Future Acts

Disclaimer

The commentary contained in this section is general. It is not intended to be legal advice or applied uncritically to your specific circumstances. You should seek specific advice that relates to your particular facts and circumstances or the particular facts and circumstances relating to your claim group or PBC.

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What is a Future Act?

A great deal of the Native Title Act concerns itself with “future acts”. A future act is something that is intended to be done by parties other than the claimants or native title holders on or with land (or waters) in such a way as to cause impact to native title rights and interests.

Because a future act is an activity that will impact native title, it is necessary that native title can or may exist before the relevant parts of the NTA can be engaged. That is, the future act regime does not apply to land or waters where native title has been extinguished (for example; on land that is subject to an exclusive possession lease or over which freehold title has been granted).

If a proposed act does not “affect' native title it will not be a future act.

As Dowsett J noted; “the adjective ‘future’ indicates that the act occurred on or after a specified date, not that it is prospective at any relevant time”. For a future act that consists of the making, amendment or repeal of legislation, the relevant date is 1 July 1993 and for any other act the relevant date is 1 January 1994.

In effect, the Native Title Act sets up a scheme under which activities that may have an outcome that effects the claimants’ or native title holders ability to exercise native title rights may be lawfully done.

Section 24AA(2) of the NTA says:

Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of the Division, and invalid if not.
Section 24AA goes on to say that a future act will be valid if the parties to an Indigenous Land Use Agreement (ILUA) agree to the act being done and, at the time the act is done, the ILUA is registered. A future act will also be valid if it is covered by any of the following sections of the Act:

(a) section 24FA (future acts where procedures indicate absence of native title);
(b) section 24GB (acts permitting primary production on non-exclusive agricultural or pastoral leases);
(c) section 24GD (acts permitting off-farm activities directly connected to primary production activities);
(d) section 24GE (granting rights to third parties etc. on non-exclusive agricultural or pastoral leases);
(e) section 24HA (management of water and airspace);
(f) section 24IA (acts involving renewals and extensions etc. of acts);
(fa) section 24JAA (public housing etc.);
(g) section 24JA (acts involving reservations, leases etc.);
(h) section 24KA (acts involving facilities for services to the public);
(i) section 24LA (low impact future acts);
(j) section 24MD (acts that pass the freehold test--but see subsection (5));
(k) section 24NA (acts affecting offshore places).

Types of Future Acts

The scheme set up under the NTA creates a ‘hierarchy’ of future acts. Future acts range from the sampling of fish species in a watercourse to developing an open cut mega mine. As a general rule, the first sub-division that applies to the proposed activity applies and will identify the procedural right available to the native title party (see Lardil Peoples v Queensland - S24 A B (2)).

The rights available to Traditional Owners whose native title is affected by the proposed future act are defined by where in the various sub-sections of the NTA the future act ‘sits’. Those rights are known as “procedural rights”. Again as a general rule, the later in the list the future act is identified, the greater the rights (and potential benefits) that flow from it.

To understand if a procedural right is available and, if so, the extent of that right, it is necessary to identify which of the NTA sections 24FA – 24NA covers it.

There are circumstances where no procedural rights are available. Examples of this are low impact future acts or areas which are subject to s 24FA protection. Where procedural rights are available then the nature of the right varies depends on the type of future act. These rights include:

- The right to be notified and to be given an opportunity to comment on the proposed act
- The same procedural rights to the holder of a non-exclusive agricultural or non-exclusive pastoral lease would be entitled
- The same procedural rights as would be forwarded to someone who is freehold title unless the area covered is in the ACT the Jervis Bay Territory
Additionally to the same procedural rights as the holder of ordinary title, the right to be consulted, the right to object to the doing of the future act and the right to have that objection referred to, and heard by, an independent person or body

The right to negotiate.

The scheme is fundamentally aimed at avoiding racial discrimination by providing to native title claimants and native title holders the rights that would be available in the same circumstances to certain non-native title interest holders.

**Indigenous Land Use Agreements (ILUAs) are special kinds of agreement created by the NTA and are outlined on a separate page.**

**Getting Assistance with Future Acts and ILUAs**

The comments in this section are intended to be informative and general. They are not, and should not be taken to be, definitive legal advice.

Prescribed bodies corporate seeking assistance with future act matters and ILUAs have a range of options. Commentary and advice about process can be found on the National Native Title Tribunal website. Additionally, the NNTT has a role in providing assistance with the negotiations relating to future act matters.

The native title representative body (NTRB) for the area in which the future act or proposed ILUA is located has a statutory function under s. 203BB of the NTA to provide facilitation and assistance to PBCs in relation to future acts and indigenous land use agreements (and other agreements in relation to native title). The NTRB may be able to offer facilitation and assistance in relation to these matters as part of the general services to native title groups at no cost. Sometimes NTRBs will seek to recover some costs or fees from the person wanting to do the future act.

Increasingly, NTRBs are under pressure through their funding agreements with the Australian Government to undertake work in relation to PBCs on a fee-for-service basis. Because NTRBs operate on a not-for-profit basis, it is possible that NTRB is may be able to offer services relating to future acts and ILUA is to PBCs at a rate lower than that available on the open market.

There are also a range of private practitioners who offer legal services in relation to future act matters and ILUAs. Some of these services may be made available to PBCs by practitioners at less than their standard market rates or, in the case of some of the larger law firms, on a pro bono basis.

**SCHEDULE**

**Regulation 9(4)/(5) of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations)**

Certification by common law holders

Those whose signatures appear on this document are all members of the INSERT RNTBC name Aboriginal Corporation Registered Native Title Body Corporate (the Corporation) who certify that:

1. The INSERT name of relevant RATSIB/NTSP has been consulted about the proposed decision to
enter into the *INSERT* short name of *ILUA* (the Agreement) and the views of that body have been considered in accordance with Reg 8(2) of the PBC Regulations.

2 The common law holders were consulted about, and consented to, the proposed decision to enter into the Agreement in accordance with Reg 8(1) before the Corporation entered into the Agreement.

*INSERT Date and signatures of members of the Corporation and specify which of those members are affected common law holders, in compliance with either Reg 9(4) or Reg 9(5). (Note certificate requirements)*

**Regulation 9(6) of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations)**

**Certification by RATSIB/NTSP**

I hereby certify that the *INSERT* name of relevant RATSIB/NTSP has been consulted by the *INSERT RNTBC name* about the proposed decision to enter into the *INSERT short name of ILUA* as required by Reg 8(2) of the PBC Regulations.

*INSERT Date and signature of an authorised member of the RATSIB/NTSP*.