

Queensland Government Native Title Work Procedures

Module BB: Can the extinguishing effect of the PEPA be relied upon to address native title for my proposed dealing?

Commonwealth Native Title Act 1993: s.47, s.47A and 47B

May 2021

Version history

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1		September 2017
2	Narrier Full Court Decision re definition of mining lease	February 2018
3	Section 47A	May 2018
4	Narrier High Court Decision re definition of mining lease	April 2019
5	WTMP doesn't satisfy "condition" requirement of s. 47B	February 2021
6	Inclusion of section 47C	May 2021

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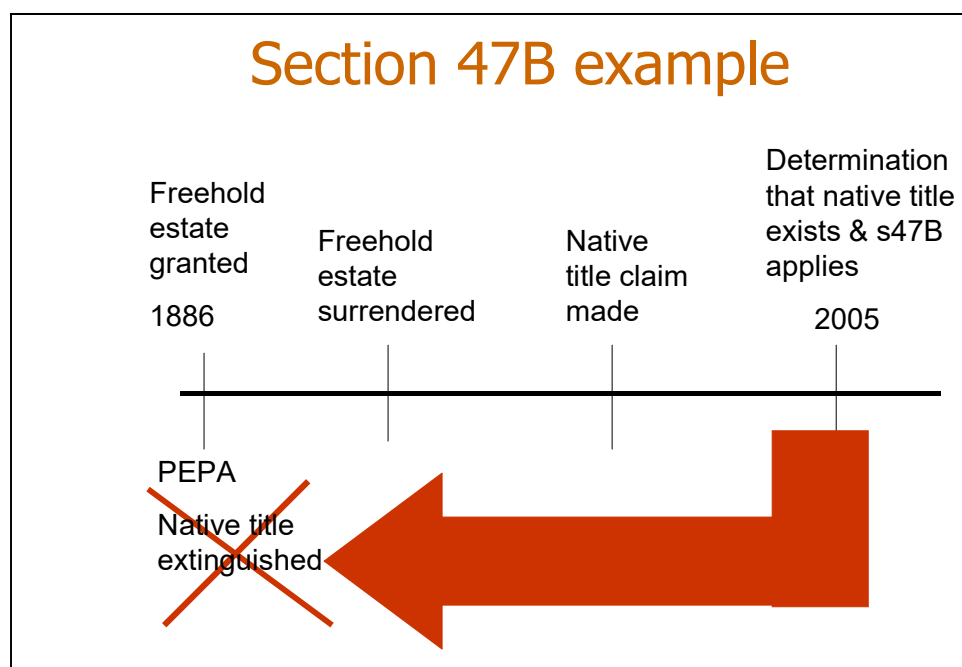
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Part 1: Introduction

In some circumstances, upon a determination that native title exists, the *Native Title Act 1993* (NTA) requires that the extinguishing effect of the previous exclusive possession act (PEPA) you identified in **Module BA** or identified in a non-public work **QNTIME conclusion** must be ignored or disregarded. This means, at the time of the determination, that native title rights and interests extinguished by the PEPA are in effect revived in relation to the PEPA area. Because of this possible revival, and subject to certain requirements being satisfied, you may now not be able to proceed with your dealing in relation to native title by relying upon the PEPA.

Sections 47, 47A and 47B of the NTA (sometimes called the section 47 suite) are the exception to the general rule that native title once extinguished is always extinguished.

The following diagram provides an example of how section 47B of the NTA can operate to disregard the extinguishing effect of an historical freehold grant.



Part 2: Summary - two key questions

If you have identified in **Module BA** that there is a current or historical PEPA or there is a non-public work QNTIME conclusion¹ over your proposed dealing area, there are two key questions you must ask before relying upon the PEPA.

Once you have answered these questions below, use the table below to determine what action you can take based on your answer combination, i.e. whether you can rely upon the extinguishing effect of the PEPA.

Question 1

Is the proposed dealing area currently covered by a native title claim? Refer to **Part 3** for more detail.

¹ This means a QNTIME conclusion based upon a PEPA that was the grant of a tenure or a vesting.

Question 2

When the native title claim was made was the proposed dealing area at that point in time a particular tenure status? Refer to **Part 3** for more detail.

Answer to Question 1	Answer to Question 2	Action
No	N/A	Rely upon your PEPA.
Yes	No	Forward all details of your proposed dealing to Land and Native Title Operations Policy (LNTOP) through your Native Title Contact Officer (NTCO). Remember to first enter your research into QNTIME.
Yes	Unsure	Forward all details of your proposed dealing to LNTOP through your NTCO. Remember to first enter your research into QNTIME.
Yes	Yes	Forward all details of your proposed dealing to LNTOP through your NTCO. Remember to first enter your research into QNTIME.

Part 3: Is the proposed dealing area currently covered by a native title claim?

The first question you need to answer is -

Is the proposed dealing area currently covered by a native title claim?

What is a native title claim for the purposes of this Module?

This term refers both to a registered native title claim and an unregistered native title claim. It does not include a determined native title claim (ie. there has been a native title determination for the claim).

If there is a determination of native title over your proposed dealing area, go back and consider **Module AB**. The extinguishing effect of any PEPAs over that area may have already been disregarded and therefore native title exists or the Court may have determined that native title does not exist.

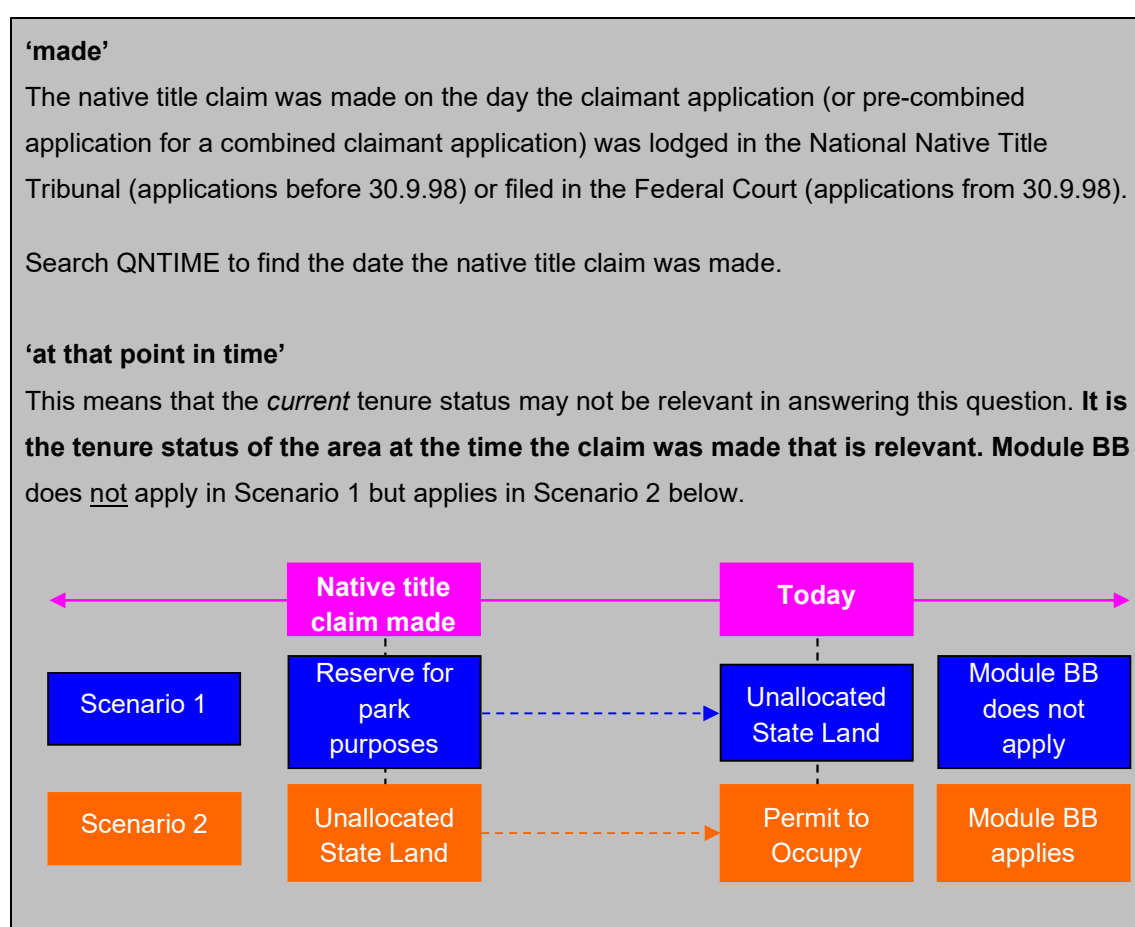
How do I find out if there is a native title claim or determination over the proposed dealing area?

Search **QNTIME** to see if there is a native title claim or determination covering your proposed dealing area.

Part 4: What was the proposed dealing area when the native title claim was made?

The second question you may need to answer is -

When the native title claim was made, was the proposed dealing area at that point in time ...



- a **pastoral lease** (s47) held by -
 - (a) the native title claimants (ie. the applicants on the claimant application) or other persons claiming to hold native title with those native title claimants
 - (b) a trustee, on trust for any of the above persons
 - (c) a company whose only shareholders are any of those persons?

Or

- a **freehold estate**, a **lease** or the area is **vested** in any person under legislation that makes provision for such grants or vestings to, in or for the **benefit of Aboriginal peoples and Torres Strait Islanders** or the area is held expressly for the benefit of, or is **held on trust**, or **reserved**, expressly for the **benefit of Aboriginal peoples or Torres Strait Islanders** (s47A)?

Examples

- a freehold estate granted under the *Aboriginal Land Act 1991* or the *Torres Strait Islander Land Act 1991*
- the former Aurukun Shire lease land and former Mornington Island Shire lease land under the *Local Government (Aboriginal Lands) Act 1978*
- a deed of grant in trust for Aboriginal purposes or Torres Strait Islander purposes under the *Land Act 1962* or the *Land Act 1994*
- an Aboriginal reserve under the *Land Act 1962* or a reserve for Aboriginal or Torres Strait Islander purposes under the *Land Act 1994*.

Note

Section 47A does not apply to an Aboriginal or Torres Strait Islander reserve having more than one purpose and which is joined by the word 'and' (ie. Aboriginal **and** recreation purposes). It cannot be assessed as granted solely or primarily for that Aboriginal or Torres Strait Islander purpose alone unless the other purpose(s) can be shown to be ancillary to the Aboriginal or Torres Strait Islander purpose.

Or

- **unallocated State land** (s47B)?

'unallocated State land' for the purposes of section 47B means that the

proposed dealing area was **not** covered by a freehold estate, lease, reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth or the State, under which the whole or part of the land or waters in the area is to be used for public purposes or for a particular purpose.

Examples of where Module BB cannot apply

The whole of the proposed dealing area was covered by, for example -

- a reserve under land legislation
- a marine park
- an occupation licence
- a permit to occupy
- a mining lease

Or

- **Not** subject to a **resumption** process (s47B)?

‘subject to a resumption process’

An area is subject to a resumption process when the native title claim was made if:

- (a) all interests (including native title interests) last existing in relation to the area before the native title claim was made were acquired, resumed or revoked by, or surrendered to, the Crown in any capacity; and
- (b) when that happened, the Crown had a *bona fide* intention of using the area for public purposes or for a particular purpose; and
- (c) the Crown still had a *bona fide* intention of that kind in relation to the area at the time the native title claim was made.

Example

The Department of Environment and Resource Management wishes to establish a museum of mapping and surveying on Lot 1 and Lot 2 on SP123658. Lot 1 is freehold land and Lot 2 is covered by a permit to occupy for grazing purposes.

In 2003, to get the museum project underway, the then department compulsorily acquired -

- the freehold interest over Lot 1 under the *Acquisition of Land Act 1967*. Lot 1 reverted to unallocated State land; and
- native title rights and interests over Lot 2 and revoked the permit to occupy. Lot 2 reverted to unallocated State land.

Since the acquisition in 2003, the department has continued with its planning and design of the museum and has gone through a tendering process for its construction. Construction of the museum is scheduled to commence on 1 February 2011.

A native title claim was made over Lot 1 and Lot 2 in 2004.

Module BB would not apply in this case as Lot 1 and Lot 2 were subject to a resumption process (which met the above definition) at the relevant times.

Or

- not held as a **Park** area (s47C)

Section 47C operates to disregard prior extinguishment over park areas where there is an agreement between the native title party and State or Commonwealth (whoever is responsible for the Park area). This agreement can disregard extinguishment of public works within the Park area.

A Park area means an area (such as a national, State or Territory park):

- a) that is set aside; or
- b) over which an interest is granted or vested;

by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation,

Part 5: Who makes the decision whether this module applies?

There are no actual delegations to make decisions in relation to native title under the Native Title Work Procedures, the NTA or the *Native Title (Queensland) Act 1993* (NTQA).

The native title assessment process is just one part of your decision-making process when making a decision under legislation, eg. a decision to grant a lease. By carrying out a native title assessment, you are ensuring your decision complies with the NTA. **However, please ensure that, where requested in the table in Part 1 of this Module, you provide all details to LNTOP through your NTCO.**

If you are unsure how to proceed, your NTCO must be contacted for advice. If the NTCO is unsure how to proceed, LNTOP must be contacted for advice.