

Queensland Government Native Title Work Procedures

Module J: Dealings on continuing pre-Wik reservations and leases

The proposed dealing area must be a valid reservation or lease created on or before 23 December 1996

Commonwealth Native Title Act 1993: s.24JA and 24JB

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Introduction

Historically, land and waters have been reserved, dedicated, declared, set aside, gazetted or vested for a range of purposes with the intent that these land and waters be managed and used for that purpose (reservations).

Application of module

The purpose of Module J is to ensure that the commitment to create, manage and use these 'reservations' can continue into the future, provided the reservation:

1. Was created on or before **23 December 1996**; and
2. Was for a **particular purpose**.

Particular purpose means that the purpose must be stated in the relevant type of reservation. For example:

- The grant of a lease - the purpose of the lease must be stated on the lease instrument
- The gazettal (i.e. the dedication/declaration, etc.) of a reserve - the purpose must be stated in the Proclamation or Order in Council or notification in the Government Gazette or Regulation.

The proposed dealing must either be:

- (a) an act that is in accordance with the purpose of the reservation; or
- (b) an act that will have no greater physical impact than that which is already allowed on the area covered by the reservation.

Effect on native title

For most dealings that are assessed in accordance with Module J, the effect on native title will be that the non-extinguishment principle applies.

However, where the proposed dealing is the establishment or construction of a public work, then native title is extinguished over the area of that work as well as any area that is or was necessary for the establishment, construction or operation of the work.

Compensation

Compensation for the effect of the future act on native title rights and interests is payable under this Module if there is a successful claim for compensation. Compensation is payable by the State where the act is attributable to the State, unless the law of the State provides that another person is liable to pay the compensation.

Requirement 1: The reservation is not listed in Table 1

The table below lists a number of reservations that are **not** captured by Module J.

Table 1 - Examples of Reservations not captured by Module J

Reservations	
1	An Aboriginal or Torres Strait Islander Deed of Grant in Trust.
2	A freehold estate granted under the <i>Aboriginal Land Act 1991</i> or <i>Torres Strait Island Land Act 1991</i> .
3	A forest reserve created under the <i>Nature Conservation Act 1992</i> .
4	Any reservation that has been created post-23 December 1996.
5	Any lease that has been created after 23 December 1996, for example, including by renewal, subdivision or amalgamation in effect causing a new lease to be granted.
6	Any reservation that is not for a particular purpose.

If the reservation is not listed in the Requirement 1 Table 1, go to Requirement 2.

If the reservation is listed in the Requirement 1 Table 1, Module J does not apply. Go to **Module K**.

Requirement 2: Reservation is for a particular purpose

To satisfy this requirement, the proposed dealing must be able to be done on land or waters subject to a reservation for a particular purpose, refer to Table 2.

Table 2 - Reservation must be for a particular purpose

Examples	
1	Reserves gazetted under various land or other legislation. For example, the <i>Land Act 1962</i> . NB. This includes Aboriginal Reserves.
2	National Parks, Regional Parks, Timber Reserves, and State Forests.
3	Moreton Bay Marine Park only.
4	Non-exclusive leases for particular purposes. For example a mining lease or a pastoral lease or rolling term lease.
5	Stock routes.
6.	Vested lands. For example areas vested under the <i>Harbours Act 1955</i> or s18(3) of <i>The State Housing Act 1945</i> .

Important: Over time, reserves may have been amended to include additional areas. For example, national parks, State forests, or Land Act reserves. When applying Module J, you must still ensure that your proposed dealing area is one which was created or established, etc., on or before 23 December 1996.

Module J will typically not apply to a proposed dealing in any area added after 23 December 1996.

If Requirement 2 is satisfied, go to Requirement 3.

If Requirement 2 is not satisfied, Module J does not apply. Go to **Module K**.

Requirement 3: The reservation was created on or before 23 December 1996

The reservation must have been created or established on or before 23 December 1996.

If Requirement 3 is satisfied, go to Requirement 4.

If Requirement 3 is not satisfied, Module J does not apply. Go to **Module K**.

Helpful tips

1. National Parks or State Forests

The easiest starting point in working out if the proposed dealing area forms part of a national park or State forest which was dedicated on or before 23 December 1996 is to rely on the relevant national park or State forest plans. Most times the relevant plans will have a note about the relevant Regulation, Order in Council or Proclamation which had the effect of establishing the national park or State forest.

By working your way back in time to a plan pre-23 December 1996, you will then be able to compare the current plan with the pre-23 December 1996 one.

2. Vested lands

The vesting of land or waters took place under a number of pieces of legislation. For example the *Harbours Act 1955*, the *State Housing Act 1945*.

Whilst these actions were valid at the time, these vestings may have been removed due to changes in legislation or tenure management practices.

If an Automated Titling System search indicates that the current tenure is vested, then you will need to ensure that you can identify:

- a) Under what legislation the vesting occurred
- b) How it was vested - by Order in Council or gazette notice; and
- c) Whether the vesting took place on or before 23 December 1996.

Requirement 4: The reservation is valid

Important: Unless there is evidence to the contrary, the reservation will be taken to be valid from a legislative perspective.

The reservation must also be valid in relation to native title.

In this regard, the following Table 3 sets out the rules in order to establish if the reservation is valid in relation to native title.

Table 3 - Valid in relation to native title

Creation date of reservation	Validation requirements
Pre-1 January 1994	Reservation is valid
Between 1 January 1994 and 23 December 1996	Reservation will be validated if a part or whole of the reservation was at some point prior to 1 January 1994, covered by one of the following: <ol style="list-style-type: none"> a) A freehold estate b) A lease (other than a mining lease) c) A valid public work.
Post-23 December 1996	Module J does not apply. Go to Module K .

If the reservation is valid with respect to native title, Requirement 4 is satisfied. Go to Requirement 5.

If the reservation is not valid with respect to native title, Requirement 4 is not satisfied and Module J does not apply. Go to **Module K**.

When trying to validate a 'reservation' which was granted between 1 January 1994 and 23 December 1996:

1. Check the Specific Parcel Report in QNTIME for your proposed dealing area under the Tenure Administration System heading.
2. Look at the survey plan to see if there is a reference to a previous tenure.
3. If there is an instrument of lease, look to see if it makes reference to a previous tenure.

Requirement 5: The dealing test

For the proposed dealing to be validly undertaken on the reservation, the activity must:

- not have the effect of cancelling the reservation
- be done in accordance with the reservation purpose; or
- not have a greater physical impact on native title.

To satisfy this requirement the proposed dealing must satisfy Criterion 1 and in addition, either Criterion 2 or 3.

Criterion 1 - Not cancelling the reservation

The proposed dealing must be carried out in the area that continues to be covered by the reservation.

If the result of the proposed dealing is the cancellation (revocation) of the reservation, Module J does not apply. Go to **Module K**.

Examples of dealings that cancel and don't cancel the reservation are listed in the table below.

Table 4 - Examples

Proposed dealing	Effect on reservation	Proceed under Module J?
Dedication of road within township reserve	Cancellation. A road can only be dedicated over USL, so the reservation will be lost	X
Change of purpose: hospital reserve to showground reserve	Nil. The reservation does not have to be cancelled.	✓
Change a reserve under the <i>Land Act 1994</i> to a National Park	Cancellation. The reserve must first become USL before becoming a National Park.	X
Change of purpose: State Forest to National Park	Cancellation. The reservation will be lost.	X
Freeholding of an operational reserve under s.34(M) of the <i>Land Act 1994</i>	Cancellation. NB - whilst the operational reserve is revoked by the registration of the deed of grant over the reserve, there is no ability to maintain the reservation.	X

If the effect of the proposed dealing is not the cancellation (revocation) of the reservation, Criterion 1 is met. Go to Criterion 2.

Criterion 2 - Under or in accordance with

The proposed dealing must be done under or in accordance with the purpose for which the land was reserved, set aside or granted.

The Criterion 2 Dealing Examples Table sets out some examples of dealings which are in accordance with the purpose of the reservation.

Table 5 - Criterion 2 Dealing Examples

Purpose of reservation	Proposed dealing example
Reserve for recreation purposes	<ul style="list-style-type: none"> Trustee lease for hockey club under <i>Land Act 1994</i>. Construction of a toilet block by trustee.
Reserve for quarry purposes	<ul style="list-style-type: none"> Sales permit to authorise removal of quarry material under the <i>Forestry Act 1959</i>.
State Forest	<ul style="list-style-type: none"> Sales permit to get and remove timber under the <i>Forestry Act 1959</i>.
National Park	<ul style="list-style-type: none"> Issue of permits under s.34, 35 or 36 of the <i>Nature Conservation Act 1992</i>. Construction of access tracks.

If Criterion 2 is met, Requirement 5 is satisfied. Go to Providing procedural rights.

If Criterion 2 is not met, go to Criterion 3.

Criterion 3 - Does not have a greater physical impact on native title

Alternatively to Criterion 2, the proposed dealing must not have a greater physical impact on native title than that which can be undertaken pursuant to the purpose of the reservation.

If the type and extent of the physical works to be undertaken under the proposed dealing is greater than that which is permissible under the reservation, Criterion 3 is not met and Requirement 5 is not satisfied. Module J therefore does not apply. Go to **Module K**.

If the type and extent of physical works to be undertaken will be less or equivalent to that which is permissible under the reservation, Criterion 3 is met and Requirement 5 is satisfied. Go to Providing procedural rights.

Table 6 - Examples of effect

Purpose of reservation	Proposed dealing	Same/lesser or greater effect
Mining lease	Sales permit authorising removal of quarry material under the <i>Forestry Act 1959</i> .	Same or lesser effect
Reserve for showground purposes	Change of purpose to sport and recreation.	Same or lesser effect
Stock route	Sales permit to get and remove timber under the <i>Forestry Act 1959</i> .	Same effect
Pastoral lease	Construction of a borrow pit by Department of Transport and Main Roads to access quarry material for the construction of a road and where the pastoral lease permits the construction of a dam.	Same effect
Pastoral lease	Example - creation of a hard rock quarry on a pastoral lease.	Greater effect
Pastoral lease	Wind farm or solar farm.	Greater effect

Providing procedural rights

Under Module J, the relevant native title parties are entitled to receive procedural rights only for the following:

1. Construction or establishment of a public work
2. Creation of a management plan for a protected area under the *Nature Conservation Act 1992*
3. Creation of a management plan for the Moreton Bay Marine Park under the *Marine Parks Act 1982*.

For all other proposed dealings, the non-extinguishment principle applies and the proposed dealings can proceed without any procedural rights being given.

Definition

The non-extinguishment principle means that to the extent that the proposed dealing affects any native title rights and interests, the future act will not extinguish those rights and interests. This means that the native title rights and interests are suppressed for the duration of the dealing.

Public Works

If the proposed dealing consists of the **construction or establishment of a public work** (this includes section 251D areas), the effect on native title is extinguishment. Refer to Module CA for relevant definitions and examples of public works.

Consequently, the person proposing to construct or establish the public work must provide a notification and an opportunity to comment to the relevant native title parties in accordance with **Annexures 7.2 and 7.3**.

Important: If a tenure is first required to be granted to authorise the construction of the public work, there is **no** notification process as the future act is the **grant** of the tenure **not** the subsequent **construction** of the public work.

This does not include a regulatory approval such as a development approval under the *Planning Act 2016*.

Where a contractor is constructing the public work on behalf of the State, the State department or agency should carry out the notification process.

Table 7 - Examples of Public Works

Type of work	Definition/explanation	Examples
A building, or other structure (including a memorial) that is a fixture	The key is that the building or other structure, etc., must be a fixture to the land or waters. Fixture: An item attached to the ground other than under its own weight. An item which is a fixture ceases to be the personal property of the person who attached it to the land as the item becomes part of the land.	<ul style="list-style-type: none"> • Court house • Playground swings • Bridge pylons • Water tank concreted to ground • Public toilet in National Park
A road, railway or bridge	Self-explanatory, however, some points to note: <ul style="list-style-type: none"> • The road doesn't have to be a major earthwork but it does have to be constructed. • The construction has to be more than say a 4WD track that is not physically formed. 	<ul style="list-style-type: none"> • Machine formed road as opposed to a 'track' being formed over time by constant use • Formed walking track that is 'benched in'

Type of work	Definition/explanation	Examples
A well, or bore, for obtaining water	Self-explanatory, however, the well or bore cannot be a naturally formed one and there must have been some form of construction. <i>Bore:</i> A deep hole of small diameter bored to the aquifer of an artesian basin, through which water rises under hydrostatic pressure.	<ul style="list-style-type: none"> • Turkey's nest dam • Artesian bore
Any major earthworks	Earthworks whose construction cause major disturbance to the land, or to the bed or subsoil under waters. This means that excavation of the area is required by machinery in order to level the land and/or fill of the land. Note: Mining is excluded from the definition of a public work. Further, s.24JA/ JB is not subject to the right to negotiate provisions as those provisions can only be invoked through section 24IC (Module IC) and section 24MD (Module M and N).	<ul style="list-style-type: none"> • Dredging of a river • Reclamation of a tidal area • Cutting and clearing (which significantly changes the contour of the land) • Excavation (which dramatically changed the contours of the land)
A building that is constructed with the authority of the State or Commonwealth, other than on a lease	There is no requirement for a building under this part of the public work definition to be a fixture. However, there must still have been some legislative power (such as a development approval or permission) to construct.	<ul style="list-style-type: none"> • Construction of a toilet block by the trustee of a reserve for recreation purposes

Creation of a management plan or marine park

If your proposed future act is the creation of a

- management plan for a protected area under the *Nature Conservation Act 1992* ; or
- management plan for the Moreton Bay Marine Park under the *Marine Parks Act 1982*.

The person proposing to create the plan must provide a notification and an opportunity to comment to the relevant native title parties in accordance with **Annexures 7.2 and 7.3** before the plan is finally approved. For example, the notification could be provided at the time the draft is released for public comment.

Important: For a management plan to be a future act the plan must have an impact upon native title rights and interests in the area. Therefore, you need to determine whether the management plan restricts or prohibits activities. For example, if it restricts or prohibits access to an area or the doing of certain activities (For example no camping is allowed in a particular area), that would be inconsistent with the exercise of native title rights and interests and would be a future act. Module J would therefore apply.

If the management plan is **not** a future act, then Module J does not apply and you can proceed without further reference to native title (subject to any consultation requirements under the relevant State legislation). Refer to **Module AB**.

Note: Just because the management plan is not a future act, it does not mean that any subsequent dealings will not be future acts as well.

Finalise your Native Title Assessment - Annexure 7.1

If all the requirements for Module J are met, finalise your Native Title Assessment using Annexure 7.1.