

Questions and Answers on the Commonwealth Native Title Act 1993

This article sets out the questions commonly asked about the Native Title Act and the answers to them .

The Act became law on 1 January 1994.

The grant of a title including freehold, a lease for commercial or business purposes, a pastoral lease, a mining lease or an exploration licence up to 31 December 1993 that was invalid is known as a past act under the Act. Certain acts that can occur after that date will also be past acts. Any other act including the grant of a new title after that date will be a future act. The passing of legislation after 30 June 1993 will also be a future act.

A specified procedure (“the Procedure”) must be followed before a permissible future act will be valid. The Procedure involves:

- (a) a Government party notifying native title claimants, native title holders, any relevant representative Aboriginal body, the relevant tribunal and the public of the proposed future act;
- (b) allowing two months for objections by those claimants or holders to be made;
- (c) if no objections are made, the Government party doing the act;
- (d) if objections are made, negotiations between the Government party, the proposed grantee and the native title claimants or holders to obtain agreement for the act to be done;
- (e) if those negotiations do not produce agreement within four months for the grant of a licence to prospect or explore or within six months for anything else, having a tribunal determine whether the future act can be done; and
- (f) if the tribunal determination is not acceptable to a relevant Minister, that Minister overruling that determination.

The Procedure can be expedited in certain circumstances.

A future act that is not a permissible future act is void to the extent it affects native title.

1. Does the Act validate all existing land titles (past acts)?

No. It only validates land titles purportedly granted by the Commonwealth that are invalid. Each State or Territory Government must pass validating legislation (which complies with the Act) if any invalid title purportedly granted by it is to be validated.

2. What rights are conferred by native Title?

Rights conferred by native title depend on the circumstances of each case. They will vary from Aboriginal group to Aboriginal group. They are not defined by the Act.

3. When does the Procedure for the grant of a mining lease commence?

When a Government party notifies the relevant persons that it proposes to grant a mining lease. Governments should be encouraged to make the decision to grant the mining lease and to notify relevant persons at an early stage so that the Procedure can be commenced at an early stage.

4. If there is no native title claim over land at a time when a Government party proposes to grant a mining lease, does the Procedure apply?

Yes. The Government party must still notify its intention to grant the mining lease to the public, the relevant tribunal and any relevant representative Aboriginal/Torres Strait Islander body.

5. If a Government party intends to grant a mining lease over land at a time when there is no native title claim over that land and subsequently a native title claim is made, what rights does the native title claimant have?

If the native title claim is made after a period of two months from the date the notice is given to the tribunal or the public by the Government party of its intention to grant the mining lease, then the mining lease can be validly granted without reference to that claimant but the claimant is entitled to compensation from the Government party for the impact of the act on its native title rights.

If the claim is made within that two month period, then the Procedure continues to apply and the claimant has the rights associated with the Procedure.

6. Is the renewal of an existing mining lease which is valid and does not need to be validated a future act?

Yes. The Procedure applies to that renewal. This result arises because the Senate did not pass the amendment proposed on this point. However, the grant of the mining lease may have extinguished native title (see the answers to questions 18 & 19 below).

7. Is the renewal of an existing validated mining lease a future act?

No. Such a renewal is a past act. The Procedure does not apply.

8. Does the Procedure need to be followed for the renewal of a mining lease granted after 1 January 1994?

Yes. Such a renewal is a future act and the Procedure must be followed. However, an applicant for a mining

lease should request a Government to grant a mining lease for a long period so that renewals are not necessary.

9. If a holder of an exploration licence applies for a mining lease does the Procedure need to be followed?

Yes. The grant of a mining lease in those circumstances is a future act and the Procedure must be followed.

10. Can native title be charged or mortgaged?

No, unless there is the incurring or creation of a debt or other liability and that was in connection with a dealing in native title rights authorised by the regulations made under the Act. But native title can be converted into a freehold title. That freehold title can be charged or mortgaged without restriction.

11. When will the expedited procedure be available?

It will be available when a future act does not directly interfere with community life of native title holders, does not interfere with areas or sites of particular significance and does not involve major disturbance to land. The grant of an exploration licence is expected to fall with these criteria.

12. What kind of future act is permissible?

Any legislative act that treats native title holders as if they held ordinary title to land or any other act that could be done if the native title holder held ordinary title to land. Examples include grant of mining leases and exploration licences.

13. Does the Procedure apply to offshore areas?

No.

14. Who pays compensation for validation of a title granted up to 1 January 1994?

The Government which purportedly granted the title and which validates the title.

15. Who pays compensation for a future act (such as a future grant of a mining lease or exploration licence)?

The person granted the mining lease or exploration licence.

16. On what basis is compensation payable for a future act?

In the case of a mining lease or exploration licence granted under State or Territory mining legislation, compensation will be based on the compensation provisions contained in that legislation. If such provisions do not result in the native title holder receiving compensation on just terms, then the Commonwealth will pay the difference to the native title holder.

In other cases, if there is no relevant State or Territory legislation, compensation must be on just terms for any loss, diminution, impairment or other effect of the act on native title rights.

17. Does compensation have to be paid in cash?

No. The person paying compensation can choose to transfer property or provide goods or services instead of paying cash.

18. If a mining lease was granted before 31 October 1975, did it extinguish native title?

Yes (if it is inconsistent with the continued existence of native title).

19. If a mining lease was granted after 31 October 1975 and before 1 January 1994, did it extinguish native title?

It is not clear whether the effect of the Racial Discrimination Act and any relevant State or Territory mining legislation is that the grant of a mining lease over native title land without payment of compensation to native title holders makes the mining lease invalid or that the mining lease is valid but that there is a requirement to pay compensation to the native title holders.

There are therefore two possible answers:

- (1) If the mining lease was validly granted, yes (if it is inconsistent with the continued existence of native title).
- (2) If the mining lease was not validly granted, no. The mining lease can be validated by the Government that purportedly granted it. When that occurs, the native title continues to exist but it will be suspended during the period of the mining lease (and renewals). The native title will revive once the mining lease (and renewals) expire.

In either case, the Government which granted or validates the mining lease will be liable to pay compensation under the Act.

20. Will a mining lease granted after 1 January 1994 extinguish native title?

No. But the native title is suspended during the period of the mining lease. The native title will revive once the mining lease expires.

21. Did an exploration licence granted after 31 October 1975 and before 1 January 1994 extinguish native title?

No.

22. Does an exploration licence granted after 1 January 1994 extinguish native title?

No. But the native title is suspended during the term of the exploration licence. The native title will revive once the licence expires.

23. Who has the power to overrule a tribunal determination that a future act not proceed?

If the determination is made by a recognised State or Territory body, the relevant State or Territory Minister.

If the determination is made by the National Native Title Tribunal, the Commonwealth Minister (whether or not it concerns a State or Territory act).

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