

AMPS

LAW

Future Acts



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This document is intended as a guide only. This does not constitute legal advice. There may be additional and important considerations that should be taken into account in your specific circumstances. If you or your organisation has a legal issue, you should obtain professional advice from a legal practitioner.

What is a future act?

A future act is a proposal to do something on land or waters that affects native title rights and interests. Examples of future acts include mining tenements, public infrastructure, water licences, and the compulsory acquisition of land.

The **Native Title Act** sets out a process for future acts to be validly done.

What rights do the native title party have in relation to future acts?

The Native Title Act sets out the rights that a native title party has when a future act is proposed. These are called “procedural rights” and depending on the type of future act being proposed, can include:

- The right to be notified
- The right to comment
- The right to be consulted
- The right to object, or
- The right to negotiate.

Under the Native Title Act, a native title party does not have the right to veto a future act from being done. The highest procedural right is the right to negotiate an agreement about the future act.

Who holds and exercises the procedural rights?

- A native title claim group secures procedural rights once their native title application is filed with the Federal Court and registered by the National Native Title Tribunal (NNTT).
- Once a native title determination is made, the Registered Native Title Body Corporate, also known as the Prescribed Body Corporate or PBC, exercises the procedural rights.

Who is involved with the future act process?

- Native title claim group or PBC, referred to as the native title party. This is the party who has claimed or secured native title over the area of land where the future act is being proposed.
- Government or state representative or agency, referred to as the government party. This is the party who are proposing to do the act. For example, granting a mining tenement or tourism licence.
- Organisation, entity, operator or individual, referred to as grantee party or proponent. This is the party who are requesting that the act be done. For example, applying for the grant of a tenement or seeking a tourism licence.

What is the right to negotiate?

- The right to negotiate (RTN) is a future act process which that requires that some future acts should only be done once every reasonable effort is made to negotiate and finalise an agreement with the native title party.
- The RTN process is triggered when a notice (called a section 29 notice) is sent by the government party to the native title party.
- The parties are required to negotiate in good faith. If they don't then the NNTT may be brought into the process. The NNTT may also assist the parties to reach agreement through mediation.

What information should be included in a future act notice?

The Native Title Notification (Notices) Determination (2011) sets out what information should be included in a future act notice. If any relevant information is missing, then the native title party may need to request additional information. This is to ensure any response to the notice provided by the native title party is a robust response to all relevant information.

What information should be included in a future act notice?

The native title party does not have to respond to future act notices, however if they don't then they miss out on the opportunity to have their say about the future act going ahead. When the native title party receives a future act notice they can start by considering:

- What procedural rights do we have?
- Does the notice include all the relevant information we need to respond?
- What is the deadline to respond?
- Does this notice involve a native title decision requiring consultation and consent from the relevant native title holders?
- Can the PBC charge the proponent for responding to and engaging with the proposed future act?

Under the PBC Regulations and the Native Title Act, a PBC can charge the proponent for certain activities associated with administering some future act notices. For example, the costs associated with consulting with and seeking consent from native title holders to enter into an agreement for a future act where there is a right to negotiate.

If the native title party needs more time to consider the future act notice in accordance with their internal governance rules including cultural governance obligations, then they can request an extension to the deadline, however there is no guarantee the extension will be agreed to.

Who is involved with the future act process?

When a future act notice is received, the native title party may want to think about things like (as relevant):



How the future act fits with the aspirations of native title claimants/holders



How the future act fits within any strategic planning documents developed by the native title claimants/holders (for example, corporate plan, economic development plan, country plan)



The potential impact on cultural heritage and the best mitigation mechanisms



The potential impact on the environment and the best mitigation mechanisms



Whether there is a risk to Indigenous Cultural and Intellectual Property rights and how to mitigate that risk



Whether there is an opportunity to gain joint management of land through a formal process where traditional owners have a stronger say about how country is managed



Whether the future act provides an opportunity for education or employment



Whether the future act provides an opportunity for community or economic benefit

Is the native title party entitled to compensation for future acts?

Under the Native Title Act, a native title party may be entitled to compensation for impairment or extinguishment of native title rights and interests for some future acts. The native title party should seek legal advice about any potential compensation.