

# Queensland Government Native Title Work Procedures

**Module H: Management or Regulation of Surface and Subterranean Water, Living Aquatic Resources and Airspace**

*Commonwealth Native Title Act 1993: s.24HA*

December 2021

## Version history

Version	Comments	Date published
1		August 2017
2	Narrier Full Court Decision re interpretation of word "legislation" in s.24HA(2)	February 2018
3	Restructure to align with the other work procedures	December 2021

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

© State of Queensland, 2021

The Queensland Government supports and encourages the dissemination and exchange of its information. The copyright in this publication is licensed under a Creative Commons Attribution 4.0 International (CC BY 4.0) licence.



Under this licence you are free, without having to seek our permission, to use this publication in accordance with the licence terms. You must keep intact the copyright notice and attribute the State of Queensland as the source of the publication.

Note: Some content in this publication may have different licence terms as indicated.

For more information on this licence, visit <https://creativecommons.org/licenses/by/4.0/>.

The information contained herein is subject to change without notice. The Queensland Government shall not be liable for technical or other errors or omissions contained herein. The reader/user accepts all risks and responsibility for losses, damages, costs and other consequences resulting directly or indirectly from using this information.

### Interpreter statement:



The Queensland Government is committed to providing accessible services to Queenslanders from all culturally and linguistically diverse backgrounds. If you have difficulty in understanding this document, you can contact us within Australia on 13QGOV (13 74 68) and we will arrange an interpreter to effectively communicate the report to you.

## Table of contents

<b>Version history</b> .....	
<b>Introduction</b> .....	<b>1</b>
<b>Application of module</b> .....	<b>1</b>
<b>Effect on Native Title</b> .....	<b>2</b>
<b>Compensation</b> .....	<b>2</b>
<b>Part A: Excluded Dealings</b> .....	<b>2</b>
<b>Part B: Legislative Acts</b> .....	<b>3</b>
Is my proposed future act the making, amending or repealing of legislation - section 24HA(1)? .....	3
Do procedural rights apply under section 24HA(1)? .....	3
<b>Part C. Granting Leases, Licences, Permits or Authorities</b> .....	<b>3</b>
Is my proposed future act the grant of a permit, lease, licence or authority - section 24HA(2)? .....	3
Do procedural rights apply under section 24HA(2)? .....	3
<b>Part D: Definitions</b> .....	<b>4</b>
What is legislation? .....	4
What is a grant? .....	4
What is 'relates to'? .....	4
What is management or regulation? .....	5
What is water? .....	5
What is living aquatic resources? .....	6
What is airspace? .....	6
<b>Finalising your Assessment</b> .....	<b>7</b>

## Introduction

This Module H native title work procedure will help you to assess whether your future act is caught by section 24HA of the *Native Title Act 1993* (NTA).

Section 24HA focuses on future acts that involve legislation that relates to the management or regulation of:

- surface and subterranean water
- living aquatic resources
- airspace.

## Application of module

Your future act falls within section 24HA, if it is either:

- the making, amending or repealing of legislation that relates to the management or regulation of surface or subterranean water, living aquatic resources or airspace - section **24HA(1)**; or
- the grant of a new permit, lease, licence or authority that is granted under legislation that relates to the management or regulation of surface or subterranean water, living aquatic resources or airspace - section **24HA(2)**.

To assess your proposed dealing under the Module H work procedure you should:

- A. Check whether it is an excluded dealing. If your proposed dealing is not excluded move on to Part B.
- B. Assess section 24HA(1) criteria 1 and 2. If your dealing does not meet Part B move on to Part C.
- C. Assess section 24HA(2) criteria 1 and 2. Decide whether your proposed dealing meets Part C.

The definitions in part D of this work procedure will help you to decide whether your future act meets the assessment criteria. If the assessment criteria are met for either section 24HA(1) or section 24HA(2) this module applies. If the criteria are not met, move on in the native title assessment pathway.

### Important

If your future act is the **renewal, re-grant, remake or extension of the term of a valid permit, lease, licence or authority** that was originally granted:

- on or before 23 December 1996
- after 23 December 1996 and before 30 September 1998 and would have been caught by section 24HA (if section 24HA had been included in the original NTA) <sup>1</sup>
- under s24HA of the NTA,

then it may be able to be renewed, re-granted, remade or the term extended under section 24IC of the NTA.

<sup>1</sup> Under the transitional provisions of the NTA, future acts that would have fallen within section 24HA but took place between 23.12.96 and 30.9.98, are considered to have been done under s24HA (as if s24HA was included in the original NTA) provided they were considered permissible future acts under the original NTA.

However, you must satisfy all the requirements set down in Module IC of this Chapter before proceeding with the proposed future act. Proceed to Module IC to review and check requirements.

## 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 H if there is a successful claim for compensation. Compensation is payable by the State where the act is attributable to the State.

## Part A: Excluded Dealings

Only dealings that relate to the management and regulation of water fall under Module H. The Department of Resources considers the definition of water for the purposes of Module H only refers to water as a 'resource', not waters as in an area such as a harbour, river, tidal inlet or the area between high and low water mark etc.

The clarification of this definition means that dealings that relate to granting access to waters, i.e. the water area, do not fall under Module H. The below dealings have been identified as being excluded from Module H:

Legislation	Excluded dealings
<b><i>Land Act 1994</i></b>	<ul style="list-style-type: none"><li>• Grant of a lease below high-water mark</li><li>• Issue of a permit to occupy below high-water mark</li><li>• Amendment of a term lease to include an additional area below high-water mark</li><li>• Issue of a permit to occupy for pump site purposes</li></ul>
<b><i>Water Act 2000</i></b>	<ul style="list-style-type: none"><li>• Grant of a quarry material allocation notice</li><li>• Grant of a riverine protection permit</li></ul>
<b><i>Planning Act 2016</i></b>	<ul style="list-style-type: none"><li>• Grant of a development approval for tidal works</li></ul>
<b><i>Transport Operations (Marine Safety) Act 1994</i></b>	<ul style="list-style-type: none"><li>• Grant of a buoy mooring authority</li></ul>

## Part B: Legislative Acts

### Is my proposed future act the making, amending or repealing of legislation - section 24HA(1)?

For your future act to be a Legislative Act under section 24HA(1) it must be:

1. The making or amending or repealing of legislation
- and**
2. legislation that relates to the management or regulation of:
    - surface or subterranean water
    - living aquatic resources
    - airspace

If your future act, satisfies **BOTH** of the above criteria then it is a legislative act under section **24HA(1)** of the NTA and will be valid in relation to native title. Finalise your assessment using Annexure 7.1.

### Do procedural rights apply under section 24HA(1)?

There are no procedural rights to be provided to the native title parties under section 24HA(1).

## Part C. Granting Leases, Licences, Permits or Authorities

### Is my proposed future act the grant of a permit, lease, licence or authority - section 24HA(2)?

For your future act to be caught by section **24HA(2)** it must be:

1. the grant of a permit, lease, licence or authority
- and**
2. done under legislation that relates to the management or regulation of:
    - surface or subterranean water
    - living aquatic resources
    - airspace

### Do procedural rights apply under section 24HA(2)?

Yes, you must provide notification and an opportunity to comment to the relevant native title parties, in accordance with **Annexure 7.2 and Annexure 7.3**. You should finalise your assessment using **Annexure 7.1**.

## Part D: Definitions

The below to definitions and examples will help you to interpret the assessment criteria and decide if your future act dealing is captured by section 24HA(1) or section 24HA(2).

### What is legislation?

The term “legislation” includes the following:

- Acts, eg. *Fisheries Act 1994*; and
  - Subordinate Legislation, ie. Regulations, statutory instruments. For example, the *Marine Parks Regulation 2006* made under the empowering Act, ie. *Marine Parks Act 2004*.
1. **making of legislation** - the enactment of a Bill as an Act OR the making by the Governor in Council of subordinate legislation.
  2. **amending of legislation** - changes are made to existing legislation by the enactment of an amending Bill OR the amending by the Governor in Council of subordinate legislation.
  3. **repealing of legislation** - existing legislation ceases to have effect.

#### Example of making legislation that relates to...

The making of new water legislation such as the *Water Act 2000*. The *Water Act 2000* is legislation that relates to the management or regulation of water.

### What is a grant?

The use of the word '**grant**' means that you must be granting a new interest to the applicant. For example, the grant of a fishing licence to an applicant that has never held a fishing licence, is the grant of a new interest. In contrast, amending a fishing licence to restrict the area in which the permit holder can fish, is not the grant of a new interest as it does not create additional rights and is simply an amendment of the terms. Such an amendment would not constitute a future act.

### What is 'relates to'?

The use of the expression **relates to** in the point above does not mean that the legislation must state that it is about the management or regulation of water, living aquatic resources or airspace. If the effect of the legislation (including a single provision in legislation) is the management or regulation of water, living aquatic resources or airspace, then the legislation relates to the management or regulation of water, living aquatic resources or airspace.

#### Example of a grant of a permit under legislation that relates to...

The grant of a permit to allow a tourist program in the waters of the marine park (eg. snorkelling, fish feeding, glass-bottom boat viewing, whale watching, etc), under the *Marine Parks Regulation 2006*.

### **Reasoning**

The *Marine Parks Act 2004* and the *Marine Parks Regulation 2006* (made under that Act) are legislation that relate to the setting apart of tidal lands and waters as marine parks and the management of those areas. The grant of a marine park permit for a tourist program within the waters of the marine park, is in effect granting access to the water of the marine park. Therefore, the permit is caught by **s24HA(2)**.

## **What is management or regulation?**

The Macquarie Dictionary defines:

- Management as the act or manner of managing; handling, direction or control. Manage is defined as including to take charge or care of and to handle, direct, govern or control in action or use.
- Regulation as a rule or order, as for conduct, prescribed by authority; a governing direction or law; the act of regulating. "Regulate" is defined as including to control or direct by rule, principle or method; to adjust to some standard or requirement.

### **Example**

The *Water Act 2000* is legislation that relates to the management or regulation of water. For example, one of its purposes is to advance sustainable management and efficient use of water and other resources by establishing a system for the planning, allocation and use of water. Another of its purposes is to provide for a regulatory framework to provide water in Queensland. Therefore, the *Water Act 2000* is controlling and directing how the State's water resources should be used.

## **What is water?**

### **Water means water in all its forms -**

- liquid
- ice
- Steam.<sup>2</sup>

### **The water can either be -**

- surface water, ie. water on the earth's surface such as rivers, sea, ocean, lakes, streams, creeks
- subterranean water, ie. water existing below the surface of the earth such as bore water, artesian water.

### **Management or Regulation of Water**

Legislation relating to the management or regulation of water is legislation that directs and/controls the use of water as resource.

---

<sup>2</sup> Explanatory Memorandum to the NTA, p. 117



Section 24HA includes the management or regulation of water, including **taking water**.

It **does not** include granting access to water. For example, a lease over land below the high water mark under the *Land Act 1994* does not meet Module H.

#### **Example – taking water**

The *Water Act 2000* is legislation that relates to the management of water. A permit may be granted under the *Water Act 2000* that authorises the taking of water from a watercourse. Therefore, this permit is caught by section 24HA(2).

## **What is living aquatic resources?**

The term living aquatic resources includes fish, marine mammals, shellfish, coral, aquatic plants, etc.<sup>3</sup> Aquatic plants could include seagrasses, algae and mangroves.

As the term “living” is used, the grant of a permit to allow the processing or selling of fish that have already been caught and killed, for example, is not captured by this term.

#### **Management or Regulation of Living Aquatic Resources**

Legislation relating to the management or regulation of living aquatic resources is legislation that directs and/ controls the use of living aquatic resources.

#### **Example**

The *Fisheries Act 1994* is legislation relating to the management of living aquatic resources in that it covers the management of fisheries resources, fish habitats and aquaculture activities. For example, a licence granted under the *Fisheries Act 1994* for commercial fishing will be caught by section 24HA(2).

## **What is airspace?**

The Explanatory Memorandum to the NTA describes airspace as -

- having its ordinary meaning
- as the atmosphere above the land or waters of Queensland
- the air available for aircraft to fly in.<sup>4</sup>

As the definition of airspace is very broad, it can be difficult to ascertain whether the use of airspace is actually an act that affects native title, i.e., a future act. For the use of airspace to be a future act it must

<sup>3</sup> Explanatory memorandum to the NTA, P.117

<sup>4</sup> Explanatory Memorandum to the NTA, P.117

affect the use or enjoyment of land or water by native title holders/claimants over which the airspace is located.

### **Example**

The Land Act 1994 is in part, legislation relating to the management or regulation of airspace in that it covers non-freehold land which includes layers and strata above and below the surface of the land. For example, the construction of a bridge over a creek, where the footings will be located outside the creek area and the bridge is fully suspended over the airspace above the creek, requires a permit to be granted under the Land Act 1994 for the occupation of that airspace. This permit would be caught by section 24HA(2).

## **Finalising your Assessment**

If all the requirements of either section 24HA(1) or section 24HA(2) of Module H are met, finalise your Native Title Assessment using **Annexure 7.1**.

If your future act has been assessed under section 24HA(2) you will need to provide notification and an opportunity to comment procedural rights to the relevant native title parties and consider any comments or submissions received. The following annexures provide information and templates on the assessment and notification process for a proposed dealing:

Annexure 7.2

Annexure 7.3

Annexure 8.4

Annexure 8.5