

Queensland Government Native Title Work Procedures

Module K: Facilities for services to the public

Commonwealth Native Title Act 1993: s.24KA

December 2022

Version history

Version	Comments	Date published
1		August 2017
2	Change made to Table 5 – Category 1 Examples	December 2022

This publication has been compiled by Native Title Policy, Lands Policy and Support, Department of resources.

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Introduction

Module K deals with future acts that involve facilities for services to the public (e.g. roads, railways, bridges, etc.) established for the benefit of the community as a whole.

Module K applies to your proposed dealing if -

- (a) it permits, or is, the construction, operation, use, maintenance or repair of one of the facilities listed in Requirement 3
- (b) it is operated for the general public.

It may be useful to think of these facilities as generally being linear (e.g. road, pipeline, bridge) and 'up and down' type infrastructure (e.g. telecommunications tower, electricity tower, etc). However, not all section Module K facilities fit this general categorisation.

Module K distinguishes between 'generation' facilities and 'distribution' facilities. If the facility is one which generates something, such as an electricity generation facility, then it will not be captured by Module K. On the other hand, an electricity distribution facility, such as a power line, will be captured by Module K.

You must be able to satisfy all seven requirements in Module K. Additionally, you may need to impose particular conditions on any interest (e.g. a lease) in order to utilise Module K.

Application of module

Module K ensures that services to the general public, including native title holders, can be provided unimpeded by native title.

Effect on native title

The non-extinguishment principle applies. This means that while the dealing exists, those native title rights and interests that are inconsistent with the dealing are not able to be exercised or enjoyed.

Compensation

Compensation for the effect of the dealing on native title rights and interests is payable under Module K 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 facility is not listed in the Facilities table

The Requirement 1 Facilities table below identifies the types of facilities that are not captured by Module K, this is not an exhaustive list.

If your proposed dealing falls within the table below, Requirement 1 is not satisfied and Module K does not apply. Go to **Module L**.

If your proposed dealing does not fall within table below, Requirement 1 is satisfied. Go to Requirement 2.

Table 1 - Excluded Facilities

Facilities	
1	Airport
2	Busway

Facilities	
3	Specialised bulk coal loading wharf facility
4	Dam
5	Effluent treatment facility associated with an irrigation facility
6	Electricity generator
7	Facility that generates electricity
8	Petrol station
9	Port
10	Power plant
11	Public toilets
12	Sewerage treatment facility
13	Water treatment facility.

Requirement 2: The dealing is not listed in the Dealings table

The Requirement 2 Dealings table below identifies the types of **dealings** that are not captured by Module K, this is not an exhaustive list.

If your proposed dealing falls within the table below, Requirement 2 is not satisfied and Module K does not apply. Go to **Module L**.

If your proposed dealing does not fall within the table below, Requirement 2 is satisfied. Go to Requirement 3.

Table 2 - Excluded Dealings

Dealings	
1	Declaring busway land and registration of the consequential perpetual lease.
2	Declaring local government tollway corridor land and registration of consequential perpetual lease.
3	Declaring local government tollway.
4	Declaring State toll road.
5	Declaring State toll road corridor land and registration of consequential perpetual lease.
6	Inclusion of land into the Rail Transport Corridor Perpetual Lease.
7	Compulsory acquisition of native title rights and interests for a facility listed in the Requirement 4 Facilities Table.

Requirement 3: The proposed dealing is at least partly onshore

Module K only applies to proposed dealings on onshore areas.

The Native Title Act (NTA) makes a distinction between dealings done on an onshore area or an offshore area.

As a general rule, an onshore area for the State of Queensland extends down to the low water mark and includes internal bodies of waters such as rivers, canals and heavily enclosed bays. It would also include islands off the coast of Queensland, such as Fitzroy Island down to the low water mark.

However, what constitutes 'onshore' and what constitutes 'offshore' may be difficult to work out, particularly in relation to bays. E.g. coastal waters in the form of bays enclosed within the 'jaws of the land' form part of the inland waters and are considered onshore.

To determine whether Requirement 3 is satisfied, the following question needs to be addressed:

Is the whole or part of your proposed dealing area:

- (a) On land, i.e. mainland Queensland or an island off the coast of Queensland
- (b) In onshore waters, i.e. waters extending down to the low water mark, or within a watercourse or within a heavily enclosed bay?

If the answer is yes to either, Requirement 3 is satisfied. Go to Requirement 4.

If the answer is no to both, Requirement 3 is not satisfied and Module K does not apply. Go to **Module L**.

Note: If you are unsure, seek advice from Aboriginal and Torres Strait Islander Land Services (ATSILS) through your Native Title Contact Officer.

Helpful tip

For some useful information, go to the Department of National Parks, Sport and Racing website and conduct a search under 'Zoning plan history'.

Requirement 4: The proposed facility is listed in the Facilities table

The proposed dealing must:

- (a) Be in relation to one of the facilities listed in the Requirement 4 facilities table; or
- (b) Be in relation to one of the facilities listed in the Requirement 4 facilities table and be works associated or incidental to those facilities.

Table 3 - Requirement 4 Facilities

Type of facility	Examples of facilities
Road, railway, bridge, or other transport facility	<ul style="list-style-type: none"> ▪ Dedicated or declared road ▪ State-controlled road ▪ Bridge ▪ Monorail ▪ Tramway ▪ Railway ▪ Airstrip which does not form part of an airport
Jetty, wharf	<ul style="list-style-type: none"> ▪ Pontoon ▪ Boat-ramp ▪ Jetty

Type of facility	Examples of facilities
Navigation marker or other navigational facility	<ul style="list-style-type: none"> ▪ Buoy ▪ Lighthouse ▪ Beacon ▪ Light
Electricity transmission or distribution facility	<ul style="list-style-type: none"> ▪ Powerline ▪ Electrical transmission line ▪ Electrical substation ▪ Underground powerline
Lighting of streets or other public places	<ul style="list-style-type: none"> ▪ Street lighting ▪ Lamps in parks
A gas transmission or distribution facility	<ul style="list-style-type: none"> ▪ Gas pipeline
A well, or bore, for obtaining water	<ul style="list-style-type: none"> ▪ Water well ▪ Water bore
A pipeline or other water supply or reticulation facility	<ul style="list-style-type: none"> ▪ Water pipeline ▪ Outdoor public showers (e.g. at a beach) ▪ Rain tanks
A drainage facility, or a levee or other device for management of water flows	<ul style="list-style-type: none"> ▪ Levee ▪ Weir ▪ Drain
An irrigation channel or other irrigation facility	<ul style="list-style-type: none"> ▪ Irrigation channel ▪ Irrigation pipeline
A sewerage facility, other than a treatment facility	<ul style="list-style-type: none"> ▪ Sewerage pipeline;
A cable, antenna, tower, or other communication facility	<ul style="list-style-type: none"> ▪ Communications tower ▪ Fibre-optic cable ▪ Public telephone box ▪ Telephone line (above and below ground)
An automatic weather station	<ul style="list-style-type: none"> ▪ Automatic weather station
Any other thing that is similar to any one or more of the facilities in this column	<p>There must be some 'likeness' or 'resemblance' to one of the listed facilities. E.g. a board walk is similar to a jetty or a wharf; a rubbish disposal site is similar to a sewerage facility</p> <p>If you are unsure, seek advice from ATSILS through your Native Title Contact Officer.</p>

Associated or incidental works

If the proposed dealing consists of a facility listed in the Requirement 4 facilities table, and associated or incidental works, then the following must be met.

The associated or incidental works must be an integral part of the facility (as they are required for the construction, operation, use, maintenance or repair of the facility), and not separate facilities. Refer to the table below.

Table 4 - Examples of Associated or Incidental Works

Facility	Examples of associated or incidental works	Examples of works that are not associated or incidental
Road	Road signage (e.g. stop signs, speed limit signs) are integral to the operation of a road.	
Communication facility	A maintenance shed to be constructed as part of the construction of a communications tower is integral to the maintenance of the tower.	
Public boardwalk		Public toilets associated with a new boardwalk, are not necessary or integral to the operation of the boardwalk.

If Requirement 4 is satisfied, go to Requirement 5.

If Requirement 4 is not satisfied, Module K does not apply. Go to **Module L**.

Requirement 5: The proposed dealing is an authority to construct, operate, use, maintain or repair or the construction, operation, use, maintenance or repair of a facility

The proposed dealing must fall within either Category 1 or 2.

Category 1 - Authority to construct, operate, use, maintain or repair, a facility

The proposed dealing must be something that **permits** or **requires** the construction, operation, use, maintenance or repair by or on behalf of any person of a Requirement 4 facility.

Examples are in the table below.

Table 5 - Category 1 Examples

Permits or requires
The declaration of a road under the <i>Transport Infrastructure Act 1994</i> .
The grant of a lease for telecommunication facility purposes under the <i>Land Act 1994</i> .
The grant of a development approval under the <i>Sustainable Planning Act 2009</i> for clearing vegetation for a road.

Permits or requires
The registration of an easement under the <i>Land Act 1994</i> for power transmission lines.
The grant of a pipeline licence for the construction of a petroleum pipeline under the <i>Petroleum and Gas (Production and Safety) Act 2004</i> .
The grant of a lease under the <i>Land Act 1994</i> for airstrip purposes.
A development approval to remove quarry material under the <i>Coastal Management and Protection Act 1995</i> for the maintenance of marine facilities (public boat ramps).

If Category 1 is met, Requirement 5 is satisfied. Go to Requirement 6.

If Category 1 is not met, go to Category 2.

Category 2 - Construction, operation, use, maintenance or repair of a facility

Category 2 has two criterion which must be met.

Criterion 1

The proposed dealing must be something that IS the construction, operation, use, maintenance or repair of a Requirement 4 facility.

If Criterion 1 is met, go to Criterion 2.

If Criterion 1 is not met, Category 2 is not met. Requirement 5 is therefore not satisfied and Module k does not apply. Go to **Module L**.

Criterion 2

The construction, operation, use, maintenance or repair of the Requirement 4 facility must be by or on behalf of the State, local government body, or statutory authority of the State or Commonwealth in any of its capacities.

On behalf of means that the State, for example, did not construct it. In some cases, the State may have chosen to use a tender and contract process. In this case, the State authorised and paid for the public work, but did not physically construct the work itself.

On the other hand, where the State has provided funding through either a grant to a private community group or an individual for the construction of a community facility, e.g. a clubhouse, the work was not done 'on behalf of the State.

Statutory Authority

Establishing whether a particular entity is a statutory authority of the State can in certain cases be difficult.

In most cases, it requires an in-depth look at the relevant legislation that the statutory authority was established under as well as the date that any works were constructed or established, etc., and whether the particular entity was a statutory authority at the time the works were constructed or established.

Statutory authority definition: Any authority or body (including a corporation sole) established by a law of the Commonwealth or State other than a general law allowing incorporation as a company or body corporate.

Note: Government Owned Corporations ('GOCs') are included in this definition but only statutory GOCs and not company GOCs.

If Criterion 2 is met, then Requirement 5 is satisfied. Go to Requirement 6.

If Criterion 2 is not met, Requirement 5 is not satisfied and Module K does not apply. Go to **Module L**.

Requirement 6: The facility is to be operated for the general public

General public means the public at large, including native title parties, as opposed to one particular individual or company.

The fact that a private person or company is constructing a facility, does not stop it from being a facility for services to the general public.

Further, the requirement for payment by the public to use or benefit from the facility does not prevent the facility being operated for the general public.

The table below contains examples of facilities operated by 'private' entities for the general public.

Table 6 - The General Public Examples

Entity	Example of facility
Optus	Communication Facility
AB Tourist Company	Construction of a jetty for the use by the general public
Outback Gas Supplies	Gas pipeline to supply gas to the general public
Global Rail Enterprises	Construction of a monorail, on behalf of the State, to be used by the general public
Billy's Taxi Cabs	Radio communication facility

Not for the general public

The Not for the General Public Examples Table below contains examples of facilities operated by 'private' entities not for the general public.

Table 7 - Not for the General Public Examples

Entity	Example of facility
Zed's Mining Company	Construction of railway line to coal mine not for use by the general public.
Underwater Escapes	Private Jetty.
Gordonvale Sugar Company	Construction of tram line not for use by the general public.

If the facility is to be operated for the general public, Requirement 6 is satisfied. Go to Requirement 7.

If the facility is not to be operated for the general public, Requirement 6 is not satisfied and Module K does not apply. Go to **Module L**.

Requirement 7: Native title holders must have reasonable access

Native title holders must still be allowed to have 'reasonable access' to the land or waters in the vicinity of the facility.

Large scale works, such as airports, ports and dams are excluded from Module K as these types of works usually require exclusive possession or would significantly impede access by native title holders.

Consequently, there are only two circumstances where it is permissible to restrict access to native title holders, just as for any member of the public, without preventing Module K from applying. These are:

- (a) Whilst the facility is being constructed
- (b) For health and safety reasons.

Important: When considering the requirement of 'reasonable access' you must also consider the issues in the Requirement 7 Issues Table.

Table 8 - Requirement 7 Considerations

No	Considerations
1	<p>The condition</p> <p>Where your proposed future act involves the grant of an interest (e.g. a lease/permit) that would normally restrict access to all others, then, in order to fall within Module K, you must condition that interest as follows:</p> <p>'The lessee/permittee must permit native title holders reasonable access to such land or waters the subject of the lease which are in the vicinity of the land or waters on which the [insert type of facility] is located or to be located, except while the [inset type of facility] is being constructed, or for reasons of health and safety.' (the condition).</p> <p>If the applicant does not accept the inclusion of this condition in the proposed interest, Requirement 7 is not satisfied and Module K does not apply. Go to Module L.</p> <p>This condition does not apply to the dedication of a road as the dedication/declaration creates immediate user rights in the public to use the area as road.</p>
2.	<p>The facility</p> <p>If the facility or the works are to cover the whole of the proposed dealing area, such that there could never be any reasonable access by native title holders, Requirement 7 is not satisfied and Module K does not apply. Go to Module L.</p>
3	<p>The legislation</p> <p>The relevant State legislation under which the proposed dealing is being done must not 'defeat' the reasonable access condition.</p> <p>E.g. S.329(1) of the <i>Transport Infrastructure Act 1994</i> and s.5 of the <i>Transport Infrastructure (Busway) Regulation 2002</i> operate so that a person must not enter a busway unless the person is on the bus or authorised by the chief executive. Therefore, the grant of a perpetual lease for a busway could not be conditioned to allow native title holders reasonable access to the busway, as the legislation already prevents access. In this example, Requirement 7 is not satisfied and Module K does not apply.</p>
4	<p>The policy</p> <p>There may be significant policy reasons as to why the reasonable access requirement can not be satisfied. E.g. Once a 'State toll road corridor land declaration' is made under section 84A of the <i>Transport Infrastructure Act 1994</i> (TIA), a perpetual lease must be issued to the State (s.84C of the TIA).</p>

No	Considerations
	<p>Although the TIA does not expressly prohibit access by persons on declared land, there are significant policy reasons against allowing any persons, including native title holders, on this land unless they are in a vehicle using the toll road.</p> <p>In this example, Requirement 7 is not satisfied and Module K does not apply.</p>

If Requirement 7 is satisfied, go to Requirement 8.

If Requirement 7 is not satisfied, Module K does not apply. Go to **Module L**.

Requirement 8: Providing Procedural Rights

The information below explains what procedural rights are.

Procedural rights means:

- (a) A right to be notified of the proposed dealing
- (b) Opportunity to comment
- (c) A right to object to the proposed dealing
- (d) Any other right that is available as part of the procedures that are to be followed when it is proposed to do the dealing.

Note: Procedural rights do not include all rights. E.g. Where the State legislation requires that you seek the consent of a freehold owner, this is not a procedural right but a substantive right. You are not required to provide a substantive right under Module K.

Procedural rights are done before the proposed dealing is done.

The procedural rights relevant to the doing of the proposed dealing will be contained in:

- (a) The relevant State legislation, i.e. those procedural rights that must be provided under the relevant State legislation under which the proposed dealing is done.
- (b) Procedural fairness. Does your department or agency extend procedural fairness (also known as natural justice) to affected persons when doing this type of dealing? This question also raises the issue of whether procedural fairness should be provided (if it is not), but this is matter for your department or agency.

Procedural fairness or natural justice: A duty to observe fair procedures when making decisions which directly and individually affect a person's rights, interests or legitimate expectations. There is a strong presumption that procedural fairness must be observed in the exercise of public power. There are two procedural fairness rules:

- (a) The hearing rule: entitles a person whose interests are liable to be affected to be given notice of relevant matters and a reasonable opportunity to present his or her case.
- (b) The rule against bias: ensures the objective appearance of impartiality and the absence of prejudice.

Procedural fairness requires that, before a person's interests are affected, notice be given of any relevant matters and an appropriate opportunity to be heard provided. Adequate notice extends to giving persons sufficient time to prepare their case so that they can present it in the fullest sense.

Opportunity to comment: This procedural right gives the native title representative body an opportunity to provide argument and information about native title interests to the decision-maker. The opportunity to comment is to ensure that any possible impact of the proposed dealing on native title rights and interests is considered before any decision is made to proceed with the proposed dealing. It is not a right of veto.

Procedural Rights process

The process for determining whether there are procedural rights is firstly dependent on what the tenure of your proposed dealing area is. In this regard:

Test A is to be applied if your proposed dealing area is a non-exclusive pastoral lease.

Test B is to be applied for all other non-exclusive tenures, including USL where native title continues to exist.

Important: Even after applying tests A or B and establishing that no procedural rights apply, an agency can still make a business decision to notify.

Table 9 - Test A - Non-exclusive pastoral lease

What procedural rights are you providing the Lessee based on the relevant legislation or procedural fairness	What procedural rights are the native title parties entitled to receive	Who are the relevant native title parties
None	None	N/A.
Notice	Notice	<ol style="list-style-type: none"> 1. The Registered Native Title Body Corporate (RNTBC) 2. The Registered Native Title Claimant 3. The Native Title Representative Body only if there is no RNTBC.
Other (e.g. right to object)	Other (e.g. right to object)	<ol style="list-style-type: none"> 1. The Registered Native Title Body Corporate (RNTBC) 2. The Registered Native Title Claimant 3. The Native Title Representative Body only if there is no RNTBC. <p>Note: For 1 and 3 above the NTRB is also entitled to an opportunity to comment.</p>

Table 10 - Test B - All other non-exclusive tenures

Question: If the proposed dealing was instead over:

- (a) freehold land
- (b) any land or waters adjoining freehold

what procedural rights would the freehold owner be entitled to under the legislation that the dealing is being done under?

- If the legislation is silent or specifically states there are no procedural rights, then there are no procedural rights under the NTA for the proposed dealing. However, if your department provides procedural fairness to a freehold owner for such a dealing (e.g. gives notice to the freeholder owner), then that procedural fairness should also be provided to the native title party as per the below table.
- If the legislation specifically states there are procedural rights, refer to the below table.

What procedural rights are you providing the freehold owner OR an adjoining freehold owner	What procedural rights are the native title	Who are the relevant native title parties

based on the relevant legislation or procedural fairness	parties entitled to receive	
None	None	N/A.
Notice	Notice	<ol style="list-style-type: none"> 1. The Registered Native Title Body Corporate (RNTBC) 2. The Registered Native Title Claimant 3. A Native Title Representative Body only if there is no RNTBC.
Other (e.g. right to object)	Other (e.g. right to object)	<ol style="list-style-type: none"> 1. A Registered Native Title Body Corporate (RNTBC) 2. A Registered Native Title Claimant 3. The Native Title Representative Body, only if there is no RNTBC or RNTCs, is instead provided with an opportunity to comment.

Finalising your assessment

If all the requirements of Module K are met, finalise your Native Title Assessment using **Annexure 7.1**.