



National
Native Title
Tribunal

Future act determination inquiries

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. 31(1)(a): government party to invite submissions from native title party
- s. 31(1)(b): negotiation parties must negotiate in good faith
- s. 33: profit sharing may be negotiated
- s. 35: applying to the Tribunal for a future act determination
- s. 38: kinds of future act determinations
- s. 39: criteria for making a future act determination
- s. 41(3): determinations can include a condition for an amount to be paid into trust pending a determination of native title

What is the right to negotiate?

The right to negotiate is the right of the native title party to be involved in discussions about—but not veto—certain proposed developments. The right to negotiate applies to proposed developments (such as mining and petroleum activities and some compulsory acquisitions of native title) on areas of land or waters where native title exists and will be affected. These proposed developments are known as future acts.

Registered native title claimants have the right to negotiate while their native title application is being considered by the Federal Court. If the right to negotiate applies to a future act, the state or territory government cannot do the future act (e.g. grant a mining tenement or petroleum permit for an area included in a native title claim area) unless the right to negotiate provisions of the Native Title Act are met. Unless the grant can be fast-tracked this means that:

- the government party must give the native title party an opportunity to make submissions to it about the future act; and
- the negotiation parties must negotiate in good faith with a view to reaching agreement on the doing of the act with or without conditions.

You can find more information on this in the information sheet *Negotiation in good faith*.

What happens if the parties cannot reach agreement?

If negotiation parties cannot reach agreement, any party can apply to the Tribunal to make a future act determination about whether the proposed activity can go ahead, and whether there should be any conditions attached to it. This is known as a future act determination application, and parties can only make an application six months after the date the proposed activity was advertised (notification date).

How do I 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 that the fee is waived.

What happens after a future act determination application is lodged?

When the Tribunal receives a future act determination application, it must conduct an inquiry (an arbitration) in order to determine whether the future act can be done and if so whether any conditions should be imposed.

A member of the Tribunal (or a panel of three members) will be appointed to conduct the inquiry, and will initially hold a preliminary conference and set directions for the parties to provide submissions and evidence. Members who have mediated a particular matter are not usually appointed as inquiry members. Inquiry members conduct hearings, receive submissions and evidence from the parties and take into account matters set out in section 39 of the Native Title Act such as:

- the effect of the future act on the enjoyment by the native title party of their registered native title rights and interests; their way of life, culture and traditions; the development of their social, cultural and economic structures; their freedom of access to the land and freedom to conduct ceremonies and other cultural activities; and the effect of the future act on any area or site of particular (special) significance to the native title party
- the interests, proposals, opinions or wishes of the native title party
- the economic or other significance of the future act
- the public interest, and
- the presence of any existing non-native title rights and interests and use of the land by other persons (for instance, pastoralists).

What is a future act determination?

After conducting the inquiry (commonly called an arbitration), the Tribunal will make a determination either that the future act cannot be done or can be done with or without conditions.

Examples of conditions that have been imposed in some previous matters include:

- conditions relating to heritage surveys and site protection
- notification of activities to the native title party

- training and employment
- socio-economic impact assessment, and
- assignment provisions i.e. any conditions stipulated by the Tribunal in relation to the doing of a future act must be transferred to a new owner.

Note: The Tribunal cannot impose a condition that has the effect that native title parties be entitled to payments worked out with reference to the amount of profits made, income derived or things produced. However, the Tribunal can determine that an amount of money is to be paid into a trust account pending a final determination of native title.

The Tribunal must try to make its determination within six months of receiving the future act determination application. This includes making a decision about good faith negotiations (where parties have raised this), and also making a determination about whether the proposed activity can go ahead. The parties will therefore have to comply with fairly strict timeframes.

Negotiation parties can continue to negotiate and reach an agreement any time up until the Tribunal makes its final determination but there is no requirement to negotiate in good faith after the future act determination application has been made.

Parties can get help from the Tribunal in reaching agreement after the future act determination application has been made, either at their own request or at the suggestion of the Tribunal member.

You can find more about this in the information sheet *Conferences held during inquiries* (section 150 of the Native Title Act).

Sometimes negotiation parties reach agreement but have difficulty in securing the signatures of all the registered native title claimants. Depending on the circumstances of each case, it might be possible for the Tribunal to make a future act consent determination in the terms agreed by all the parties. You can find more about this in the information sheet on *Future act consent determinations*.

Parties do not need legal representation for either the negotiations in good faith or the final determination proceedings. However, as sometimes the issues are complex and there are special procedures to follow within specific timeframes, the Tribunal does encourage parties to seek legal advice.

What is negotiation in good faith?

If you are a negotiation party in any future act negotiations you should approach them in a responsible and serious manner. There is no definition of the term 'negotiate in good faith' in the Native Title Act, but basically it means that negotiation parties should enter into negotiations with an open mind and genuine desire to reach agreement.

Negotiation parties must negotiate in good faith. As the first part of an inquiry into a future act determination application the Tribunal will usually call the parties together for a preliminary

conference. The full inquiry hearing cannot proceed if the government or grantee party have not negotiated in good faith. If one party says that either the government or grantee party has not negotiated in good faith then the Tribunal will hold a mini-inquiry to investigate and make a decision on this issue before conducting a full inquiry. You can find more about this in the information sheet *Negotiation in good faith*.

Further information and background reading

The Tribunal's *Guide to future act cases* lists the major 'negotiation in good faith' cases and summarises their main points. The guide is available from the Tribunal website www.nntt.gov.au.

Cases of particular interest

Good faith negotiations:

- Carr J in *Walley v State of Western Australia* (1996) 67 FCR 366
- *Minister for Mines WA/Taylor (Njamal people)/Mullan*, NNTT WF96/4, Hon C J Sumner, 7 August 1996
- *Minister for Lands WA/Strickland (Maduwongga)*, NNTT WF97/4, Hon C J Sumner, 10 December 1997
- *Minister for Mines WA/Hayes (Thalanyi)/WAPET*, NNTT WF00/7, Hon C J Sumner 9 March 2001

Future act determinations:

- *Western Australia vs Thomas (Waljen)*, 1996 133 FLR 124
- *Re Koara People* 1996 132 FLR 73
- *Evans vs Western Australia* 1997 77 FLR 193
- *Minister for Mines (WA) vs Evans & others* 1998 163 FLR 274
- *WMC Resources & another vs Evans* 1999 163 FLR 333
- *Western Australia vs Hayes and others* 2001 163 FLR 384

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

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 proposes to do the future act); the grantee party (the person who has requested the future act be done); and the native title party (persons who have been determined to hold native title or the registered native title claimants over the area where it is proposed the future act be done).

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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