

Queensland Government Native Title Work Procedures

Module IB: Pre-existing right based acts (PERBAs)

Commonwealth Native Title Act 1993: s.24IB and s.24ID

August 2017

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Introduction

Module IB is based on s.24IB of the *Native Title Act 1993* (NTA) which is about proposed dealings known as pre-existing right based acts (PERBAs).

Application of module

Your proposed dealing will be caught by Module IB if it takes place either:

1. In exercise of a **legally enforceable right** created by an act done on or before 23 December 1996 that is valid (s.24IB(a) (NTA)); or
2. In good faith in giving effect to, or otherwise because of, an **offer, commitment, arrangement or undertaking** made or given in good faith on or before 23 December 1996, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made (s.24IB(b) NTA).

Important: Module IB captures proposed future acts, however, there may be a limited set of dealings that were done in the period 24 December 1996 to 29 September 1998 (the transitional provisions) or from 30 September 1998 onwards that may have satisfied the requirements under Module IB. E.g. during that period a grant of a lease was made in 1999 and now the lessee is making an application to convert the lease to freehold. If you think your proposed dealing falls within this limited set of dealings, Module IB may apply and you must refer all details to Aboriginal and Torres Strait Islander Land Services (ATSILS) via your Native Title Contact Officer for advice.

Table 1 - Effect on native title and procedural rights

Type of PERBA	Example	Effect on native title	Procedural rights
Grant of a freehold estate	Deed of Grant	Extinguishment	Notification and opportunity to comment require notification form
Conferral of a right of exclusive possession (other than the grant of a freehold estate)	Certain leases	Extinguishment	Notification and opportunity to comment require notification form
Any other dealing	Public work, permit to occupy	Non-extinguishment principle	No procedural rights

Compensation

Compensation for the effect of the dealing on native title rights and interests is payable under Module IB if there is a successful claim for compensation. Compensation is payable by the State where the act is attributable to the State, unless a law of the State provides that another person is liable to pay the compensation.

Decision on whether this module applies

If you think Module IB applies, you must refer the matter and all supporting evidence to ATSILS through your Native Title Contact Officer.

Requirement 1: Proposed dealing must not be listed in the exclusions table

A proposed dealing will not be a PERBA if it is listed in the Requirement 1 Exclusions table.

Table 2 - Requirement 1 Exclusions

	Excluded proposed dealings
1	The proposed dealing is a grant to the State, or a legally enforceable right in favour of the State, or is an offer, commitment, arrangement, or undertaking made to the State. However, see proposed dealings between the State and Government owned corporations, statutory authorities of the Crown, the Commonwealth, or local authorities below.
2	There is no evidence of a legally enforceable right, or offer, commitment, arrangement, or undertaking on or before 23 December 1996.
3	An offer, commitment, arrangement, or undertaking was made to the broad community and not a specific party.
4	An offer, commitment, arrangement, or undertaking was made to a party on or before 23 December 1996, however, the conditions were not complied with or, if an offer was made, the offer was subsequently withdrawn or it lapsed.
5	An offer, commitment, arrangement, or undertaking was made to a party on or before 23 December 1996, however, a third party wants to take up that offer, commitment, arrangement, or undertaking even though it wasn't made to them or they have not acquired an interest which includes the offer, commitment, arrangement, or undertaking. Also see other third party situations for an offer, commitment, arrangement, or undertaking below.

If your proposed dealing does not fall within the Requirement 1 Exclusions table, go to Requirement 2.

If your proposed dealing is listed in the Requirement 1 Exclusions table, Module IB does not apply. Go to **Module IC**.

Proposed dealings between the State and Government owned corporations, statutory authorities of the Crown, the Commonwealth, or local authorities.

A legally enforceable right, or an offer, commitment, arrangement, or undertaking made between State government departments and agencies is not a PERBA. However, this does not include a legally enforceable right, or an offer, commitment, arrangement, or undertaking between the State and Government owned corporations, statutory authorities of the Crown, the Commonwealth, or local authorities; such proposed dealings do not fall within item 1 of the Requirement 1 Exclusions table.

Other third party situations for an offer, commitment, arrangement, or undertaking.

There have been many situations where an offer, commitment, arrangement, or undertaking has been made with a particular party and before the dealing has been finalised, the party has transferred whatever existing interest they had or there was a change in name or status. In that situation, the third party may be able to rely on the offer, commitment, arrangement, or undertaking.

E.g.: A lessee was made an offer to convert their lease on or before 23 December 1996, however, prior to accepting the offer or before the matter was finalised, they transferred the lease to a third party. In that situation, the third party may be able to rely on the offer, subject to confirmation that the incoming lessee wished to take up the offer as originally made.

These type of dealings do not fall within item 5 of the Requirement 1 Exclusions table. Therefore, Requirement 1 may be satisfied and Module IB may apply.

If in doubt about anything in Requirement 1, refer to ATSILS via your Native Title Contact Officer for advice.

Requirement 2: The legally enforceable right, or offer, commitment, arrangement, or undertaking must have been made on or before 23 December 1996

To satisfy Requirement 2, Criterion 1 must be met. In addition, Criterion 2 or 3 must be met.

Criterion 1 - On or before 23 December 1996

The legally enforceable right or the offer, commitment, arrangement or undertaking must have been made on or before 23 December 1996.

If Criterion 1 is met, go to Criterion 2.

If Criterion 1 is not met, Module IB does not apply. Go to **Module IC**.

Criterion 2 - Legally enforceable right

The proposed dealing must be a legally enforceable right.

A legally enforceable right is where the proposed dealing can proceed based upon a right that a person can enforce at law. Typically, this would be achieved through a right previously created by an act, such as those in the Legally Enforceable Right Examples table below.

Table 3 - Legally enforceable right examples

	Example	Explanation/example
1	A contract	A contract is legally binding.
2	Deed of agreement	A deed of agreement is legally binding.
3	Legislation, e.g. <i>Central Queensland Coal Associates Agreement Act 1968</i>	<p>The <i>Central Queensland Coal Associates Agreement Act 1968</i> authorised an Agreement between the State and Utah Development Company. The Agreement was made in 1969 and has force of law as if it were enacted.</p> <p>Clause 5, Part 8 of the agreement is a legally enforceable right in favour of Utah:</p> <p>Subject to Clauses 2 and 3 of this Part, the State shall, as and when required by the Companies, in respect of any land situated within the Franchise Lands or the catchment area referred to in Part VII of this Agreement which, in the opinion of the Minister is reasonably required for any of the following purposes:</p> <p>(i) town site or town sites; or</p> <p>(ii) cutting and constructing thereon water-races, pipelines, drains, dams, reservoirs, tramways, railways, haulage ways, roads and other improvements required and to be used for the purposes of this Agreement; or</p> <p>(iii) pumping, raising or obtaining water to be used in connection with mining, treatment and transportation of coal and/or by-products and for purposes connected directly or indirectly therewith.</p>

		<p>grant to the Companies such Special Lease or Special Leases or other tenure, license or permit which may be appropriate to the particular purpose, and on such terms and conditions as the Companies shall be lawfully entitled to, having regard to the purpose for which the said land is required. The rent under such lease or license or fee under such permit shall be fixed by the Minister.</p> <p>Important: When assessing possible PERBAs in accordance with this Act, care must be taken to ensure that the proposed dealing area is within the area originally acquired for the purposes of town site or town sites, etc.</p>
4	An offer made under the <i>Land Act 1994</i>	<p>On 1 December 1995, the then Department of Lands made a party an offer to purchase an area of USL subject to certain requirements being met (survey, purchase price and written acceptance of offer).</p> <p>On 30 January 1996, Ms May accepted the offer and advised that survey would be completed within 6 months. The department advised in writing that this time frame was acceptable.</p> <p>Ms May wrote to the department again in June 1996 advising that due to unforeseen circumstances, survey would not be complete until January 1997 and sought an extension of the offer.</p> <p>The department accepted this and provided an extension.</p> <p>On 4 January 1997, the survey plan was lodged and registered, however, the department failed to grant the deed.</p> <p>On 15 April 1997, Ms May enquired as to when she will receive her freehold estate over the proposed dealing area.</p> <p>As Ms May had satisfied all of the departments conditions of offer, she was legally entitled to her freehold tenure.</p>

If Criterion 2 is met, Module IB may apply. You must refer the matter to ATSILS through your Native Title Contact Officer for advice.

If Criterion 2 is not met, go to Criterion 3.

Criterion 3 - Prior offer, commitment, arrangement or undertaking

The proposed dealing must be a prior offer, commitment, arrangement or undertaking.

A prior offer, commitment, arrangement or undertaking is where the proposed dealing can proceed based upon a prior offer, commitment, arrangement or undertaking that was made.

There must:

- (a) Be **written evidence** of the offer, commitment, arrangement or undertaking which was created at or about the time the offer, commitment, arrangement or undertaking was made; and
- (b) Have been **communication** of the offer, commitment, arrangement or undertaking to the relevant person or company.

Written evidence

Written evidence could include (and be a combination of) the examples in the Examples table below:

Table 4 - Written evidence examples

	Written evidence examples
1	Letters by the relevant department, e.g. a letter of offer
2	Contracts or agreements
3	Memorandums of understanding
4	Legislation
5	Actions evidenced in writing including expenditure taken by the relevant department in order to give effect to an offer, commitment, arrangement or undertaking
6	Aerial photographs with overlays on photo
7	Reports to Parliament, Cabinet Submissions and Decisions
8	Maps, plans, and planning documents
9	Telephone attendance notes

Table 5 - Prior offer, commitment, arrangement or undertaking examples

Evidence	Explanation	Example
An offer	An offer is an expression by one person, group, or agent on their behalf, made to another person, of their willingness to be bound to a contract with that other person on certain terms.	The State makes a written offer to an applicant that it will grant a lease subject to certain conditions.
A commitment	A commitment is that to which one has committed or pledged oneself. There should be some communication between the parties so that each party has an understanding of the commitment and expectations raised. Commitments may be of various types, that is, a conditional commitment subject to certain terms being met, or a firm commitment which is binding without conditions.	The Minister's Delegate signs off a submission approving the grant of a lease and prior to any offer being made, telephoned the applicant to advise them of the approval. The Minister's Delegate made a hand written note on the file prior to 23 December 1996 stating that the applicant had been advised of the outcome.
An arrangement	An arrangement (or understanding) normally involves communication between the parties arousing expectations in	In November 1995, the then Environmental Protection Agency (EPA) approached a lessee about a land swap proposing that part of the pastoral lease

	<p>each that the other will act in a particular way.</p> <p>An arrangement is something less than a binding contract or agreement, something more in the nature of an understanding between two or more persons; a plan arranged between them which may not be enforceable at law.</p>	<p>be included into the adjoining National Park in return for an adjoining area of National Park. The lessee was generally agreeable to this proposal. The EPA confirmed their proposal and discussion with the lessee by way of a letter in December 1995 to which the lessee responded in writing the same month confirming that he was agreeable to the proposal and would like to commence the process.</p>
An undertaking	<p>An undertaking can be described as a promise, pledge or guarantee.</p>	<p>In 1995, the then Department of Main Roads guaranteed a land owner that they would reconstruct the boundary fence as part of the proposal to purchase part of his property required for road widening.</p>

If Requirement 2 is satisfied, you must refer the matter to ATSILS through your Native Title Contact Officer for advice on whether Module IB applies.

If Requirement 2 is not satisfied, Module IB does not apply. Go to **Module IC**.

Effect on Native Title

S.24ID of the NTA sets out the effect of a PERBA on native title. This is set out below.

Extinguishment of Native Title

If the proposed dealing is:

1. The grant of a freehold estate; or
2. An act that would confer a right of exclusive possession (refer to helpful tips)

then once the proposed dealing has been finalised, it will extinguish native title.

Non-extinguishment principle

If the proposed dealing is any other act, then the proposed dealing will be subject to the non-extinguishment principle.

Helpful tips

When it comes to assessing whether a proposed dealing confers a right of exclusive possession, there are no clear guidelines.

Typically, if the proposed dealing is the grant of a lease, then this is likely to be one which confers a right of exclusive possession.

Note: Whilst the categories of leasehold tenures that are PEPAs under Module BA can give some initial guidance, the rules that apply to some of those categories (such as public access), do not apply when assessing the effect of a lease under Module IB. A decision as to whether a leasehold tenure confers exclusive possession must be made by ATSILS.

Finalising your assessment

If all the requirements of Module IB are met, finalise your Native Title Assessment using **Annexure 7.1** and refer to ATSILS through your Native Title Contact Officer for advice.