

FUTURE ACTS UNDER THE NATIVE TITLE ACT

by

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The grant of petroleum production and exploration tenements made after 1 January 1994 and the conversion of an exploration tenement to a production tenement are “future acts” under the native title legislation.

The *Native Title Act 1993 (Cth)* distinguishes between permissible and impermissible future acts. Permissible future acts are any acts that could be done if native title holders instead held ordinary title. In Queensland it is possible to classify the grant of an exploration tenement as an impermissible future act and the grant of a production tenement as a permissible future act.

The *Native Title Act* creates an anomaly between these two types of future acts. Impermissible future acts are invalid only to the extent that they affect native title rights, whereas permissible future acts may be completely invalid if the “right to negotiate” procedure is not followed.

The right to negotiate procedure will apply to acts which include the grant of a right to mine, such as the grant of a petroleum tenement. The High Court has stated that if that procedure is not followed for any permissible future act the act will be invalid. In Queensland the State government has attempted to avoid the operation of the right to negotiate provisions by adopting a “Swiss cheese approach”. That is, tenements are granted with a qualification that any lands subject to native title are excluded from the grant of the tenement. This, however, will leave the holder of a petroleum tenement potentially liable for trespass or interference with native title rights that may exist on the land.

The federal government is proposing amendments to the “right to negotiate procedure” so that it will not apply to the grant of exploration tenements and it is proposing to make the process itself quicker. The proposed amendments may also remove the anomaly that presently exists between permissible and impermissible future acts and will provide that if the right to negotiate procedure is not followed the grant will only be invalid to the extent that it affects valid native title rights.

The present *Native Title Act* validates renewal of all tenements only if there is a legally enforceable right to renew. Proposed amendments to the *Native Title Act* which are expected to be passed by Federal Parliament before the end of the September Parliamentary sitting will clarify the position for renewal and regrants of existing petroleum tenements. It is proposed that any renewal, regrant or extension of an existing lease will be valid provided there is no change to the proprietary rights of the holder.