freehold test | 24MD (7) | ■ | | ■ | |
| Acts affecting off-shore places | 24NA (9) | ■ | | ■ | |

The following information must be provided:

- a) a clear description of the land, or waters, affected by the act (eg a Blinmap map of the land proposed to be affected together with a plan indicating the locality of the land to be affected); and
- b) a description of the general nature of the act; and
- c) the time at which it is intended that the act begin; and
- d) the time during which it is intended that the act will continue; and
- e) an indication of the kind of disturbance that the doing of the act will cause to the land or waters.

A notification period of 28 days must be allowed to enable comments to be submitted. The notification must also provide information advising the name and address of the person to whom comments should be provided together with the manner in which those comments

should be made in relation to the proposed acts or class of acts can be made. Any comments received must be considered before the dealing is approved by the delegated officer. A draft letter is provided at the end of this attachment.

It is important to note that if the legislation under which the dealing is proposed affords procedural rights of notification to ordinary title holders, potential native title holders must be afforded those same rights in order to comply with the NTA. The NTA requires that native title holders have the same procedural rights as those of an ordinary title holder. In such circumstances, whichever process of notification is more extensive should be applied.

SUMMARY:

1. Check to see if the legislation under which the activity can be authorised requires notification. If it does, the requirements of both processes of notification must be met. If not proceed to step 2.
2. Letters to go by post to:
 - any Representative Body in the area;
 - all registered native title;
 - all registered native title claimants ; and
 - any native title claimants whose claim has been accepted by the NNTT.
3. Letters to contain the following information:
 - a) a clear description of the land, or waters, affected by the act (eg a BLINMAP map of the land proposed to be affected together with a plan indicating the locality of the land to be affected); and
 - b) a description of the general nature of the act; and
 - c) the time at which it is intended that the act begin; and
 - d) the time during which it is intended that the act will continue; and
 - e) an indication of the kind of disturbance that the doing of the act will cause to the land or waters. Allow 28 days for responses.
 - f) the name and address of the person to whom comments should be made together with the manner in which they should be made (ie within 28 days and in writing).
4. Consider comments received in response to letters.
5. Make decision as to whether or not activity can proceed.
6. If in doubt contact DP&C.

Standard Notification Form

NOTIFICATION UNDER THE NATIVE TITLE ACT 1993

| | | | |
|------------|--|---------|--|
| | | SECTION | |
| DEPARTMENT | | | |
| CONTACT | | | |
| TELEPHONE | | | |

An application has been received by the Department from <<party>>for the following approval :

| | |
|----------------------|--|
| TYPE OF APPROVAL | |
| UNDER WHAT STATE ACT | |

The approval, if granted, will permit the following activity to happen :

| | |
|----------------------|--|
| NATURE OF ACTIVITY | |
| LOCATION OF ACTIVITY | |
| REFER TO MAP | |

Some further details about the activity :

| | |
|--|--|
| IT WILL COMMENCE ON | |
| IT WILL CONTINUE UNTIL | |
| LIKELY DISTURBANCE TO THE LAND OR WATERS | |
| | |
| | |

You are invited to comment upon the grant of the approval.

Any comments :
 must be **IN WRITING**; and
 must be received no later than **(DATE)**

YOU CAN SEND YOUR COMMENTS TO :

NAME
 DEPT
 ADD

Date Issued : date now

ATTACHMENT 105 - CONSIDERING COMMENTS BY REGISTERED NATIVE TITLE HOLDERS, REGISTERED NATIVE TITLE CLAIMANTS AND ABORIGINAL AND TORRES STRAIT ISLANDER REPRESENTATIVE BODIES

Notification is required to be given under Work Instruction 4.0 to registered native title holders, registered native title claimants and Aboriginal and Torres Strait Islander representative bodies. Comments received in response are to be considered in the following manner:

CHECKLIST FOR CONSIDERATION OF COMMENTS

The following is a checklist which should be used by departmental officers when making decisions.

- Are you the lawful decision maker under an Act, statutory instrument, policy, program or departmental instruction?
- Have you been formally 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 the decision maker?
- What information is available?
- Have you perused all relevant departmental documents?
- Is there a need to make further enquiries?
- Enquire into relevant issues raised by a person, particularly where the person has submitted evidence that conflicts with any tentative findings of the decision maker.
- Do persons affected by your decision need to be consulted so they have an opportunity to comment (procedural fairness)?
- Consider the decision in a comprehensive manner - explore both sides.
- Individually assess 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 substantiate the comments, then those comments will have no weight.
- Further, if other factors outweigh the comments, those comments will have little weight.
- Make a determination of the facts based on the evidence.
- Beware of the status and quality of evidence. Is the evidence hearsay or direct testimony; is it fact or opinion; how well is it verified?
- When a decision is based on some adverse findings of fact, those findings must not be based on mere suspicion or uncorroborated hearsay, but rather on reliable logically probative evidence.
- Ensure the decision making process is logical and lawful.
- Ensure that any 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 this Procedure.
- 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 the decision maker.
- Do not make a decision in such a way that is an abuse of the decision making power.
- Exercise the decision making power independently and personally - do not make a decision at the direction of someone else.
- Record the decision. Be prepared to review the decision if it involves an error of law.
- When recording the decision use plain language - vague or ambiguous language should not be used.

WRITTEN ADVICE OF CONSIDERATIONS

After the relevant officer has considered the comments, the person who commented should be advised in writing of:

- a) the decision;
- b) the material facts considered;
- c) the evidence of those facts; and
- d) the reasoning used, ie. how the facts and evidence were used to arrive at the decision.

The letter must acknowledge their comments, ie make specific reference to it.

SAMPLE LETTER IN RESPONDING TO COMMENTS

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

Dear *[Name]*

Re: Comments on *[insert details of proposed dealing]*

I refer to your letter dated *[date]*, which was received at this office on *[date]*, commenting on *[insert details of proposed dealing, eg. grant of waterworks licence to Mr Bill Brown]*.

Decision

After considering your comments, I have decided *[insert details of decision]*.

I made this decision pursuant to *[state relevant sections of Procedure and/or Act]* which *[paraphrase the text]*. The *[state relevant sections of Procedure and/or Act]* states: *[cite exact words of Procedure and/or Act; Note: An extract of the Procedure or legislation or copy of the Procedure can be attached to the letter for ease of reference and to keep the main text reasonably concise]*.

Material Considered

In arriving at my decision, I considered the following material:

[Outline relevant evidence including material (if any) put forward by the person making the comments or other parties supporting or not supporting the proposed dealing; natural justice requires that comments/material/evidence from those other parties be acknowledged and duly considered]

Findings of Fact

I made the following findings of fact:

[eg. section XX of the Procedure or section YY of the Act requires the following facts to be established...

- ...
- ...
- ...]

I was/was not satisfied that there were special circumstances in this case that warranted departure from strict application of the Procedure because ... *(If an exceptional case was accepted by you, explain why it was exceptional)*

From the evidence cited above I was satisfied that

- . : was/was not proven.
- ... was/was not proven
-was/was not relevant

Reasons for the Decision

I made the decision for the following reasons:

[Summarise the linkage of the relevant findings of particular facts of the case to the facts required to be established under the Procedure/Act and the terms of the decision at issue.] Below is an example for a hypothetical valuations objection decision made under the Valuation of Land Act where the objector disputed the increase of assessed value and made a range of claims supporting the objection. It is not obligatory to make the conclusion as detailed as the example if the matter for decision is relatively simple:

“I made the decision for the following reasons

- *The property is a single dwelling used for residential purposes*
- *There is no substance to the objector’s allegation of proposed resumption affecting the valuation*
- *The site is located opposite a major shopping centre and faces the car park of the centre. The noise and associated nuisance created by this development has increased over recent years with population expansion and longer trading hours*
- *The residential amenity of the locality has been affected detrimentally by resultant increases in traffic and noise nuisance*
- *Noise from through traffic has intensified in large part due to X Avenue being a service road allowing traffic to by-pass the major intersection at Y and Z Roads and*
- *From High Court case law precedent (Spencer v Commonwealth of Australia), it is established, enforceable practice that the determination of market value under the Valuation of Lands Act 1944 for the purposes of sections 3, 37 and 43 requires that the*
- *valuation must reflect any such detriment to the amenity of the site. The relevant market sector in the case of your property is for residential single dwelling purposes.*
- *I was satisfied that the valuation recommendation of \$made by..... , a professionally qualified and experienced valuer employed by the Department, was correctly conducted and it accurately assessed the decreased value of the land.*

- *Overall I believed that the valuation of \$.....was correct when compared with available local sales evidence and making appropriate site allowances for detrimental nuisances of the immediate area. I concluded that your claims about property value relativities, relativity of the size of the value reduction, resumption speculation and the amenity of the area were unsubstantiated and incorrect. I concluded that the factors of property value relativities in the area and loss of amenity were the critical matters to determine the valuation. They were properly assessed and reflected in my decision to disallow your objection.”*

Yours faithfully

[insert name and position of decision maker]

ATTACHMENT 106 - CONTACT LIST - QUEENSLAND NATIVE TITLE REPRESENTATIVE BODIES AND ACCOMPANYING MAP

In order to provide the most effective, coordinated notification delivery on behalf of the State Government the Department of Natural Resources (DNR) is to provide a whole of government service point. This will affect all notifications provided to representative bodies which relate to Section 24 activities, providing the right to be notified and the opportunity for comment, but will not affect notices which relate to compulsory acquisition, the right to negotiate or an alternative State based regime.

The relevant notices which are required to be sent to a specific representative body are to be forwarded to the DNR as shown below rather than directly to the representative body. The DNR will organise a regular meeting (where impractical to meet in person a telephone conference), at least weekly to provide a personal, verbal update and explanation of the various notices for delivery.

The coordination service is purely designed to present a coordinated service point and will not involve DNR officers in any subsequent discussion or decision making role on behalf of other departments. Once the notices have been delivered, any discussion or comments from the representative body will be directly with the originating Department's contact officer as shown on the notice. However, if notices are dealt with immediately (during the delivery meeting), because of their minor nature, they will be returned with the appropriate comment by the relevant DNR officer to the originating Department. In these cases the comment will need to be recorded in writing and endorsed by the relevant officer from the representative body. This may be by way of rubber stamp, tick box and initialled, method or some other appropriate agreed process.

Note: The delivery service coordinated by DNR **does not** extend to delivery of notices to claimants or registered bodies corporate which are also required to be notified. These notices will still be required to be forwarded directly by the originating Agency to the claimant or registered body corporate.

Following is a list of the official Representative Bodies, with their contact details, to be used in the event of discussion which may follow the provision of notices. Also listed are the contact details for the relevant DNR offices which will coordinate delivery of the notices.

| | |
|--|---|
| <p style="text-align: center;"><u>Cape York Land Council</u></p> <p>Executive Director: Tel 07 4051 9077 Fax 07 4051 0097</p> <p>Postal Address: PO Box 2496 CAIRNS QLD 4870</p> <p>Business Address: 32 Florence Street CAIRNS QLD 4870</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources PO Box 937 CAIRNS QLD 4870 Phone: 07 4052 3966 Fax: 07 4031 2984</p> | <p style="text-align: center;"><u>Carpentaria Land Council</u></p> <p>Co-ordinator: Tel 07 4745 5132 Fax 07 4745 5204</p> <p>Postal Address: PO Box 71 BURKETOWN QLD 4830</p> <p>Business Address: Musgrave Street BURKETOWN QLD 4830</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources PO Box 7 CLONCURRY QLD 4824 Phone: 07 4742 1404 Fax: 07 4742 1715</p> |
| <p style="text-align: center;"><u>Central Old Land Council</u></p> <p>Executive Director: Tel 07 4951 1899 Fax 07 4951 3629</p> <p>Postal Address: PO Box 108 MACKAY QLD 4740</p> <p>Business Address: 31 Sydney Street MACKAY QLD 4740</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources PO Box 63 MACKAY QLD 4740 Phone: 07 4951 8770 Fax: 07 4957 4005</p> | <p style="text-align: center;"><u>FAIRA</u></p> <p>General Manager: Tel 07 3391 4677 Fax 07 3391 4551</p> <p>Postal Address: PO Box 8402 WOOLLOONGABBA QLD 4102</p> <p>Business Address: 37 Balaclava Street WOOLLOONGABBA QLD 4102</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources GPO Box 1401 BRISBANE QLD 4001 Phone: 07 3227 8118 (Senior Land Officer) Fax: 07 3227 6885</p> |
| <p style="text-align: center;"><u>Goolburri Land Council</u></p> <p>Land Claims Manager: Tel 07 4639 4766 Fax 07 4639 4924</p> <p>Postal Address: PO Box 2562 TOOWOOMBA QLD 4350</p> <p>Business Address: 9 Bowen Street TOOWOOMBA QLD 4350</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources PO Box 962 TOOWOOMBA QLD 4350 Phone: 07 4631 9160 Fax: 07 4631 9142</p> | <p style="text-align: center;"><u>Gurang Land Council</u></p> <p>Executive Officer: Tel 07 4153 3990 Fax 07 4153 3615</p> <p>Postal Address: PO Box 2580 BUNDABERG QLD 4670</p> <p>Business Address: 3 Maryborough Street BUNDABERG QLD 4670</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources PO Box 1143 BUNDABERG QLD 4670 Phone: 07 4153 7842 Fax: 07 4153 7823</p> |
| <p style="text-align: center;"><u>North Old Land Council</u></p> <p>Chairman: Tel 07 4031 4779 Fax 07 4031 7414</p> <p>Postal Address: PO Box 679N CAIRNS NORTH QLD 4870</p> <p>Business Address: 13 Martin Street CAIRNS QLD 4870</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources PO Box 937 CAIRNS QLD 4870 Phone: 07 4052 3966 Fax: 07 4031 2984</p> | <p style="text-align: center;"><u>Torres Strait Regional Authority</u></p> <p>Executive Officer: Tel 07 4069 2581 Fax 07 4069 2582</p> <p>Postal Address: PO Box 388 THURSDAY ISLAND QLD 4875</p> <p>Business Address: Victoria Parade THURSDAY ISLAND QLD 4875</p> <p>Postal Address for Notifications: District Manager Department of Natural Resources PO Box 937 CAIRNS QLD 4870 Phone: 07 4052 3966 Fax: 07 4031 2984</p> |
| <p style="text-align: center;"><u>*North West Queensland Region</u></p> <p>Richard Norwojee Tel 0747 436 133 Regional Manager Fax 0747 437 736 ATSIC</p> | |

| | |
|--|--|
| <p><u>Postal Address:</u> PO Box 2416 MT ISA QLD 4825</p> <p><u>Business Address:</u> Cnr Mary & Isa Streets MT ISA QLD 4825</p> <p>Postal Address for Notifications: Regional Service Director Department of Natural Resources PO Box 519 LONGREACH QLD 4870 Phone: 07 4658 4901 Fax:07 4658 3447</p> | |
|--|--|

***Note: At this time there is no representative body for North West Queensland.
Notifications should be sent to ATSIC.**

MAP IS TO BE INSERTED.....

ATTACHMENT 107 - INFORMATION REGARDING COST BENEFIT ANALYSIS SUPPORTING RECOMMENDED FUTURE ACT OPTION

This Attachment is relevant to a decision about whether it is appropriate to proceed with the recommended Future Act Option. In the unlikely event this Attachment needs to be used, please phone DP&C who will talk you through the requirements. ATTACHMENT 108 - INDIGENOUS LAND USE AGREEMENTS

To date, the State's ability to enter agreements under the NTA has been limited because of the uncertainty as to the identity of native title holders given that there have only been two determinations of native title in Queensland. Although quite a number of claims are currently in mediation it may still be some time until those claims are resolved.

The NTAA provides more certainty for agreements with registered native title claimants. This being the case, the amendments in relation to the making of Indigenous Land Use Agreements (ILUA's) provide greater scope for the achievement of acceptable and workable outcomes in mediation and in State development projects.

Under the NTAA, ILUA's may be about:

- the doing of future acts or future acts included in particular classes;
- withdrawing, amending, varying or doing any other thing under Division 1 of Part 3 (ie section 61 of the NTA which outlines the types of native title and compensation claims which can be lodged);
- particular future acts or future acts (other than intermediate period acts) included in classes, that have already been done;
- changing the effects, that are provided for by section 22B (ie validation of intermediate period acts);
- the relationship between native title rights and interests and other rights and interests;
- the manner in which native title rights and interests may be exercised;
- extinguishment of native title rights and interests by surrender;
- any other matter about native title rights and interests in the area; and
- any other matter concerning native title rights and interests conferred by Division 3Q (which gives native title claim groups with registered claims rights of access to non-exclusive agricultural and pastoral leases).

ILUA's may be a valuable tool in achieving outcomes in mediation. Similarly, it is envisaged that agreements about particular classes of activity may be entered into by the State with representative bodies registered native title holders and registered native title claimants. These will be negotiated by or with approval of officers from the DP&C.

Consequently, it will be necessary for officers to establish whether or not any registered ILUA's have implications for the proposed dealing or the resources, land or waters which will be affected by the proposed dealing. The DP&C will provide information in regard to ILUA's when they are registered.

ATTACHMENT 109 - GOVERNMENT LAND MANAGEMENT SYSTEM DEALINGS

Prior to dealing with areas of land under the Government Land Management System (GLMS) native title implications must be addressed.

A. GOVERNMENT LAND MANAGEMENT UNIT REQUESTS

The Government Land Management Unit presently requests district offices to:-

- **issue freehold titles** in the name of The State of Queensland represented by [name of particular government department] over land which has been declared essential to the operations of a particular department. This is because the Government Land Management System encourages agencies to dispense with reservations and hold the land as freehold (where the land is considered an essential part of that agency's core business); or
- **dispose** of surplus government land.

The **disposals** can be broken down further into the following categories:-

- (a) surplus government land in which an interest has been expressed by another government department/organisation where the Department of Natural Resources (DNR) acts as agent;
- (b) surplus government land in which no other interest has been expressed; and
- (c) surplus government land in which an agreement has been made with a private party for the land.

There are also disposals of surplus government land in which an interest has been expressed by another government department or organisation but DNR does not act as agent.

All government departments have their own procedures for assessing native title implications in relation to their dealings. In some cases it will be the responsibility of DNR to assess native title implications and, in others, it will be the responsibility of DSD.

Therefore the following processes are to be adopted for GLMS work:-

The issue of freehold titles in the name of The State of Queensland represented by DSD over land which has been declared essential to the operations of a particular department

In these cases the particular department has forwarded a Property Management Plan to the Government Land Management Unit together with a request that a freehold title be issued over the area in place of the existing reserve. DSD will have to address native title implications in accordance with their own native title procedures as approved by the DP&C. Confirming advice that native title has been extinguished, must be lodged together with the original request.

If native title has not been extinguished by a previous inconsistent grant, development or use the dealing cannot proceed under Work Instruction 2. (***NB - Any decisions based on extinguishment by private development will require the approval of DP&C in accordance with Work Instruction 2.***) It is the responsibility of the particular department to address

native title implications under a Future Act Option, should they wish to pursue that avenue. (Refer to Work Instruction 5).

Disposal of surplus government land in which an interest has been expressed by another government department or statutory body where DNR acts as agent

In these particular cases, the areas have been declared surplus to requirements and the matter has been forwarded to the district via the Government Land Management Unit with a request that the district take the appropriate action for the disposal of the property, in priority, to the interested government department or statutory body.

Native title implications must be assessed by DNR. If native title has not been extinguished by a previous inconsistent grant, development or use the dealing cannot proceed under Work Instruction 2. (*NB - Any decisions based on extinguishment by private development will require the approval of DP&C in accordance with Work Instruction 2.*) If native title has not been extinguished it will be necessary for consideration to be given as to whether the dealing can proceed under a Future Act Option. (Refer to Work Instruction 5). DNR Staff will initiate consideration of this matter.

Disposal of surplus government land in which no other interest has been expressed

Districts are requested to take action for the disposal of surplus land from other government agencies through the Government Land Management Unit.

In these cases a native title assessment must be undertaken by DNR. If native title has not been extinguished by a previous inconsistent grant, development or use the dealing cannot proceed under Work Instruction 2. (*NB - Any decisions based on extinguishment by private development will require the approval of DP&C in accordance with Work Instruction 2.*) If native title has not been extinguished it will be necessary for consideration to be given as to whether the dealing can proceed under a Future Act Option. (Refer to Work Instruction 5). DNR Staff will initiate consideration of this matter.

Disposal of surplus government land in which an agreement has been made with a private party for the land

A native title assessment must be undertaken by the department handling the disposal. If DNR is involved in the process of disposal **or** only involved in the process of issuing a Deed of Grant to facilitate the disposal, DNR must ensure that native title implications have been addressed. If native title has not been extinguished by a previous inconsistent grant, development or use the dealing cannot proceed under Work Instruction 2. (*NB - Any decisions based on extinguishment by private development will require the approval of DP&C in accordance with Work Instruction 2.*) If native title has not been extinguished it will be necessary for consideration to be given as to whether the dealing can proceed under a Future Act Option. (Refer to Work Instruction 5). DNR Staff will initiate consideration of this matter.

Disposal of surplus government land in which an interest has been expressed by another government department/organisation but DNR does not act as agent

In these particular cases there is no requirement on DNR to undertake a native title assessment when DNR is not involved in the process. However, if DNR is involved in the process of issuing a Deed of Grant to facilitate the disposal, DNR must ensure that native title implications have been addressed by requiring such advice in writing from the vendor.

B. DEALING WITH SPECIFIC APPLICATIONS FROM A GOVERNMENT DEPARTMENT OR AGENCY

Following a specific application from a government department or agency, eg State Emergency Services in the case of a Rural Fire Brigade to lease or purchase an area of land (road, reserve, unallocated State land, existing lease, etc), native title implications must be assessed by DNR.

If native title has not been extinguished by a previous inconsistent grant, development or use the disposal cannot proceed under Work Instruction 2. (***NB - Any decisions based on extinguishment by private development will require the approval of DP&C in accordance with Work Instruction 2.***) If native title has not been extinguished it will be necessary for consideration to be given as to whether the dealing can proceed under a Future Act Option. (Refer to Work Instruction 5). DNR Staff will initiate consideration of this matter.

**ATTACHMENT 109(a) - (A) RESERVE ISSUES CONSIDERED
(B) STATE FREEHOLD ISSUES CONSIDERED**

(A) RESERVES (includes all forms of State held grants “for a particular purpose)

The Native Title Act 24JA (1)(d) uses the following terminology to define “Reservations” - “contained, made or conferred a reservation, proclamation, dedication, condition, permission or authority (the reservation) under which the whole or part of the land or waters was to be used for a particular purpose;”

The definition **will include** land commonly known as Reserve, Vested Land, Road and Freehold Deed of Grant in Trust and State Leasehold land **but will not include** unrestricted State Freehold (ie. Freehold without any restrictive purpose). The term “reserve” below is used in this context.

Notes:

1. Where “extinguishment of native title” is discussed below in terms of Work Instruction 2.0, and reference is made to private grants and public works as extinguishing events, there is also the recognition that in some cases there may be valid private works or developments which extinguish native title (such as sporting stadiums) on recreation reserves. However, this will be rare as there will generally be exclusive leases granted in such situations. Any decisions based on extinguishment by private development will require the approval of DP&C in accordance with Work Instruction 2.0.
2. The comments below in this attachment assume that the reserve is valid; eg. validly created or set apart prior to 23.12.96, or established over land where native title is extinguished (say acquired from private freehold land), or permissible in accordance with the NTA by substituting the original purpose for a purpose of similar or lesser impact on native title (see dot point 2 of Dealing item 1 below).
3. Consideration of native title is a matter for the relevant Agency approving the dealing or development. DNR staff will require written advice that native title issues have been appropriately considered by any Agency requiring DNR staff to register a dealing which may affect native title. This does not require DSD staff to redo the assessment but simply provides a final check that appropriate consideration and approval has been made. On the other hand, if DNR is the approving Agency DNR will assess the native title implications.
4. The permitted purposes of new Reserves created under the *Land Act 1994* are “Community Purposes” only as per Schedule 1 of that Act. This is a greatly reduced list of possible purposes than those which have been created in the past. That said, those reserves which have previously been validly created may continue as valid reserves notwithstanding that the purpose may not be a Community Purpose.

Examples of the types of dealings, development and use of reserves, together with the matters which must be considered are as follows:

DEALINGS:

1. **Disposal of a reserve to another Agency as it is no longer required by the trustee for its gazetted purpose.** The relevant questions to be considered in order to make a decision as to whether the dealing may proceed are as follows:
 - Has native title been extinguished by a previous grant or development for public works (see Work Instruction 2.0)? If “yes” the dealing may proceed?
 - If “no”; Will the proposed use of the land have a greater impact on native title than the current purpose? If “no” does State legislation permit the disposal? For example a “showground reserve” could be regazetted for use as a “sport and recreation reserve”. In this case the development for either usage would have a similar effect on native title and both are community purposes under the *Land Act 1994*. A “showground reserve” could also be regazetted for use as a “parks and garden reserve” as development of the latter would arguably have a lesser impact on native title than development of the former. However, this could not happen in reverse as the impact of the latter development would arguably have a greater impact on native title than the former.
 - On the other hand, the NTA gives the following example in Section 24JA (1)(e)(ii) as something which is permitted; “Example 3: ...land was reserved as a hospital site before 23 December 1996, and instead a school is later built on the land.” However, this cannot happen because State legislation does not permit the gazettal of land as a school reserve as it is not a community purpose and the trustee of land which is held for a hospital purpose cannot use the land for a school purpose. In other words, State legislation does not permit a dealing which the NTA permits.
2. **Disposal of a reserve to private interests (eg. sale on open market) as it is no longer required for its gazetted purpose.** This may only happen if native title has previously been extinguished by a private freehold or exclusive possession grant or development for a public work (see Work Instruction 2.0).
3. **Conversion of a reserve to State Freehold or Leasehold in accordance with the Government Land Management System (GLMS).** This may only happen if native title has previously been extinguished by either a private freehold or exclusive possession grant or development for a public work (see Work Instruction 2.0).

DEVELOPMENT:

4. **Development of a reserve for a public work (eg. hospital, school, road etc.) in accordance with the purpose of the reserve.** The following must be considered in order to make a decision as to whether the dealing may proceed:
 - Has native title been extinguished by a previous grant or development for public works (see Work Instruction 2.0)? If “yes” the development may proceed?
 - If “no”; notification and the opportunity to comment must be provided in accordance with Attachment 104 prior to the development proceeding.
5. **Development of a reserve for a private purpose (eg. sporting club house or oval etc.) in accordance with the purpose of the reserve.** The following must be considered in

order to make a decision as to whether the dealing may proceed:

- Has native title been extinguished by a previous grant or development for public works (see Work Instruction 2.0)? If “yes” the development may proceed?
- If “no”; notification and the opportunity to comment must be provided in accordance with Attachment 104 prior to the development proceeding.

6. **Development or use of a reserve for a purpose other than in accordance with the purpose of the reserve.** The following must be considered in order to make a decision as to whether the dealing may proceed:

- Does State legislation, other than native title considerations, permit the proposed development (eg. does the proposal contravene the Land Act)? If it does contravene State legislation the development would be invalid and therefore cannot be approved. If the development does not contravene State legislation, consider the questions below which relate to native title.
- Has native title been extinguished by a previous grant or development for public works (see Work Instruction 2.0)? If “yes” the development or use may proceed?
- Is one of the dealing options (see 1 to 3 under the Dealings heading above) appropriate?
- If “no” to both of these questions; Have appropriate options been considered and approved (see Work Instruction 5).

(B) STATE FREEHOLD (State held unrestricted freehold which is not restricted by a particular purpose and will therefore not include DOGIT lands)

DISPOSAL: It is important to note that a grant of freehold by the State to one of its Agencies should not be considered to extinguish native title (see the definition of State in 6.0 Definitions). Similar considerations apply to the disposal of State held freehold as explained above for reserves; eg.

- Has native title been extinguished by a previous private grant or development of public works?
- If “yes” disposal may occur;
- If “no” disposal to a private party may not occur without following an appropriate process as per Work Instruction 5.0. However, disposal to another Government Agency may proceed. Disposal or transfer of State owned freehold from one Government Agency to another Government Agency does not affect native title.

What should be considered if an Agency wishes to acquire unrestricted freehold title when the current tenure is not unrestricted State freehold? (Examples may be, acquisition of unrestricted State freehold title where the land is currently a reserve, vested land, non-exclusive leasehold etc, and there has been no extinguishing public work.)

- Is the land required for a public purpose (eg. Education Department seeking to acquire an unused hospital reserve to build a school)? An appropriate option as set out in Work Instruction 5.0 must be followed such as ILUA or compulsory acquisition etc..

Note: The department requiring the land (in this example Education) would be responsible for instigating or ensuring the relevant native title process is followed in accordance with its legislative power (eg. Just as Education Department would instigate the process to acquire private freehold interests if such land were required

for a school it would also deal with native title interests. Whilst another Department may implement the necessary action the implementing decision rests with the acquiring Department. Put another way, in the case of the quoted example, just as the Health Department would not instigate acquisition proceedings on behalf of the Education Department if the land were private freehold it would also not instigate a process to acquire any native title rights and interests.

However, following the same example, because each Agency has an approved native title work procedure, the disposing Agency (ie. Health Dept. in this example) would make the assessment as to whether native title has been extinguished before making the land available for transfer or disposal.

DEVELOPMENT: Similar considerations apply to new development on State freehold as explained above for reserves; eg. Consider;

- Is native title extinguished by a previous private grant or development of public works?
- If “yes”, new development may occur;
- If “no”, new development may occur only after notification in terms of Attachment 104. Renovation/refurbishment of existing improvements without notification.

ATTACHMENT 110 - CONSTRUCTION OF BOAT RAMPS, JETTIES AND PONTOONS

Dealings which relate to the construction of boat ramps, pontoons and jetties may proceed without further reference to native title in the following circumstances:

1. Where the boat ramp, pontoon or jetty is constructed in a canal which was developed over land which was previously, or is currently, privately held freehold title or was previously, or is currently, privately held leasehold tenure which is scheduled as granting rights of exclusive possession; or
2. Where the pontoon or jetty is replacing a previous valid structure such as a wharf, jetty or pontoon; or
3. Where the pontoon or jetty is wholly within a valid, artificially constructed harbour, which involves for example, retaining or break walls, fill and dredging and is not an extension of the outer perimeter of the artificial harbour.

Construction of Pontoons, jetties, wharfs & boat ramps for private use

Where a pontoon, jetty or boat ramp is to be constructed for private use in waters other than in situations 1 to 3 above it may proceed so long as native title holders or registered native title claimants in relation to the adjoining land are afforded the same procedural rights as afforded to ordinary title holders of any adjoining land. In most circumstances, no such rights are provided. However, if there are informal procedures in place that provide notification to ordinary title holders, notification must be provided to native title holders.

If there is a procedural right to be notified, this can be satisfied as outlined in Attachment 104.

Construction of Pontoons, jetties, wharfs & boat ramps for public purposes

Dealings which relate to the construction, operation, use, maintenance or repair of any jetty or wharf facility (including pontoons and boat ramps) constructed by the Crown or on behalf of the Crown it may proceed in accordance with Work Instruction 4.0, Attachment 4.7.

It is important to note that 4.7 requires that native title holders must be notified in relation to such public works.

Any other procedural rights which may be afforded to ordinary title holders in relation to the provision of such facilities must also be afforded to native title holders.

Prior to a decision being made as to whether or not the activity can proceed consideration MUST be given to any relevant comments received in response to the notification.