

Queensland Government Native Title Work Procedures

Module CA: Public Works

Commonwealth Native Title Act 1993: s.23B(7), s.253 & s.251D

Native Title Act 1993 (Qld): s.21

August 2017

Version history

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Introduction

Under s.253 of the *Native Title Act 1993* (NTA), there are two essential parts to the definition of public work. These are described in Parts A and B below. A public work will come under either of these parts.

Module CA sets out the parameters on when and how native title may be extinguished by a previous exclusive possession act which includes a valid public work. An assessment under this module requires the compilation of evidence to satisfy the requirements and this evidence must be recorded in and attached to the Module CA Evidence Template spreadsheet.

Annexed to this module is the template and a completed sample template.

Part A

Any of the following that is constructed or established by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities:

- (a) building, or other structure (including a memorial), that is a fixture
- (b) road, railway or bridge
- (c) well, or bore, for obtaining water
- (d) any major earthworks.

or

Part B

A building that is constructed with the authority of the Crown other than on a lease.

Important: The work does not need to still be in existence to be a valid public work.

Section 251D area

Section 251D (s.251D) of the NTA states that a public work will also include any adjacent land or waters, the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work.

In effect, applying s.251D to a public work assessment typically expands the footprint of the public work.

Important: If the proposed dealing area is within a determination that native title continues to exist, you must refer your Module CA Evidence Template to Aboriginal and Torres Strait Islander Land Services via your Native Title Contact Officer to advise on whether Module CA applies.

Effect on native title

Where all of the requirements under Module CA can be met, then the effect on any native title rights and interests of a valid public work, including any s.251D area for that work, will be the extinguishment of native title.

The extinguishment is taken to have occurred at the commencement of the construction or establishment of the public work.

Extinguishment is permanent. This means that the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect. E.g. if a public work constructed over an area of land was later removed, the native title rights and interests cannot revive.

Requirement 1: Categories of public works

Whilst the wording of the categories of public works may seem straight forward, there are some general principles that need to be considered before concluding that the work falls within one of the five categories.

The table below sets out the categories, definitions /explanations, and examples of what is and what is not a public work.

Table 1 - Categories of public works

Categories of public work	Definition/explanation	Examples of what is a public work	Examples of what is not a public work
Building, or other structure (including a memorial) that is a fixture.	<p>The key is that the building or other structure, etc. must be a fixture to the land or waters.</p> <p>Fixture -</p> <p>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.</p> <p>The general rule in relation to fixtures is that where something is affixed to the land, even slightly, it is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue as personal property rather than real property.</p>	<ul style="list-style-type: none"> • Court House • Playground swings • Bridge pylons • Water tank concreted to the ground • Demountable building attached to the ground by cementing the stumps to the ground and/or electricity line/sewerage pipes/water pipes are attached to the demountable. 	<ul style="list-style-type: none"> • Demountable building that sits on the ground and isn't attached to the ground. E.g. a ranger's hut. • Building, or other structure etc constructed on post 23 December 1996 on a Deed of Grant in Trust for the benefit of Aboriginal people or Torres Strait Islanders. • Building, or other structure etc constructed on a lease. • Building, or other structure etc constructed on a post 23 December 1996 reservation.
<p>Constructed road, railway or bridge.</p> <p>Important: Dedicated roads</p>	<p>Self-explanatory, however, some points to note:</p> <ul style="list-style-type: none"> • Road doesn't have to be a major earthwork but it does 	<ul style="list-style-type: none"> • Constructed road • Bitumen road • Formed road 	<ul style="list-style-type: none"> • 4WD track • Dirt road

Categories of public work	Definition/explanation	Examples of what is a public work	Examples of what is not a public work
<p>(not necessarily constructed) are dealt with under Module CB.</p> <p>Consider this module also if you're proposed dealing area is a road.</p>	<p>have to be constructed or formed.</p> <ul style="list-style-type: none"> Construction has to be more than say a 4WD track. 	<ul style="list-style-type: none"> Constructed railway Constructed bridge. 	
<p>Well, or bore, for obtaining water.</p>	<p>Self-explanatory, however, there must have been some form of construction.</p> <p>Bore definition: A deep hole of small diameter bored to the aquifer of an artesian basin, through which water rises under hydrostatic pressure.</p>	<ul style="list-style-type: none"> Constructed well Turkey's nest Artesian bore Constructed bore. 	<ul style="list-style-type: none"> Naturally formed well, or bore, for obtaining water.
<p>Any major earthworks.</p>	<p>Major earthworks definition: Earthworks (other than in the course of mining) 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 the land.</p>	<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) Road which has been constructed through cutting and filling of the land. 	<ul style="list-style-type: none"> Grading the land Grading of an area to assist with the natural flow of water to create a dam, however, it may be a s.251D area 4WD track A major earthwork constructed on a post 23 December 1996 reservation. <p>Note: Mining is excluded from the definition of a public work. Mining includes a quarry where the quarrying goes beyond the natural surface of the land.</p> <p>Therefore, where the quarrying goes beyond the natural</p>

Categories of public work	Definition/explanation	Examples of what is a public work	Examples of what is not a public work
			<p>surface of the land, it is excluded from the definition of a major earthwork. However, quarrying may form part of a s.251D area, e.g. gravel pits adjacent to the road area required for the construction of a road.</p>
<p>Building that is constructed, other than on a lease, with the authority of the State or Commonwealth.</p>	<p>Explanation: This part of the definition of public work implies that the building can be a private one.</p> <p>In applying this Part B of the definition, there are two key differences with the Part A definition involving a building:</p> <ol style="list-style-type: none"> 1. Does not have to be constructed by the State or Commonwealth but rather with the authority of the State or Commonwealth. However, the building must not be on lease land 2. Does not have to be a fixture. So temporary buildings, e.g. dongas, could be a public work. 	<ul style="list-style-type: none"> • Construction of a toilet block by the trustee of a reserve for recreation purposes • Construction of an environmental educational centre on a reserve for education purposes by Education Queensland • Construction of a building by a private trustee on a reserve and which doesn't require a lease. 	<ul style="list-style-type: none"> • Clubhouse constructed on a reserve for recreation by the local hockey club under a trustee lease granted under the <i>Land Act 1994</i>. • Construction of onsite offices as part of a mining operation by a mining company under a mining lease granted under the <i>Mineral Resources Act 1989</i>. <p>Homestead constructed by a lessee on a pastoral lease granted under the <i>Land Act 1994</i>.</p> <ul style="list-style-type: none"> • A retaining wall constructed by a private person on their riverside property under authority of the <i>Harbours Act 1955</i>. A retaining

Categories of public work	Definition/explanation	Examples of what is a public work	Examples of what is not a public work
			wall is not a building.

If the work you are assessing falls within the five categories of a public work proceed to Requirement 2.

If the work you are assessing does not fit into the five categories of a public work then Module CA does not apply. Go to **Module CB**.

Requirement 2: The work was constructed/established on or before 23 December 1996 or after 24 December 1996 on a reserve

To comply with this requirement, the work assessed typically needs to have been constructed/established on or before 23 December 1996.

The exception to this rule is when the work was constructed/established post 1996 on a reservation created on or before 23 December 1996. If you fall into this scenario then the requirements of Module J need to be satisfied as well before progressing to the next requirement.

If this requirement is satisfied go to requirement 3, if not then this Module doesn't apply, go to Module CB.

Requirement 3: Valid work

A public work is valid, depends on:

1. When was the work established or constructed.
2. Whether there was a power or authority under legislation that would have allowed the works to be carried out.

Table 2 - Valid in relation to native title

Constructed/established	Validation
Pre-1 January 1994	Work is valid from a native title perspective.
Between 1 January 1994 and 23 December 1996	Work will be validated if a part or whole of the proposed dealing area was at some point prior to 1 January 1994, covered by one of the following: <ol style="list-style-type: none"> a) freehold estate b) lease (other than a mining lease) c) valid public work.
Post-23 December 1996	Valid only if the future act provisions were complied with for the construction or establishment of the public work i.e. Module J (section 24JA of the NTA). Public work in this period will require additional compliance check against Module J of the Native Title Work Procedures. This includes ensuring the work was constructed on an area that was subject to a reservation created pre 23 December 1996 and that reservation was

	created for a particular purpose. For example, Land Act 1962 reserves, National Parks, Timber Reserves, leases etc.
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Power and authority for the work

There needs to be a power that provided the authority for the work to be established or constructed.

That authority may be derived from a number of potential sources, such as legislation itself, an Order in Council published under and in accordance with a specific piece of legislation, or possibly a tenure.

The table below provides some examples. You will need to assess the relevant evidence carefully as there may be additional evidence required to satisfy this requirement.

Table 3 - Authority examples

Category of public work	Example of authority
Major earthwork (reclamation).	Order in Council published in the Qld Government Gazettes.
Construction of building by trustee of a Reserve for Recreation purposes.	Reserve and development approval.

If Requirement 3 is satisfied, go to Requirement 4.

If Requirement 3 is not satisfied, Module CA does not apply. Go to **Module CB**.

Requirement 4: By or on behalf of or with the authority of the State or Commonwealth, local government body, or another statutory authority of the State or Commonwealth

The public work must have been constructed or established by or on behalf of:

- the State or the Commonwealth in any of its capacities
- a local government body
- another statutory authority of the State or the Commonwealth.

When the term on behalf of is used, it means that the work can still be a public work even if 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.

Private works

Generally, private works are not public works for the purposes of Module CA. The exception to this rule is where the work is 'a building that is constructed, other than on a lease, with the authority of the State or Commonwealth'.

Example

The State has provided funding through a grant to a private community group for the construction of a community facility, being a clubhouse. While the work was not done 'on behalf of' the State, if the clubhouse was constructed on a reserve for recreation purpose and:

- the construction had the authority of the State
- a lease was not required in order to allow the construction to proceed,

then it would be a public work.

Statutory authority

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

A 'statutory authority', means 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. Please also refer to the helpful tips at the end of this requirement.

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.

The following Table sets out some examples of entities that are considered to be statutory authorities.

Note: This is not exhaustive.

Table 4 - Example of entities

Name	Legislation established/constituted under
Government owned corporations (GOCs). Check the GOC list on the Department of Treasury website. Remember you need to establish if particular entity was a GOC at the time the tenure was granted or vesting occurred	Various
Local government bodies	<i>Local Government Act 1936 (LGA)</i>
Emerald-Peak Downs Saleyards Board	<i>Local Government Act 1936 (LGA); Order in Council date 7 October 1967</i>
South West Electricity Board	<i>Electricity Act 1976</i>
Queensland Grain Handling Authority	<i>Queensland Grain Handling Act 1983</i>
Cairns Harbour Board	<i>Harbours Act 1955</i>
Gladstone Area Water Board	<i>Water Act 2000 Gladstone Area Water Board Act 1984</i>
Gold Coast Waterways Authority	<i>Gold Coast Waterways Authority Act 1979</i>
Public Curator or Public Trustee	<i>Public Curator Act 1915; or Public Trustee Act 1978</i>
Rural Fires Board	<i>Rural Fires Act 1946</i>
Queensland Ambulance Transport Brigade (QATB)	<i>Ambulance Services Act 1967</i>

If Requirement 4 is satisfied, Module CA applies.

If Requirement 4 is not satisfied, Module CA does not apply. Go to **Module CB**.

Finalising your Assessment

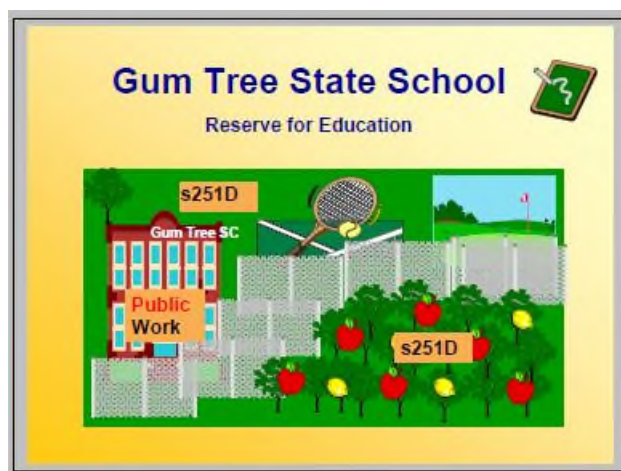
If all the requirements for Module CA are met consider if section 251D areas will apply to your assessment. If section 251D areas are to be incorporated please see next section.

If not you can finalise your Native Title Assessment here. Ensure all necessary evidence is recorded in and attached to the **Module CA Evidence Template**.

Section 251D Areas

Establishing whether a public work would include any adjacent land or waters the use of which was or is necessary for, or incidental to, the construction, establishment or operation of the work requires careful consideration.

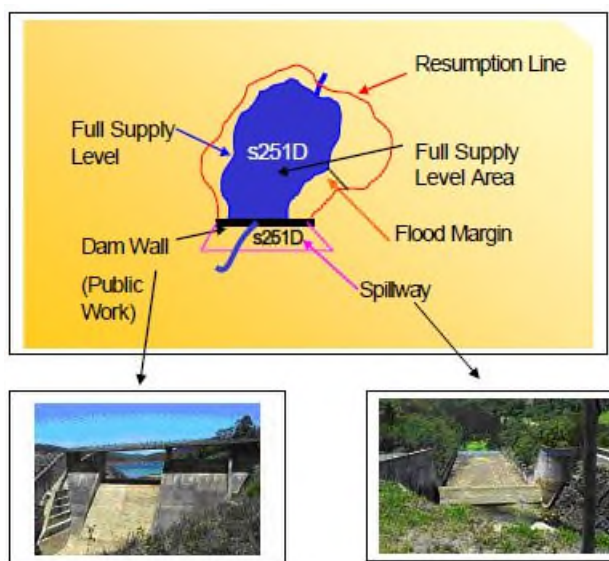
Whilst s.251D allows for the expansion of the footprint of a public work, extreme care must be taken when applying it and any evidence being relied on must strictly relate to the actual public work.



The public work is the school building.

The land adjacent to the school building and which is necessary or incidental to the operation of the school includes the areas used by the school, i.e. the tennis courts, the school golf course, the playground area where students eat lunch and play, and the environmental area which is used as part of the school's agricultural studies.

Generally, any s.251D area must be 'commensurate' with, or at or around the same time as, the public work being established or constructed. E.g. a dam was constructed in 1975, with the actual spillway being the public work. If the full supply level was raised 10 years later, that could not be said to be at or around the time the public work (the spillway) was constructed. In order for the new full supply level to be a s.251D



area, a 'new' public work would need to be identified at or around the same time as the full supply level was raised.

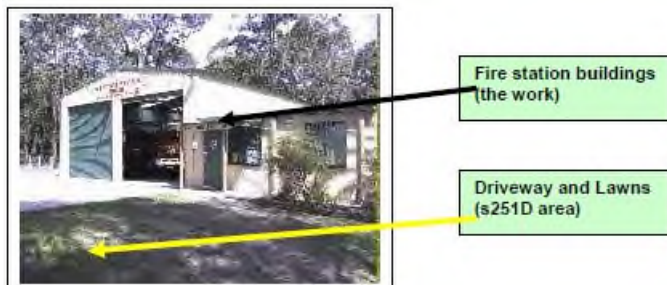
The table below gives examples of s.251D areas.

Table 5 - S.251D Examples

Type of Work	Example 'public work' area	Example of s.251D area
A building, or other structure (including a memorial) that is a fixture.	Telecommunications tower.	An access track to a telecommunication tower. There is no limit to the length of the track.
	Construction of the school building on a reserve for education purposes.	Playground, sports area and the environmental area for agricultural studies as they are adjacent to the school building and are necessary for the operation of the school.
A road, railway or bridge.		Adjacent land used to store bridge building materials, park heavy earthmoving equipment, erect site office offices. Please also consider Module CB if you're proposed dealing area is a road.
A well, or bore, for obtaining water.	Bore.	The Federal Court held that an area of 0.10 hectares was the appropriate area 'necessary or incidental to' each water bore within the Ngadju claim area. (<i>Graham on behalf of the Ngadju People v Western Australia</i> . [2014] FCA 700; 3 July 2014).
Any major earthworks.		Safety zones
A building that is constructed, other than on a lease, with the authority of the State or Commonwealth.	Tennis shed on a reserve.	Private trustee constructed work. Tennis court area is 251D.

The following are examples of different types of public works. Some of the examples also show the s.251D area.

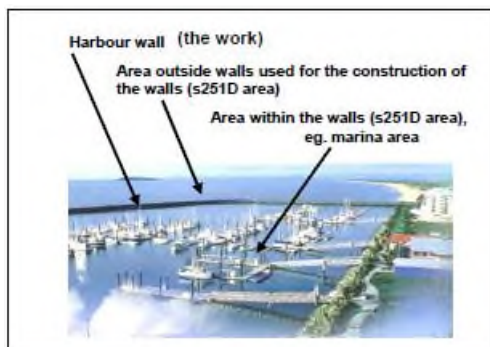
Fire station:



The fire station is the public work.

The s.251D area includes the curtilage area, driveway, and surrounding lawns of the fire station.

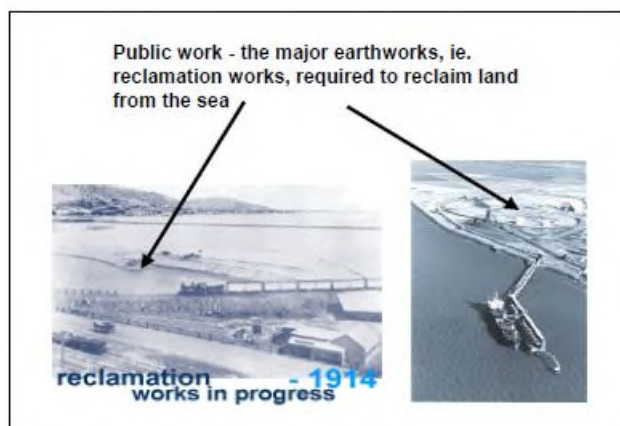
Artificial harbour/marina - harbour wall:



The harbour wall is the public work.

The s.251D area is the area within the harbour wall (e.g. a marina area, dredged area, etc.) and the area outside the walls which were used in the construction phases of the wall.

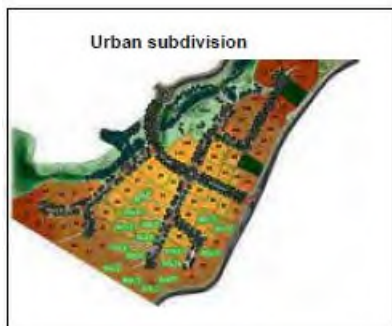
Major earthworks:



The public works are the reclamation works required to reclaim land from the sea.

The s.251D would include dredging areas and associated operational areas for dredging works.

Developed urban allotments:



The development of urban allotments by clearing trees, construction of drainage, and the connection of all applicable services, e.g. water, power, and sewerage to the of themselves do not constitute a public work over the whole area.

Working out the s.251D area

Where the public work is surrounded by a fence.

If the public work is surrounded by a fence that is often a good guide as to the s.251D area. However, this is only a rule of thumb. There are two potential scenarios where this would not be the case. There could be an area outside the fence that may have been necessary or incidental to the operation or have been used for the construction of the public work. On the other hand, there could be an area inside the fence which was not necessary or incidental to the operation or was not used for the construction of the public work.

If you think you have sufficient evidence to include any adjacent land or waters the use of which was or is necessary for, or incidental to, the construction, establishment or operation of the public work you can finalise your Native Title Assessment here. Ensure all necessary evidence is recorded in and attached to the **Module CA Evidence Template**.