



Future act consent determinations

Information sheet

Future act unit, September 2002

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Relevant sections of the Act

Relevant sections of the *Native Title Act 1993* (Cwlth):

- s. 31: normal negotiation procedure
- s. 35: applying to the Tribunal for a future act determination
- s. 38: future act determinations
- s. 39: criteria for making a future act determination

What is a future act determination inquiry (commonly called a future act arbitration)?

Certain future acts, such as the grant of mining tenements and petroleum permits and some compulsory acquisitions of native title rights and interests cannot be validly done unless native title parties are given the right to negotiate under the Native Title Act.

Where matters are in the right to negotiate, the negotiation parties must negotiate in good faith with a view to reaching agreement about the doing of the future act. The Tribunal may be requested to assist the parties by mediation. You can find more about mediation in the information sheet *What to expect in a future act mediation*.

If the negotiation parties are unable to reach agreement during negotiations and mediation then any one of them may make a future act determination application to the Tribunal. That is, they may ask the Tribunal to make a determination whether the future act (e.g. the grant of a mining lease) can be done and if so whether any conditions should be imposed.

In order to make such a determination the Tribunal must conduct an inquiry (an arbitration), and after conducting the inquiry will make a determination either that the future act cannot be validly done or can be validly done with or without conditions. You can find more about these inquiries in the information sheet *Future act determination inquiries*.

How do you apply for a future act determination?

Future act determination applications must be made in the format specified by the Regulations made under the Native Title Act (known as a form 5). Form 5s and a guide to help you complete the form can be downloaded from the Tribunal's website, or hard copies can be provided by your nearest Tribunal office. Form 5 should be accompanied by an application fee, or in some circumstances it may be possible to request the fee to be waived.

What is a future act consent determination, and when might the Tribunal make one?

Sometimes parties are able to reach agreement about the doing of the act, but there may be technical or logistical difficulties why the agreement cannot be finalised. One common example is where it is difficult to obtain the signatures of all the registered native title claimants to an agreement (the state or territory Deed). This can be because of large numbers of claimants and/or the difficulty in contacting them to obtain their signatures. It may also be because one of the claimants refuses to sign, even though the claim group as a whole has reached agreement. When a future act consent determination is requested, the Tribunal must be satisfied that the registered native title claimants have reached agreement, have given their consent to a determination being made and that it is appropriate to make the determination in all the circumstances. A future act consent determination is, therefore, a determination of the Tribunal which acknowledges the agreement already reached by all negotiation parties. The Tribunal must assess whether consent to the determination has been provided, and to this end will usually accept written undertakings from parties' legal practitioners that this is the case.

The usual procedure for a future act determination requires the Tribunal to consider evidence relating to the elements set out in section 39 of the Native Title Act. However, in the case of a consent determination, the Tribunal is prepared to act on evidence that the parties have reached agreement.

The parties may agree to a simple consent determination that the future act may be done without conditions, leaving the details of the agreement to be documented in an ancillary agreement which may be confidential to the parties. Alternatively there may be a consent determination which includes the conditions agreed to by the parties.

How do you apply for a future act consent determination?

A future act determination application is made in a specific form, as noted above. A request for a consent determination may be included in the future act determination application or in an accompanying letter, or may be made at a later time. The request must include:

- a brief statement of reasons for the consent determination being sought;
- a draft of the proposed determination including conditions (if any) to be imposed; and
- if possible a letter from all parties agreeing to the determination.

The request is to be provided to the Tribunal and copied to the other parties. If the other parties intend to consent to the determination but have not yet provided their consent in writing, they should do so within seven days of receipt of the request. The Tribunal will then conduct a brief hearing to satisfy itself that a consent determination is appropriate. The Tribunal will normally

regard it as appropriate to make a consent determination where the parties (and particularly the native title party) are legally represented.

If a future act consent determination is made before an inquiry hearing commences, the parties are not required to comply with the normal directions for the production of submissions and evidence.

Can you apply for a consent determination after a future act determination application has been lodged?

Application for a consent determination can be made before an inquiry hearing has commenced or while it is in progress. Where parties reach agreement after lodging a future act determination application, they can request the Tribunal to make a consent determination at any time prior to the conclusion of an inquiry hearing and before it has made a determination.

The parties should inform the Tribunal of their agreement to the consent determination and provide a draft of the proposed determination including conditions (if any) to be imposed. The agreement to a consent determination may be reached after the Tribunal has heard part of the submissions and evidence and the Tribunal may take these into account in deciding whether to make the determination.

Further information

The Tribunal's determination in *Monkey Mia Dolphin Resort Pty Ltd/Western Australia/Albert Darby Winder and others*, NNTT WF01/2, Hon C J Sumner, 22 June 2001, provides more information on future act consent determinations and is available online at www.nntt.gov.au/procedures/files/fa_cases_guide/index.html.

Parties considering applying for a future act determination and requesting a consent determination should also read the Part 5 of the Procedures under the Right to Negotiate, which are also located on the Tribunal's website.

List of terms

Arbitration

An inquiry conducted by the Tribunal into a future act determination application which takes into account the effect of the future act on the enjoyment by the native title party of their registered native title rights and interests (among other things) and the economic or other significance of the future act and the public interest. The arbitration (inquiry) leads to the

Tribunal making a determination whether the future act can be done and if so, whether conditions should be imposed.

Directions

Formal orders from the Tribunal in relation to the inquiry, which include orders stating when parties should provide material to the Tribunal.

Future act

The granting of the right to conduct a proposed activity or development on land and/or waters that affects native title rights and interests. Generally, rights to be informed and consulted about the future act are given to native title claimants. In the case of some future acts including the grant of mining or exploration rights and some compulsory acquisitions of native title, the future act cannot validly be done unless the right to negotiate process in the Native Title Act is followed.

Future act consent determination

A decision by the Tribunal that a future act may proceed and whether any conditions apply, which is made when parties have reached agreement and consented to those conditions applying.

Future act determination

A decision by the Tribunal that a future act may proceed and whether any conditions apply.

Future act determination application

An application made by a negotiation party to the Tribunal for it to determine whether a future act may proceed, and if so what conditions should apply.

Inquiry hearing

The hearing by the Tribunal of evidence and submissions by parties in a right to negotiate inquiry (i.e. a future act determination application inquiry or an expedited procedure (fast-tracking) objection application inquiry). In some cases a determination will be made based on written evidence submitted to the Tribunal without holding an inquiry hearing.

Mediation (future act)

A process which allows negotiation parties, with the assistance of a mediator, to discuss their interests in the area, identify the issues, consider alternatives and explore ways to reach agreement. Mediation processes are useful where negotiation is not progressing.

Member

A person who has been appointed by the Governor-General as a member of the Tribunal under the Native Title Act. Members are classified as presidential or non-presidential. Some members are full-time and others are part-time appointees.

Native title application

An application for the legal recognition of the native title rights and interests held by Indigenous Australians over a particular area of land or waters, according to traditional laws and customs.

Native title determination

A decision by an Australian court or other recognised body that native title does or does not exist in a particular area of land or waters.

Native title party

Registered native title claimant, registered native title body corporate, or representative Aboriginal or Torres Strait Islander body.

Negotiation party

An individual, group or organisation that may participate as a party to proceedings in a right to negotiate inquiry, namely the government party (usually a State or Territory government who propose to do the future act); the grantee party (the person who has requested the future act to be done) and the native title party (the registered native title claimants).

Notification (future act)

The publishing of a notice in major newspapers by the State or Territory government stating that it intends to do certain future acts, such as granting a mining lease, in an area. This is called a 'section 29 notice', because section 29 of the Native Title Act sets out how notice must be given.

Notification date

The 'notification date' is identified in the published notice. Starting from the notification date parties have specific periods of time in which to lodge applications. Periods of time vary, depending on the type of application.

Preliminary conference

A meeting of the parties, convened by the Tribunal member appointed to the inquiry, at which directions may be made and information sought from the parties about issues relevant to the inquiry. A preliminary conference may be conducted by telephone.

Registered native title claimants

Native title claimants who have met the conditions of the registration test.

Registration test

A set of conditions under the Native Title Act that is applied to native title claimant applications. If an application meets all the conditions, it is included in the Register of Native Title Claims, and the native title claimants then gain the right to negotiate together with certain other rights, while their application is under way.

Right to negotiate

The right of native title claimants (whose application has satisfied the registration test) to be involved in discussions about — but not veto — proposed developments (such as mining) on areas of land or waters where native title exists. Where the right to negotiate applies, negotiations with native title claimants must occur before the grant for the proposed development can go ahead.

The right to negotiate process is managed by the State or Territory government, but the Tribunal may be requested to mediate.

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