

Native Title process guideline

A guide for native title processes for resource authorities in Queensland

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2 Introduction

Australian law recognises that Aboriginal and Torres Strait Island people have rights and interests in the land and waters under their traditional laws and customs. The *Native Title Act 1993* (Cth) (the NTA) sets out specified processes that must be followed for any 'future act' on land or waters that may affect native title rights and interests. Applications for most resource authorities are considered future acts and are subject to a native title process.

This guide provides an overview of the native title requirements for your resource authority application and provides information to help you choose a suitable native title process.

Important Note: Quarry operators should refer to the guide [native title procedures for sales permits](#) as the *Forestry Act 1959* does not pass the Freehold Test and the grant of a sales permit may require an Indigenous land use agreement (ILUA).

3 Managing Queensland's resources

All mining and petroleum resources in Queensland are owned by the State. Individuals or companies may apply to explore or extract those resources.

The Department of Resources (the department) manages those resources on behalf of the State. This is done by applying a regulatory framework to administer the provisions of the relevant legislation. The Legislation provides a way to assess, develop and utilise the mineral and petroleum resources in Queensland for the benefit of Queensland and its people.

Resource authorities are administered by the department under the *Mineral Resources Act 1989* (MRA), the *Petroleum and Gas (Production and Safety) Act 2004* (P&G Act) and associated Regulations/Legislation.

The legislation:

- encourages and facilitates exploration for and mining of minerals,
- improves knowledge of the mineral resources in Queensland,
- minimises land-use conflicts that can arise from prospecting, exploring and mining,
- encourages environmental responsibility and land care management in the resources industries.
- ensures that the State receives a financial return from resource extraction; and
- provides a framework to manage and regulate prospecting, exploration and production activities.

These objectives are used when resource authorities are assessed and granted, ensuring best practice, production-oriented, competent exploration and development.

4 The purpose of this guide

The department has developed a series of guides to help resource authority applicants understand the native title legislation in regards to the granting of resource authorities and their responsibility as permit holders.

This *guideline* provides information about how the department applies and coordinates the appropriate legislation as it relates to addressing the affect on native title rights and interests over the resource authority area in accordance with the NTA.

Applicants are required to nominate a native title process at the time the resource authority application is lodged. This guide will provide an overview of each process.

This guideline applies to applications for:

- Exploration Permits, Mineral Development Licences, Mining Claims and Mining Leases made under the MRA; and
- Authorities to Prospect and Petroleum Leases and any other applicable resource authority applications made under (P&G Act,
- Resource authorities under the *Greenhouse Gas Storage Act 2009* (GGSA) and *Geothermal Energy Act 2010* (GE Act)

Applications which are not considered to require a native title process:

- Prospecting Permits for pegging purposes under the MRA
- Assignments or transfers

Information in this guideline does not supersede, limit the Minister's decision or discretionary powers and it is to be used as a guide only.

5 Key information

- The information required in MyMinesOnline and on the paper form is the same; however, you may find it easier to use the online form in MyMinesOnline.
- You will have to undertake a quick registration process before using the system to make a request online. This is so you can submit your details in a secure environment.
- Applying is as easy as registering for the [MyMinesOnline](#) electronic lodgement system, or downloading and submitting a paper application form.
- Lodgement can be online or through an Assessment Hub as listed on [department's website](#)¹.

The decision-maker may also consider whether the intended transferee is disqualified from being transferred the prescribed authority, under section 196C(1)(c) of the *Mineral and Energy Resources (Common) Provisions Act 2014* (MERCPC Act).

Refer to the [Disqualification guideline](#) and [Operational Policy, MIN/2020/5440 – Disqualification criteria and assessment](#) for information about the procedure and matters that may be considered when deciding whether to disqualify an intended transferee from being transferred a resource authority.

6 Native title rights and interests

Native title is defined as the rights and interests that are possessed under the traditional laws acknowledged and the traditional customs observed, by the Aboriginal and Torres Strait Islander peoples. Those laws and customs have a connection with the land or waters and are recognised by common law of Australia.

Native title rights and interests may include rights to:

- Camp and live on the land,
- access the area for traditional purposes such as conducting ceremonies,

¹ s59 MERCPC Reg, s386O MRA, s851AA P&G Act

- visit cultural places and sites to maintain and protect,
- hunt, fish and gather food or traditional resources such as water, wood and ochre; and
- teach traditional law and customs on country.

For a native title claim group to have their native title rights and interests recognised by the common law of Australia, a native title determination application is made to the Federal Court of Australia under the NTA.

A native title determination application must be made by or on behalf of a claim group and pass the registration test which was introduced in 2007 for new applications to be accepted and entered on the Register of Native Title Claims. The registration test consists of 12 conditions (see sections 190B and 190C of the NTA).

The Federal Court of Australia or High Court of Australia determines the validity of the claim for native title by hearing evidence presented in the application, which is gathered and compiled by the claimants (referred to in this document as the Native Title Party). A decision is then made based on this evidence which is called a native title determination.

A registered claim affords the Native Title Party certain procedural rights, such as the 'right to negotiate' with others in relation to the grant of most mining or petroleum resource authorities in relation to the area covered by the native title claim.

Where native title has been determined to exist, the determined Native Title Holder (also referred to in this document as the Native Title Party) may be granted the same or different rights as landowners depending on whether the determination confers 'exclusive' or 'non-exclusive' native title rights and interests.

Not all land is subject to native title, there are sections within the NTA that outline acts that extinguished native title, being "previous exclusive possession acts" which include the grant or vesting of land tenures such as freehold estates or leases or the construction of public works. Refer to section 23B of the NTA (additionally see Schedule 1 Part 3 Clause 21 of the NTA)

For more detailed information on native title, visit the NNTT website: www.nntt.gov.au

7 National Native Title Tribunal

The National Native Title Tribunal (NNTT) is an independent agency established under the NTA. The NNTT is responsible for making decisions, conduct inquiries, reviews and mediations, and assist various parties with native title applications, and ILUAs. As well as maintaining three Registers – National Native Title Register and register of Native Title Claims and ILUA's.

The NNTT also have powers to make decisions regarding whether future acts can be done and assist with negotiations.

For right to mine processes the NNTT engage in the following ways:

- Provides overlap analysis of native title claims and determinations for proposed resource authorities,
- The NNTT manages the process for objections to the Expedited Procedure assertion,
- Provides mediation assistance at the request of any negotiating party (Applicant, Native Title Party or the State),
- Registration of ILUAs,
- Manages the Future Act Determination process; and

- Provides native title information and resources.

For more information see: <http://www.nntt.gov.au>

8 The native title processes for resource authorities

Pursuant to the NTA the granting of a mining or petroleum resource authority for exploration or production purposes, is classified as a “right to mine”.

A right to mine over land subject to native title is captured in the ‘future act’ provisions of the NTA which provides an avenue to engage with the relevant Native Title Party.

The granting of some mining or petroleum resource authorities are *not* considered a right to mine and fall within other future act sections of the NTA. For example, a Water Monitoring Authority or a Mining Lease for infrastructure. *See the relevant sections below for more details.*

All future acts trigger the obligation to address native title, and there are a variety of options available, pursuant to the NTA and State Policy. The processes available to Applicants vary depending on the type of resource authority, the works to be undertaken and the area of land that is subject to native title.

Where a resource authority area contains land subject to native title and a future act is triggered, the Applicant is required to nominate one of the below native title processes:

- Expedited
- Right to Negotiate
- ILUA
- 24MD Notifications
- 24HA Notifications
- Combination of the above processes.

If a resource authority’s area contains 10% or less land subject to native title, the Applicant can also elect to exclude that land and waters and proceed under the Predominately Exclusive Land process. *Refer to the [Predominately exclusive land process section](#) for further information.*

See the Table 1 (below) for a quick reference to which native title processes may be followed for a particular resource authority.

Resource Authority Type	Bulk sampling included Exploration Activities	NT process available				
		NT Land Excluded	Expedited	RTN	ILUA	24MD
EPC	Yes	✓	x	✓	✓	x
	No	✓	✓	✓	**	x
EPM	Yes	✓	x	✓	✓	x
	No	✓	✓	✓	**	x
MDL	Yes	✓	x	✓	✓	x

	No	✓	✓	✓	**	x
MC	N/A	x	x	✓	✓	x
ML	N/A	x	x	✓	✓	x
ML for Infrastructure	N/A	x	x	x	✓	✓
ATP	N/A	✓	x	✓	✓	x
PL	N/A	x	x	✓	✓	x
PPL	N/A	x	x	x	✓	✓
PSL	N/A	x	x	x	✓	✓
PFL	N/A	x	x	x	✓	✓
WMA *	N/A	x	x	x	✓	x
EPG	N/A	x	x	x	✓	✓
GL	N/A	x	x	x	✓	✓
EPQ	N/A	x	x	x	✓	✓
QL	N/A	x	x	x	✓	✓

Table 1: Native title process available for each resource authority type

* For WMAs also see section 24HA notification process

** The ILUA process is available for this type of resource authority. Negotiating a new private ILUA can take a significant amount of time which is contrary to the purpose of the Expedited Procedure.

9 Researching the land and waters

The department's mapping program GeoRes Globe allows the applicant to navigate around a map of the State and overlay specific layers to assist with understanding the native title requirements.

The native title layers in GeoRes Globe are list in Table 2 below.

Layer	Sub-layer	Notes
Aboriginal and Torres Strait Islander land	ATSIL-freehold land	Aboriginal Freehold land is subject to native title
	ATSIL-reserve	Land held as a reserve for the benefit of Aboriginal people
	Deed of Grant in Trust	Land held in trust for the benefit of Aboriginal people

	Designated landscape area	Contains areas of high cultural significance. May require exclusion from resource authority or a full RTN process
Indigenous Land Use Agreement-expired		Expired State ILUAs
Registered Native Title Body Corporate (RNTBC)		Identified the Body Corporate for a determined native title claim
Indigenous Land Use Agreement-private		Private ILUAs that are related to mining or petroleum
Indigenous Land Use Agreement-state		There are no current State ILUAs available for grants
Land subject to Native Title-indication only		This layer should be used as a guide only and is broadly based on the tenure type.
Native Title claim determination		Determinations of native title shown as QCDyear/number. Identifies both determinations of native title and where it does not exist
Native Title claim application		Registered claims shown as QCyear/number. Also identifies registered claims for NTA compensation which are not relevant to this guide. Shown as QPyear/number.
Representative Aboriginal and Torres Strait Islander Body (RATSIB) area		Identifies the relevant representative body for the area

Table 2: Native title layers in the GeoRes Globe mapping system

Other important layers to utilise in your research are:

- Cadastre (for land parcels and roads)
- Satellite Imagery *

These layers can be overlaid with the various resource authorities or sub-blocks**.

Follow this link [GeoRes Globe \(information.qld.gov.au\)](http://GeoResGlobe.information.qld.gov.au) to access the mapping system.

Tutorial videos on how to use GeoRes Globe can be found here [Tutorial videos – GeoRes Globe \(information.qld.gov.au\)](#).

* The satellite imagery is located in Base maps.

** Blocks and sub-blocks are located in Administrative boundaries.

10 Native Title Processes

10.1 Exclusive land process

If native title is extinguished over all of the underlying land tenure for the resource authority in accordance with the provisions of the NTA, then Applicants should select '100% Exclusive Land' for the process. The State will complete an assessment on the underlying land tenure to confirm the application can proceed under this process.

If the State's assessment identifies land subject to native title in the resource authority area, then the Applicant will be contacted to confirm a native title process to address the native title requirements.

Applicants should undertake a quick review of the resource authority area by utilising the Land subject to Native Title layer in GeoRes Globe. As mentioned above, this layer is an indication only and does not replace a full assessment.

Resource authorities that are wholly with a determination that native title does not exist (e.g. Mandandanji, Mardigan, Brown River, Yirendali) will follow the Exclusive land process.

10.2 Predominately exclusive land process

This process is available for certain resource authority types (i.e. EPM, EPC, MDL, ATP or PL) where 10% or less of the resource authority area contains land subject to native title. The Applicant can select 'Predominately Exclusive Land' and the land subject to native title will be excluded from the grant of the resource authority, consequently the Applicant will have no right to access the excluded land for any purpose.

The State will complete an assessment on the underlying land tenure to confirm the application can proceed under this process. If the State's assessment of the resource authority area contains more than 10%, the Applicant will be contacted to confirm a native title process to address the native title requirements.

The excluded land can be added into the resource authority in the future by lodging an application for the addition of excluded land under the respective legislation, this will require the Applicant to undertake a native title process identified in this guide.

Important Note: Land excluded from a PL can only be added in if the PL has been granted directly because of a PL only Land Release. Therefore, careful consideration is required to add excluded land into the prerequisite resource authority (the ATP) prior to the grant of the PL. Otherwise, the excluded land will remain unavailable for the duration of the PL.

Please refer to the policy [Excluding land subject to native title \(Policy No. 2/2012\)](#) in Operational Policies for further details.

10.3 Expedited Procedure process

This process is only available for EPMs, EPCs and MDLs. The Expedited Procedure is where the State anticipates the activities will have minimal impact on native title rights and interests pursuant to sections 32 and 237 of the NTA.

Activities that cause major ground disturbance, such as bulk sampling, are not an eligible activity that can undertake the Expedited Procedure and instead would need to undertake a full RTN process, or an ILUA process.

The State makes the assertion that the Expedited Procedure applies on the section 29 notice and proposes to grant the resource authority with the Native Title Protection Conditions (NTPCs) attached as conditions. The State considers the NTPCs adequate to protect native title rights and interests for the resource authority area. The NTPCs outline what is required by the Explorer to engage the Native Title Party and undertake exploration activities

If no objections are lodged with the NNTT during the notification phase of the Expedited Procedure, the resource authority can be granted after the 4 month notification period ends with the NTPCs being applied to the resource authority at grant.

10.3.1 Native Title Protection Conditions

The NTPCs are a set of conditions placed on the resource authority granted under the Expedited Procedure, which:

- set out a process for the Explorer and Native Title Party to engage and exchange information before and during exploration,
- identify how the Explorer must engage with the Native Title Party regarding the protection and management of cultural heritage during the life of the resource authority,
- define what occurs when timeframes specified in the NTPCs are not met; and
- sets out payments applicable by the Explorer to the Native Title Party.

Table 3 below lists the Agreed and Non-Agreed activities under the NTPCs.

Agreed activities considered eligible to be undertaken after notification as prescribed by the NTPC's	<u>Non-Agreed Activities that require notification, inspections or monitoring as prescribed by the NTPCs</u>
✓ Aerial surveys	✗ Levelling of drilling pads and digging sumps
✓ Geological and surveying field work that does not involve clearing	✗ Changing a fence line
✓ Sampling by hand methods	✗ Open trenching or costeaning with an excavator
✓ Ground-based geophysical surveys that do not involve clearing	✗ Vegetation clear-felling
✓ Environmental field work that does not involve clearing	✗ Constructing an exploration camp, concrete pad, sewage or water treatment facility or fuel dump
✓ Drilling and activities associated with drilling that <u>do not include</u> : <ul style="list-style-type: none"> • clearing or excavation, other than the minimum necessary to establish a drill pad for a mobile rig, • clearing or excavation for access to a drill site, • side hill excavation for access or drill pads as would be necessary on steep slopes, • drilling in a watercourse or stream diversion; and • clearing in densely vegetated areas. 	✗ Geophysical surveying with physical clearing ✗ Carrying out a seismic survey using explosives ✗ Constructing a track or access road

Table 3: Agreed and Non-Agreed Activities in the NTPCs

If agreement has been reached between the parties, then the terms of that agreement (Ancillary Agreement) replace the NTPCs. Following the execution of the Section 31 Deed by the Minister's delegate, the State removes the Expedited Procedure assertion and the resource authority is granted without the NTPCs attached as conditions. See the section on *Section 31 Deeds* for further details.

In the absence of a fully executed Section 31 Deed, the NTPCs will apply to all EPMs, EPCs and MDLs granted under the Expedited Procedure. The section on *Side Agreements* has further details on what happens when agreement is reached but a Section 31 Deed is not fully executed.

If there is no Native Title Party for the resource authority area at 4 months from the Notification Day stated on the section 29 notice, the Explorer cannot activate the NTPCs and subsequently then needs to comply with their "duty of care" requirements of the *Aboriginal Cultural Heritage Act 2003*. This "duty of care" applies to all land, including land where native title has been extinguished (such as Freehold Land).

More information on the cultural heritage duty of care is located here [Cultural heritage duty of care | Aboriginal and Torres Strait Islander peoples | Queensland Government \(www.qld.gov.au\)](http://www.qld.gov.au/industry/mining/land-access-environment/native-title/expedited-procedure/protection-conditions)

Explorers should read the conditions of the NTPCs carefully and ensure they comply with all requirements. A failure to comply with the NTPCs is a breach of the resource authority conditions and may result in the issue of a compliance direction or initiate compliance action by the Minister who may impose a penalty, amend or impose new conditions, or cancel the resource authority.

For more information and a copy of the NTPCs please follow this link: <http://www.business.qld.gov.au/industry/mining/land-access-environment/native-title/expedited-procedure/protection-conditions>.

10.3.2 Objections to the Expedited Procedure assertion

If a Native Title Party does not agree that the Expedited Procedure should apply, an objection is lodged with the NNTT during the notification phase.

The notification phase is 4 months from the Notification Day stated on the Section 29 Notice. If the resource authority area is unclaimed at the Notification Day, a Native Title Party has 3 months in which to gain registration status with the NNTT and a further 1 month to lodge an objection.

If an objection has been lodged the Applicant and the Native Title Party will then enter negotiations to address the grounds for the objection.

Objections can be resolved by:

- Parties reaching agreement (Ancillary Agreement) and the objection being withdrawn either voluntarily by the Native Title Party or through the fully executed Section 31 Deed (**Preferred outcome**),
- The State withdrawing the Expedited Procedure assertion and the proposed grant moves into the full RTN process,
- The objection being dismissed by the NNTT; or
- A determination by the NNTT after a formal inquiry.

The NNTT convenes a monthly Status Conference to oversee objections to the Expedited Procedure. The Applicant, State and Native Title Party representatives must attend this conference to provide updates to the presiding Member on the progress the parties have made towards resolving the objection.

The State cannot grant the resource authority until the objection has been resolved.

For more NNTT information on the objection process follow this link: <http://www.nntt.gov.au/futureacts/Pages/Expedited-procedure-objections.aspx>

10.3.3 Side Agreements

If there is more than one Native Title Party and the Applicant wishes to utilise the Section 31 Deed, then the Applicant must find agreement with all Native Title Parties that overlap the area. This is because following the execution of the Section 31 Deed by the Minister's delegate, the State removes the Expedited Procedure assertion and the NTPCs are not conditions on the resource authority.

However, if one of the Native Title Parties does not object and/or is not interested in negotiating an Ancillary Agreement and subsequently executing the Section 31 Deed, the matter may proceed via 'side agreement'.

This is where the Applicant executes an Ancillary Agreement with the Native Title Party that has lodged an objection but has not found agreement with the other Native Title Party. The objection is voluntarily withdrawn from the Tribunal and the resource authority is granted with the NTPCs.

The State acknowledges that side agreements exist and that the terms of such agreements go above and beyond the requirements of the NTPCs, better suiting the needs of the Explorer and the Native Title Party. Therefore, the State accepts that the NTPCs will not be activated with the Native Title Party that has a side agreement and that the parties will be operating under the terms of that agreement.

The Explorer must activate the NTPCs with the other Native Title Party as there is no agreement in place for their area.

Important Note: If there is a dispute the parties should follow the dispute resolution clauses set out in their side agreement. The department has no ability to investigate breaches of the side agreement and will instead address any complaints by referring to the NTPCs.

The undertaking of activities which involve major disturbance to land under a resource authority granted subject to NTPCs would result in a breach of grant conditions. Such a breach may result in a compliance direction or compliance action by the Minister who may impose a penalty, amend or impose new conditions, or cancel the resource authority.

10.3.4 Costs

There are advertising fees and other costs involved for negotiating agreements through this process. If the resource authority is granted with the NTPCs, there are annually adjusted fees that are payable by the Explorer. The current fee schedule for the NTPCs is available on the department's website here <http://www.business.qld.gov.au/industry/mining/land-access-environment/native-title/expedited-procedure/protection-conditions>.

10.3.5 Estimated time to complete

Where there is no Native Title Party or no objections have been lodged, the native title process is completed 4 months after the Notification Day and the resource authority can be granted with the NTPCs.

If a Native Title Party objects to the State's assertion that the Expedited Procedure applies, the parties then enter negotiations and the process may take a further 6+ months to resolve.

Once this native title process is finalised, the other prerequisite requirements for the application must be completed, such as issuing of a relevant environmental authority and payment of rent, prior to a final decision on the application.

10.4 Right to Negotiate process

The Right to Negotiate (RTN) process is a mechanism through which a Native Title Party, under Subdivision P of the NTA, is given the “right to negotiate” with the aim of reaching agreement with the Applicant.

This right is given to the Native Title Party so that they may enter discussions about what is to occur on their country, and how best to manage any impacts on their native title rights and interests that may occur as a result of certain activities.

The RTN process does not give a Native Title Party the right to veto the grant of resource authorities but is a part of the NTA that ensures parties negotiate “in good faith” about the future act.

To initiate an RTN process, the Applicant for the resource authority will be required to provide the State with an RTN submission and payment of native title advertising costs (refer to [Section 29 notification and advertising requirements](#)). The RTN submission will assist the Minister (having responsibility under the relevant portfolio) to decide on behalf of the State, whether the RTN process should proceed. The RTN submission should include a detailed explanation covering all points as set out in the RTN Submission Template (available from the department’s website). Failure to address points may delay the progress of the application.

Once the RTN Submission has been accepted and payment of the native title advertising costs have been received the section 29 notification process will commence. See Figure 1 for a timeline for the RTN advertising and negotiation process.

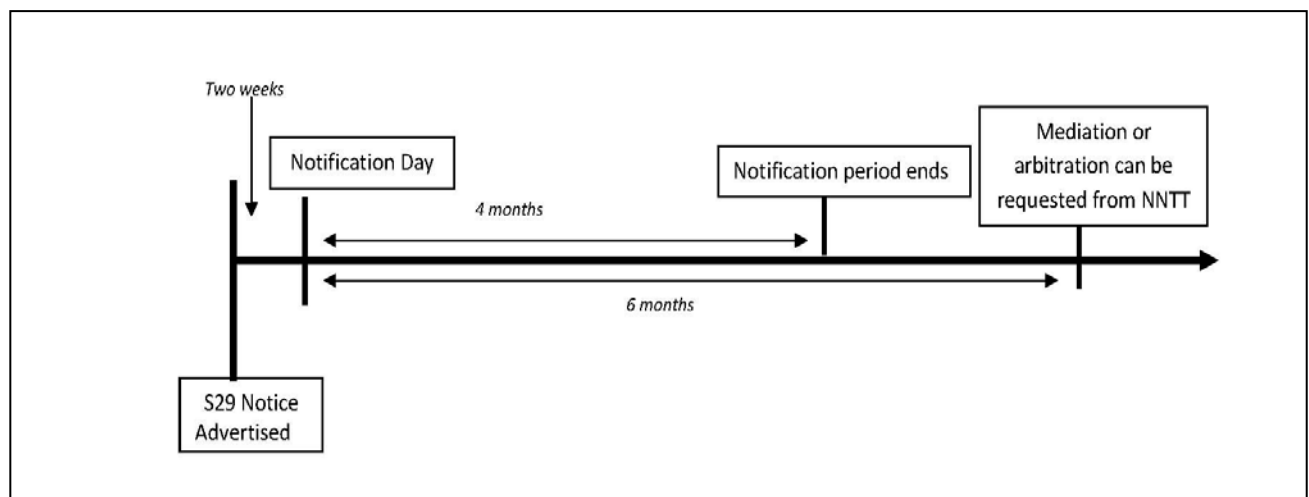


Figure 1: RTN advertising and negotiation process timeline

After 6 months from the Notification Day, if the parties are having difficulty in reaching an agreement and negotiations have stalled, any party (the Applicant, State or Native Title Party) may apply to the NNTT for assistance through mediation or a determination process (outlined below in [Good Faith Requirements](#)). Please note that mediation from the NNTT can be sought at any stage during the negotiation period to assist in negotiations. The State may also request this on behalf of the other parties if there are substantial delays.

This 6 month timeframe also incorporates the 4 month notification period and if any claims are not registered on the Notification Day, they have a 4 month period in which to gain registration status with the NNTT. The Applicant must negotiate an agreement with any Native Title Party that overlaps the resource authority area at the end of the notification period.

The State is a party to the RTN process and requires the Applicant provide the State updates on the negotiations at a minimum of **every month**.

The State is not a party to the Ancillary Agreement and will have no obligations under that agreement. Once agreement has been reached between the Applicant and the Native Title Party, a Section 31 Deed is issued by the State for execution by all parties. See the section on *Section 31 Deeds* for further details.

For further information about the RTN process, please contact the relevant Native Title Officer for the department.

For more information on the Right to Negotiate follow this link:

<http://www.nntt.gov.au/futureacts/Pages/Negotiation.aspx>

10.4.1 Good Faith Requirements and NNTT determinations

If at least 6 months have passed since the Notification Day and the parties have not reached an agreement, the Applicant may make a Future Act Determination Application (FADA) to the NNTT.² Following receipt of such an application, the NNTT will hold a preliminary conference which the parties will attend, and the presiding NNTT Member will set directions for the parties to file statements of contentions and documents relevant to the inquiry.

In making a determination, the NNTT must take into account the criteria in section 39 of the NTA. The NNTT must make one of three types of determinations³:

1. the act must not be done,
2. the act may be done, or
3. the act may be done subject to conditions to be complied with by any of the parties.

Following, or in conjunction with, the lodgement of a section 35 FADA, the Native Title Party may assert that the Applicant and/or the State have not negotiated in good faith. If such an assertion is made, the NNTT must first deal with this issue and make a determination on whether the relevant party has negotiated in good faith.

If any negotiation party satisfies the NNTT that another negotiation party has not negotiated in good faith, the NNTT must not make a determination on whether the act can be done⁴. If a lack of good faith is confirmed, then the negotiations must recommence and the 6-month timeframe for negotiation restarts. If the NNTT is satisfied that the negotiating parties have negotiated in good faith, the NNTT may then proceed to make a determination on whether the act can be done.

For further reading relating to the good faith requirements of the NNTT follow this link:

<http://www.nntt.gov.au/futureacts/Pages/Negotiation.aspx>

10.4.2 Costs

There are advertising fees and other significant costs involved for negotiating agreements through this process.

² Section 35 NTA

³ Section 38 NTA

⁴ Section 36(2) NTA

10.4.3 Estimated time to complete

The RTN process can generally take 9-12 months to complete from the Notification Day. However, this can vary depending on progress of negotiations between parties and if the matter is referred to the NNTT for a determination.

10.5 A private Indigenous Land Use Agreement

Indigenous Land Use Agreements (ILUAs) are flexible and can encompass a broad range of considerations. The NTA is not prescriptive on what can be included in an ILUA. An important clause for an Applicant would be the sections providing the Native Title Party's consent to possible future acts, such as future production resource authorities, infrastructure or pipelines. These clauses will need to be worded carefully to ensure that they capture the Native Title Party's consent. Legal advice should be sought by all parties in respect of proposed ILUA terms and conditions.

Whilst there are no restrictions, ILUAs may include:

- Monetary consideration (lump sum, distributed or royalties),
- Compensation for the future act,
- Employment and training provisions,
- Aboriginal Cultural Heritage components,
- Contracting opportunities; and
- Environmental preservation and rehabilitation.

There are three types of ILUAs:

1. Body Corporate Agreements (where there are determined native title holders for the area),
2. Area Agreements (where there is no determined holder, but claimants and interested parties); and
3. Alternative Procedure Agreement (which can be used for large scale areas).

In relation to mining or petroleum resource authorities, the State is not a party to the ILUA and has limited involvement with the negotiation process. The Applicant is solely responsible for the ILUA process, including the identification of the correct persons to negotiate with, organising negotiation meetings, arranging for the agreement authorised/signed and then registered by the NNTT. However, the Applicant is required to update the State on the progress of their ILUA negotiations **every month**.

Things to consider about ILUAs:

- ILUAs can incorporate many Future Acts and larger scale operations not just single resource authorities,
- There is no time limit on negotiations - if an agreement is not reached there is no opportunity for referral to the NNTT,
- ILUA negotiations can be commenced at any time – there is no requirement to initiate the process through the State; and
- As there are no legislative timeframes on negotiations, parties should be aware that there is no guaranteed outcome.

Assistance can be sought from the NNTT under s24CF of the NTA to reach an agreement but the role of the NNTT is discretionary rather than mandatory like the RTN process.

For further information regarding ILUAs follow this link:

<http://www.nntt.gov.au/ILUAs/Pages/default.aspx>

To compare the ILUA and RTN process follow this link:

<http://www.nntt.gov.au/Information%20Publications/ILUA%20-%20The%20Right%20to%20Negotiate.pdf>

10.6 Combining native title processes

In certain circumstance it is possible to combine two or more native title processes. During the applicant process you may only be able to select one process so please contact Native Title Services to discuss how to address the native title requirements.

10.7 RTN and existing ILUA

This combined process could apply in the situation where the Applicant has an existing registered ILUA covering part of the resource authority area, but the remaining area requires a native title process that must be addressed through the RTN process.

In this situation the applicant would provide the details of the existing registered ILUA when applying and then complete the RTN native title process for the remaining area before the resource authority is granted.

10.8 RTN and new private ILUA

This combined process could apply in the situation where the Applicant has a large scale project that may include other resource authorities (i.e. roads, power lines, pipes lines, infrastructure etc) and begins negotiating an ILUA over an area that includes the resource authority area, whilst using the RTN process to address native title requirements for a specific mining or petroleum resource authority.

In this situation the resource authority could be granted under either the ILUA or RTN process depending on which is completed first. The reporting requirements to the State apply for both processes. If the ILUA is completed before the RTN process, the RTN process will cease, however, in most cases if an agreement through a RTN process is reached, the ILUA negotiation generally continue to incorporate other aspects of the project and future grants.

The advantage of running both processes concurrently is that if an RTN process has been commenced and negotiations are delayed, the future act can be referred to the NNTT for meditation or a decision.

10.9 Section 24MD notifications

Section 24MD of the NTA describes acts that pass the Freehold Test, this test requires that for certain future acts, a Native Title Party must be given the same procedural rights as a freehold landowner and may also have the right to lodge an objection. The State will notify the affected Native Title Party when required.

A Native Title Party may object to the doing of the act so far as it affects their native title rights and interests,. The objection must be lodged within the specified 2-month timeframe from the Notification Day stated on the 24MD Notification.

For resource related projects, 24MD Notifications are most commonly used for the construction of an infrastructure facility associated with mining (section 24MD(6B) of the NTA).

Under the MRA this includes a Mining Lease for Infrastructure (for associated facilities such as haul roads, power substation, water pipelines etc.).

Important Note: Certain mining infrastructure does not fit the definition of an infrastructure facility under section 253 of the NTA. Activities such as construction of a mining camp, toilet facilities and sewerage treatment plants do not fit the definition and require a full RTN process.

Resource authorities under the P&G Act include Petroleum Facility Licence and Data Acquisition Authority but does not include the grant of a Petroleum Pipeline Licence (PPL) even though a pipeline is listed in the definition of an infrastructure facility at section 253 of the NTA.

The grant of PPL is dealt with under section 24MD(6A) of the NTA as an onshore dealing because granting a PPL does not give the right to enter the land and construct a pipeline. Under the P&G Act the Applicant must obtain consent or an easement to enter the land to construct and operate a pipeline under the licence after grant.

For pipeline land subject to native title, consent or an agreement is obtained through a registered private ILUA with the Native Title Party. Native title rights and interests may be temporarily satisfied through a Part 5 permission whilst the ILUA is being finalised. For more information please see the PPL Guideline located here [Policies and Guidelines](#).

Exploration permits granted under the GGSA and GE Act are not considered a right to mine and can be addressed through this process depending on the type of land tenure and if the Native Title Party is determined.

Important Note: ‘Procedural’ rights are not the same as ‘substantive’ rights. In the case of an application for a Mining Lease for Infrastructure (for a haul road) under the MRA, a landowner is entitled to a Conduct and Compensation Agreement (CCA) as a substantive right under the Land Access Code. A Native Title Party is not entitled to a CCA unless they are the landowner.

10.9.1 Process

There is no public notification requirement for s24MD, instead the relevant parties are notified directly by the State if required. Parties notified are the Applicant, Native Title Party and the representative body.

The Native Title Party only has 2 months to lodge an objection regarding the effect of the act on their native title rights and interests. If an objection is lodged, the Applicant must consult with the Native Title Party that objected about ways to address the impact on native title rights and interests. If a properly lodged objection is not resolved by the parties it will be heard by an independent body, currently the Land Court of Queensland⁵.

10.9.2 Estimated time to complete

If a Native Title Party objects, parties then enter into negotiations and the process may take a *further* 6+ months to resolve. If there is no objection lodged, timeframes will be the same as timeframes required under the relevant resources Act.

⁵ Section 32E *Land Court Act 2000*

Once this native title process is finalised, the application must satisfy the other prerequisite requirements prior to a final decision on the application.

For more information on land access requirements and the Land Access Code, follow this link: <https://www.business.qld.gov.au/industry/mining/land-access-environment/conducting-exploration-and-mining-activities-on-private-land>

10.10 Section 24HA notifications

Section 24HA of the NTA describes acts related to the management or regulation of surface or subterranean water. The State will notify the affected Native Title Party.

A Native Title Party may provide comments to the department, within 28 days of receiving the notification, to the doing of the act so far as it affects their native title rights and interests.

It is currently only applied for the grant of a Water Monitoring Authority that contains land subject to native title.

10.10.1 Process

There is no public notification requirement for s24HA, instead the relevant parties are notified directly. Parties notified are the Applicant and the Native Title Party.

The Native Title Party has 28 calendar days to submit comments regarding the effect of the act on their native title rights and interests. If comments are lodged, the State must consider the comments and any proposed ways to address the impact on native title rights and interests to the waters concerned.

10.10.2 Estimated time to complete

If a Native Title Party comments on the impact on their native title rights and interests, the process may take a *further* 2+ months to resolve. If there are no comments submitted, timeframes will be the same as timeframes required under the relevant resources Act.

Once this native title process is finalised, the application must satisfy the other prerequisite requirements prior to a final decision on the application.

10.11 Variations and addition of excluded land

An application to vary the resource authority conditions may require a new native title process. Adding bulk sampling to an EPC, EPM or MDL that was granted under the Expedited Procedure increases the right to mine and will trigger a new native title process.

The addition of a mineral that increases the right to mine will also require a new native title process. Applicants should provide a submission outlining the details of the mining process if the addition of a mineral *does not* increase the right to mine. This will assist with the native title assessment and decision-making process.

An addition of excluded land may require a new native title process. If the land to be added into the resource authority is land subject to native title that was excluded under the [Excluding land subject to native title \(Policy No. 2/2012\)](#) then a new native title process is required.

Any other land will require an assessment to ascertain if a native title process is required. For example, the area of a Mining Lease is excluded from EPMs and that area can be added into the EPM if the Mining Lease expires. If the assessment identifies that the land under the expired Mining Lease is subject to native title, then a new native title process will be required.

A similar situation would apply to adding an extra land into a resource authority area. Under the P&G Act the holder of a PPL may apply to include extra land into the area of the PPL for

the construction of monitoring stations along the pipeline. If the assessment identifies that the land is subject to native title, then a new native title process will be required.

The Applicant will be required to undertake a native title process identified in this guide.

11 Renewals

When a resource authority is up for renewal, the online system will pre-load the native title process with the details recorded at grant. A native title assessment will be completed to confirm the native title process remains applicable and allows for the resource authority to proceed to renewal.

A new native title process is required if:

- there is an increase in the right to mine by increasing the term greater than the original grant term (e.g. 3 year to 5 years)
- the resource authority was granted under an ILUA and the ILUA has expired and/or doesn't allow for renewals.

11.1 Increasing renewal terms

Under the NTA the renewal term must not be greater than the original term. The only exceptions are:

- If the resource authority was granted under a section 31 deed, it can be renewed with a greater term if the Applicant confirms that the Ancillary Agreement does not prevent the increase and the Native Title Party is in no way disadvantaged.
- If the resource authority was granted under a private ILUA, it can be renewed with a greater term if the Applicant confirms that the ILUA allows for the increase.

Where a native title process is required to be undertaken for the renewal of a resource authority, the department will contact the Applicant to confirm.

12 Section 29 notification and advertising requirements

The notification process (section 29 of the NTA) is triggered when addressing native title rights and interests through the Expedited Procedure and RTN process. The NTA requires that any relevant Native Title Party, the representative body, the NNTT and the Applicant must be notified of the State's intention to grant a right to mine over land that is subject to native title

Examples of the types of resource authorities notified are:

- proposed grant of MCs and MLs,
- proposed grant of Exploration Permits and MDLs
- proposed grant of ATPs and PLs
- proposed addition of excluded land,
- proposed variation to resource authority conditions that increase the right to mine; and
- proposed resource authority renewals that increase the right to mine.

The notification must occur in both:

- a newspaper that circulates generally throughout the area to which the notification relates; and
- a relevant special interest publication-usually a newspaper or magazine (e.g. *Koori Mail*) that caters mainly or exclusively for the interests of Aboriginal or Torres Strait Islander peoples.

These notices are published pursuant to section 29 of the NTA and are referred to as “section 29 notices”. The section 29 notices are also published on the department’s website here: <http://www.business.qld.gov.au/industry/mining/land-access-environment/native-title/public-notices>

Additionally, the NNTT, representative body, Applicant and Native Title Party must be notified directly of the future act. The State notifies these parties directly through notification letters sent prior to the Notification Day.

The Native Title Party over the resource authority area as at the date 4 months from the Notification Day, are the negotiating party that the Applicant must engage to reach agreement.

For the Expedited Procedure, Native Title Party may lodge an objection to the Expedited Procedure assertion with the NNTT within 4 months from the Notification Day.

12.1 Determined land

If the resource authority area is wholly within a determination that native title exists, then there is no requirement to advertise in the newspapers. The notification is sent directly to the Applicant, Native Title Party, representative body and the NNTT. The State notifies these parties directly on behalf of the Applicant.

The Applicant should check the Native Title claim determined layer in GeoRes Globe to check if the resource authority is wholly within a determination to ensure the correct advertising process is selected. Where the advertising fee has been paid, this will be refunded.

12.1.1 Costs

The department has nominated standard advertising fees for the required publications of the section 29 notice (the Indigenous specific paper and relevant regional paper).

There are four choices for advertising:

1. Single Advertisement at the cost of **\$3000** per permit application.
The resource authority application will be advertised as a stand-alone advertisement.
2. Multiple Advertising at the cost of **\$1,000** per resource authority application.
The resource authority application will be advertised with a minimum of 6 other resource authorities in the Indigenous newspaper and combined where appropriate in the relevant regional paper.
3. Small scale mining Multiple Advertising at the cost of **\$500** per resource authority application.
The resource authority application will be advertised with a minimum of 14 other resource authorities in the Indigenous newspaper and combined where appropriate in the relevant regional paper.
4. No Advertising required as 100% with a determination **No cost** per resource authority application.

Were the department has underestimated the costs of advertising, the additional costs will be requested and required to be paid prior the advertising proceeding. Where the advertising costs is less than the fee paid, the difference will be refunded.

13 Section 31 Deed

The State has developed a Section 31 Deed to satisfy the requirements of section 31 of the NTA. The Section 31 Deed is used for the Expedited Procedure and RTN processes with the State preparing the agreement for the parties to execute when negotiations are finalised.

Queensland operates through a 'dual deed' system with the Applicant and the Native Title Party having two agreements: the Section 31 Deed and an Ancillary Agreement.

The Section 31 Deed is subject to the Applicant and the Native Title Party having entered into an agreement (Ancillary Agreement) which may comprise of setting out land access arrangements, conduct and consideration for grant arrangements, the protection of native title rights and interests and Aboriginal Cultural Heritage with respect to the resource authority area.

The Section 31 Deed is provided to the Applicant and the Native Title Party following the future act being notified and after 4 months from the Notification Day, to ensure the correct Native Title Party has been identified as per the Native Title Claim Register.

A Section 31 Deed may be issued for Expedited Procedure matters regardless of an objection is lodged with the NNTT. Applicants may have a standing agreement with a Native Title Party and wish to utilise that agreement and not have the NTPCs attached as conditions.

Most importantly, by signing the section 31 deed the Applicant and the Native Title Party confirm that:

- an Ancillary Agreement has been successfully negotiated and executed, and
- that the Native Title Party consents to the grant of the resource authority.

In Expedited Procedure matters the section 31 deed also confirms:

- the withdrawal of any objection by the Native Title Party,
- the removal of the assertion that expedited procedure applies, and
- that the NTPCs will not be imposed as conditions.

Once executed by the Native Title Party and the Applicant, the Section 31 Deed is submitted to the State for execution by the Minister's delegate. After the execution of Section 31 Deed by the State, the native title process can be finalised.

The State will provide a copy of the fully executed section 31 deed to the parties and upload a copy against the resource authority. In accordance with section 41A of the NTA, the State also provides a copy to the NNTT and advises the Commonwealth Attorney General of the execution of the deed.

Important Note: Parties may have the option to request a conjunctive or non-conjunctive Section 31 Deed. A conjunctive deed allows for the grant of future higher tenure (i.e. grant of a PL following an AEL into an ATP) without a new native title process. This can only occur where the Applicant has elected to undertake the native title process as a conjunctive process and the Native Title Party is the same.

A signed Section 31 Deed can be submitted to the department at:

Email: nativetitleservices@resources.qld.gov.au

Or posted to:

Manager
Native Title Services
Department of Resources
PO Box 3679
ROCKHAMPTON QLD 4701

14 Native title contact details

Native Title Services
GeoResources
Department of Resources
Building E, 25 Yeppoon Road, Parkhurst

Postal Address: PO Box 3679 Red Hill QLD 4701

Email: nativetitleservices@resources.qld.gov.au

Phone: (07) 4936 0128

15 Glossary of Terms

Ancillary Agreement	A private agreement between the Applicant and Native Title Party
Applicant	Is a person or company applying for a resource authority (also Grantee Party, Proponent, Resource Authority Holder, Explorer). Not to be confused with a Native Title Party <i>Applicant</i> for a registered Native Title claim
ATP	Authority to Prospect (also Exploration Permit for Petroleum)
EPC	Exploration Permit for Coal
Determination of native title	Is a determination whether native title exists in relation to a particular area of land or waters
EPG	Exploration Permit for Geothermal
EPM	Exploration Permit for Minerals other than Coal
EPQ	Exploration Permit for Greenhouse Gas Storage
Exclusive Land	Land where native title has been extinguished in accordance with the <i>Native Title Act 1993</i> (Cth) (e.g. Freehold). This is a shortening of “previous exclusive possession act”. Not to be confused with <i>exclusive</i> native title rights listed in a determination
Expedited Procedure	As defined in section 237 of the <i>Native Title Act 1993</i> (Cth). The Expedited Procedure is a negotiation process with tight timeframes with NNTT oversight. Not to be confused with achieving an immediate grant
Explorer	The holder of the Exploration Permit, or Mineral Development Licence as defined in the NTPCs. Also Applicant as defined above
Exploration Permit	Is a resource authority that allows a permit holder to conduct authorised activities to determine the existence, quality and quantity of any minerals in or under land or in the waters or sea above land
FADA	Future Act Determination Application lodged with the National Native Title Tribunal
Freehold Land	As defined in the <i>Native Title Act 1993</i> (Cth)
Freehold Test	As define in Part 2, Division 3, Subdivision M of the <i>Native Title Act 1993</i> (Cth)
Future Act	As defined within the <i>Native Title Act 1993</i> (Cth) (section 233)
GL	Geothermal Lease
ILUA	Indigenous Land Use Agreement as defined in the <i>Native Title Act 1993</i> (Cth)

MC	Mining Claim
MDL	Mineral Development Licence
Minister	Defined as the Minister whose portfolio encompasses Mining, (Currently the Department of Resources)
ML	Mining Lease
MRA	<i>Mineral Resources Act 1989</i>
Native Title Claim	As defined within the <i>Native Title Act 1993</i> (Cth) (section 235)
Native Title Party	In this guide means both a registered Native Title claim and a determined Native Title claim
NNTT	National Native Title Tribunal. http://www.nntt.gov.au/
Notification Day	Is the date listed on the section 29 notice as the “Notification Day”, generally 2 weeks following the day of advertising
NTA	<i>Native Title Act 1993</i> (Cth)
NTPCs	Native Title Protection Conditions
P&G Act	The <i>Petroleum and Gas (Production and Safety) Act 2004</i>
PFL	Petroleum Facility Licence
PL	Petroleum Lease
PPL	Petroleum Pipeline Licence
PSL	Petroleum Survey Licence
QL	Greenhouse Gas Storage Lease
Representative body	The Representative Aboriginal and Torres Strait Islander Body (RATSIB). Also known as land council. There are currently 5 in Qld: Queensland South Native Title Services, North Queensland Land Council, Cape York Land Council and Carpentaria Land Council, Torres Strait Regional Authority
RTN	Right to Negotiate process as defined by Part 2, Division 3, Subdivision P of the <i>Native Title Act 1993</i> (Cth)
WMA	Water Monitoring Authority

16 Document information

Availability: External

Location: Business Industry Portal

Owner and approver: Director, Georesources Division

Review date: May 2023

Related documents:

Contacts: For help and information about this guide, please use the following contacts
Native Title Services on (07) 4936 0128 or email nativetitleservices@resources.qld.gov.au.

For help with MyMinesOnline please contact the MyMinesOnline Helpdesk on
(07) 3199 8133 or email minesonline@resources.qld.gov.au.