

# **Queensland Government Native Title Work Procedures**

## **Module R: Non-claimant applications**

*Commonwealth Native Title Act 1993: s.61 and 24FA*

**August 2017**

## Version history

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## Introduction

This Module helps you assess whether a non-claimant application is an option for your proposed dealing.

### Part 1: What is a non-claimant application?

You have reached this Module because:

- (a) no module in **Chapter 5** applied to your proposed dealing<sup>1</sup>; and
- (b) Module Q directed you to consider this module in addition to the registered Indigenous Land Use Agreement (ILUA) option.

Whilst an ILUA is always an option (Module Q), a non-claimant application is only an option in certain circumstances. This module sets out those circumstances.

The *Native Title Act 1993* (NTA) allows any person who has a non-native title interest in relation to an area to file an application in the Federal Court for a determination as to whether native title exists over that area. This is known as a non-claimant application (the application).

The person filing the application can either be a government party or a non-government party. A government party can make an application over any area within its jurisdiction.<sup>2</sup> A non-government party, can only make an application over an area if they have a non-native title interest in ALL of the area covered by the application.<sup>3</sup> For example, the lessee of a non-exclusive pastoral lease may make an application over the area of their pastoral lease.

The filing of an application provides the trigger for what is known as section 24FA protection, which will allow your proposed dealing to proceed provided -

- the requirements in Module F are satisfied and you have received advice from Aboriginal and Torres Strait Islander Land Services (ATSILS) that section 24FA protection applies

or

- a determination is made that native title does not exist - see **Module AD**.

**This Module is divided into the following 2 divisions -**

- A. Requirements for making a non-claimant application.
- B. Effect on native title, compensation and decision-making.

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<sup>1</sup> Even if a Module in Chapter 5 applies to your proposed dealing, a non-claimant application can still be made.

<sup>2</sup> Section 61(1), NTA

<sup>3</sup> Section 61(1), NTA

## A. Requirements for making a non-claimant application

This Division is divided into three parts -

- a non-claimant application by the applicant - **Part 2**
- a non-claimant application by the State - **Part 3**
- protection arising from a non-claimant application - **Part 4**.

When considering the requirements in Part 2 and Part 3 remember that “proposed dealing area” refers to the area over which the proposed dealing will take place and “proposed application area” refers to the area covered by the non-claimant application. Sometimes these areas will be the same, other times they may not be.

### Part 2: A non-claimant application made by the applicant

It is a matter for the applicant if they wish to file a non-claimant application. However, all of the following requirements must be satisfied before advising the applicant that a non-claimant application is an option, apart from an ILUA, to progress the proposed dealing -

#### Requirement 1

A native title assessment must have been completed. This means that a tenure history is done and Chapters 1, 2, 3 and 5 of the procedures fully considered.

and

#### Requirement 2

There is **no determination of native title** over the proposed dealing area.

You should already have assessed whether there is a determination of native title under **Module AD**.

If there is a determination that native title does **not** exist in relation to the proposed dealing area, you can proceed with the proposed dealing in accordance with **Module AD**. If there is a determination that native title does exist in relation to the proposed dealing area, your only option is an ILUA - refer to **Module Q**.

and

#### Requirement 3

There is **no registered native title claim** over the proposed dealing area.

and

#### Requirement 4

The applicant has a **non-native title interest** in the **whole** of the proposed application area.

A **non-native title interest** means that the applicant currently has an interest that goes beyond that held by the general public in relation to the application area.

For example, the applicant may currently hold a permit, licence, authority, lease etc. over the application area.

If the applicant does not hold a non-native title interest in the proposed dealing area, **Module L** could be used to grant, for example, a permit to occupy over the application area as a low impact future act.

Where all of the above requirements are satisfied, then a non-claimant application is an option for the applicant. An ILUA is always another option - refer to **Module Q**.

You should now complete your native title assessment form - **Annexure 7.1**.

It is now a matter for the applicant whether they wish to proceed with a non-claimant option or an ILUA option. The applicant should be advised to seek their own independent legal advice about these options.

If your proposed future act does not satisfy ALL of the above requirements then this Module does not apply to your proposed dealing. Your only option is a registered ILUA - return to **Module Q**.

## Part 3: A non-claimant application made by the State

All of the following requirements must be satisfied before the State will consider proceeding with a non-claimant application -

### Requirement 1

A native title assessment must be completed. This means that a tenure history is done and Chapters 1, 2, 3 and 5 fully considered.

and

### Requirement 2

There is **no determination of native title** over any part of the proposed application area.

You should already have assessed whether there is a determination of native title under **Module AD**.

If there is a determination that native title does **not** exist, you can proceed with the proposed dealing in accordance with **Module AD**. If there is a determination that native title does exist, your only option is an ILUA - refer to **Module Q**.

and

### Requirement 3

There is **no registered native title claim** over any part of the proposed application area.

and

## Requirement 4

The option of using an **ILUA has been considered** by your department or agency - **Module Q**.

If all of the above requirements are satisfied and your department or agency is of the view that an ILUA is not an appropriate option, then -

### Step 1

Provide your native title assessment (including the tenure history and other relevant documents) to Aboriginal and Torres Strait Islander Land Services through your Native Title Contact Officer (NTCO).

### Step 2

Aboriginal and Torres Strait Islander Land Services will consider and check the native title assessment.

### Step 3

If the assessment is confirmed, Aboriginal and Torres Strait Islander Land Services will request a meeting through your NTCO to discuss the proposed non-claimant application.

### Step 4

Aboriginal and Torres Strait Islander Land Services then briefs the Minister and upon the Minister endorsing the approach will instruct Crown Law to prepare and file the non-claimant application.

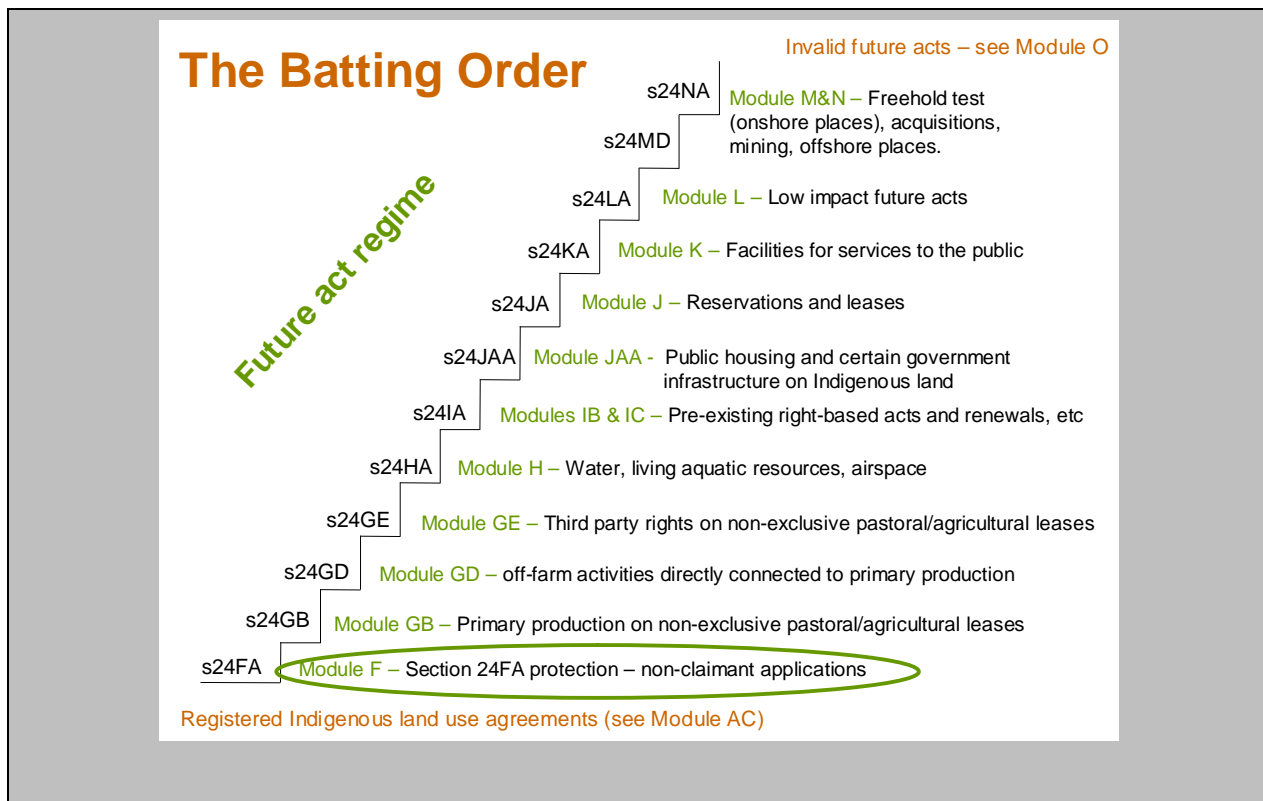
Only Crown Law, as instructed by Aboriginal and Torres Strait Islander Land Services, can file in the Federal Court a non-claimant application on behalf of the State.

If your proposed future act does not satisfy all of the above requirements then this Module does not apply to your proposed future act. Your only option is a registered ILUA - return to **Module Q**.

## Part 4: Protection arising from a non-claimant application

After a non-claimant application is filed the NNTT must notify that a non-claimant application has been filed with the Federal Court. The notice must contain a statement that the area covered by the application may be subject to section 24FA protection, unless at the end of a specific time period (starting on the notification day) the area is covered by a registered native title claim.

Section 24FA protection allows future acts to validly proceed over the area covered by a non-claimant application. The requirements in **Module F** must be satisfied for section 24FA protection to apply to your proposed dealing area and the proposed future act/s.



If-

- at the end of the period specified in the notice the requirements in **Module F** are satisfied and Aboriginal and Torres Strait Islander Land Services has advised that section 24FA protection applies

or

- a determination is made by the Federal Court that native title does **not** exist,

then you can proceed with your proposed future act over the proposed dealing area. Your future act will be valid in relation to native title based upon the protection arising under section 24FA of the NTA (**Module F**).

## B. Effect on native title, compensation and decision-making

### Part 5: What is the effect on native title?

The making of a non-claimant application is not a future act. The dealing that is done relying upon the section 24FA protection is the future act. Refer to **Module F** for the effect of dealings relying upon section 24FA protection.

### Part 6: Compensation

There is no compensation payable for the making of a non-claimant application.

Refer to **Module F** for when compensation is payable for dealings relying upon section 24FA protection.



## Part 7: Who makes the decision whether this Module applies?

Your NTCO should confirm your assessment that a non-claimant application is an option for the proposed dealing based upon the requirements in this Module.

Where appropriate a non-claimant application (and ILUA) can be presented to an applicant as a possible option to progress their application. However, it is a matter for the applicant if they wish to pursue this option, as it will be at their own expense and time and with their own independent legal advice.

Where the non-claimant application is proposed to be made **by the State** (eg. a department is the proponent for a project), provide all details of the proposed dealing and your native title assessment to Aboriginal and Torres Strait Islander Land Services through your NTCO. Aboriginal and Torres Strait Islander Land Services makes the final recommendation to the Minister as to whether a non-claimant application should be made, based upon the proposed dealing and other relevant factors.

If this Module does not apply to the proposed dealing,  
please return to **Module Q** as a registered ILUA is now your only option.