**Mining, Exploration and Geoscience**
Department of Regional NSW

# Guideline

# An overview of native title and the Mining Act – minerals and coal

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# 1. Purpose of this guideline

This guideline provides a general overview on how Mining, Exploration and Geoscience (MEG), within the Department of Regional NSW, applies the *Native Title Act 1993* (Cth) (NTA) in the administration of the *Mining Act 1992* (NSW).

This guideline is introductory and is intended to complement other MEG guidance. Where available, this guideline includes links to this additional information.

This guideline:

- is designed to assist your understanding of MEG's approach to native title
- is intended to help compliance with the NTA and the Mining Act, and
- contains resources and information to assist you.

## 1.1. What this guideline covers

- Applications for exploration licences (see part 3)
- Applications for assessment leases and mining leases (see part 4)
- Renewal of authorities (see part 5)
- Consolidation of mining leases (see part 6)
- Transfer of authorities (see part 7)
- Variation of authorities (see part 8)
- Addition of minerals and petroleum to mining leases (see part 9).

Under the Mining Act, an authority means an exploration licence, an assessment lease, or a mining lease.

## 1.2. Where this guideline does not apply

This guideline does not cover all the ways in which compliance with the NTA can be achieved or all the decisions under the Mining Act where the NTA may apply.

This guideline is not legal advice. You are encouraged to obtain your own legal advice in relation to how NTA may apply.

## 1.3. Additional information

Additional resources are available at the links below:

- Right to Negotiate guideline
- Guideline: The preparation of native title assessment reports in support of applications for authorities granted under the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*.

The National Native Title Tribunal (NNTT) website contains additional information in relation to the operation of the NTA and native title, including an online register of claims and determinations which can be used to search for native title parties.

# 2. Understanding native title

## 2.1. What is native title?

Native title is the name Australian law gives to the traditional rights and interests that indigenous groups have practised, and continue to practise, over land and water. Native title reflects the close and continued connection indigenous groups have with land and water. Native title rights and interests may include, but are not limited to, the right to:

- live and camp in an area
- conduct ceremonies

- hunt and fish
- light fires
- collect food and resources
- build shelters, and
- visit places of cultural importance.

Native title rights and interests in land and waters are recognised by common law, and in the NTA, including the native title claim process and formal determinations by the Federal Court of Australia that native title exists.

When assessing an application, MEG assumes native title exists unless the applicant is able to prove otherwise.

Native title is most commonly extinguished by past acts of the Crown that are inconsistent with the continued existence of native title, including:

a. granting a freehold interest[1]
b. building roads, airports, railways, schools or other public works before 23 December 1996
c. compulsory acquisition of land, and
d. granting a leasehold interest that confers exclusive possession.

For this reason, native title is most likely to continue to exist over public or vacant Crown land, such as:

a. state forests
b. national parks
c. public reserves
d. areas subject to non-exclusive leases from the Crown
e. coastal areas, or
f. beds and banks of some watercourses.

## 2.2. Engaging with native title holders

MEG acknowledges that native title holders are significant and important stakeholders who have an enduring spiritual and cultural connection to the land.

Applicants and authority holders should be prepared to engage with native title holders and understand their views can be based on their traditional rights, interests and values.

## 2.3. What is the NTA?

The Commonwealth Government passed the NTA in 1993. It commenced on 1 January 1994. The NTA has several functions, including creating processes through which native title is recognised and protected.

Importantly, the NTA contains procedures that MEG must follow before doing or undertaking an act that affects native title rights and interests. Most decisions under the Mining Act that affect native title rights and interests are within the NTA definition of 'future acts'. As a general principle, future acts will only be valid where the relevant future act process in the NTA has been complied with.

[1] Native title can still exist in land held freehold where it has been transferred under the *Aboriginal Land Rights Act 1983* (NSW)

## 2.4. When does the NTA apply?

The NTA applies if native title exists in the land to which an authority (or other right of access) is to be granted under the Mining Act.

The Minister responsible for administering the Mining Act must comply with the NTA in relation to certain acts under the Mining Act, including the grant and renewal of authorities.

## 2.5. What happens if the NTA is not complied with?

If the NTA processes are not followed, the relevant act may be invalid to the extent that it affects native title. This means there may be a challenge to the decision in the courts, which could lead to delays and financial risks for an applicant or authority holder. Native title holders could also practice their rights in some circumstances, as well as seek damages.

In addition, failure to comply with the NTA affects the important relationships between native title parties, MEG, applicants and authority holders.

# 3. Applications for explorations licences

Applicants for new exploration licences (ELs) have several options available to comply with the NTA. We discuss each option below, set out in the order of most common to least common.

Unless an applicant requests options 2-6, MEG will process all applications for the grant of ELs by applying option 1 (Native Title Condition).

## 3.1. Option 1 – Standard process: apply the Native Title Condition

In NSW, the standard process to ensure compliance with the NTA when granting an EL is to apply the 'Native Title Condition'. We refer to this as a 'Standard EL.' This is permitted by:

- the Native Title (Right to Negotiate (Exclusion) – NSW Land) Determination No.1 of 1996, and
- the Native Title (Right to Negotiate (Inclusion) – NSW Land) Approval No.1 of 1996 (together the 'Determinations').

The Determinations provide for an EL to be granted without going through the Right to Negotiate (RTN) process, provided the EL is granted subject to a Native Title Condition.

The Native Title Condition is:

*The licence holder must not prospect on any land or waters within the exploration area on which native title has not been extinguished under the Native Title Act 1993 (Cth) without the prior written consent of the Minister.*

Unless requested by an applicant to undertake the RTN (see option 3) MEG will process all applications for the grant of ELs by applying the Native Title Condition.

Once the Native Title Condition has been applied, the Minister must not give written consent to prospect on land where native title exists or may exist (referred to here as Native Title Land)[2] without first completing the RTN, a process commenced under Subdivision P of the NTA. Practically speaking, this means that the RTN process is delayed until such time as the holder wishes to prospect on native title land. The RTN process for the grant of Minister's consent can only commence after an EL has been granted that contains the Native Title Condition.

It is the titleholder's responsibility to investigate and confirm the native title status of land within the EL to ensure they comply with the Native Title Condition. The titleholder should retain this evidence and be prepared to share it with MEG if requested.

It is an offence under the Mining Act to prospect on land where native title exists, unless:

[2] For purposes of this guide 'native title land' means land where native title exists or may exist. This encompasses land and waters where the Federal Court has determined that native title exists and all other land and waters where there is no clear evidence that native title has been extinguished.

- the EL went through the RTN before grant
- the titleholder has the written consent of the Minister to prospect in satisfaction of the Native Title Condition, or
- the EL was granted under another valid option.

In addition to any consequences under the NTA, substantial penalties apply for failing to comply with the conditions of an authority, such as a maximum fine of $220,000 for individuals and $1,100,000 for corporations[3].

### 3.1.1. Seeking Minister's consent under the Native Title Condition

Where the holder of a standard EL (an EL that contains the Native Title Condition) wishes to prospect on native title land, the holder must make an application for Minister's consent, which triggers the RTN. This can only be undertaken on existing licences, not applications. Once the RTN process has been finalised Minister's consent can be granted to prospect over the entire EL area or specific land parcel/s. See section 3.3 below for more details on the RTN process.

If the RTN for Minister's consent is undertaken for specific parcels, additional RTNs will be required if the titleholder wishes to prospect on land parcels where native title may exist that were not subject to the original RTN and Minister's consent.

Refer to the Right to Negotiate guideline for further information.

Where Minister's consent is obtained, the Native Title Condition will remain on the EL, unless, later in the title's life, another option from this section is undertaken instead.

Minister's consent only needs to be obtained once for each area of native title land to which the consent relates.

Note: The need to obtain Minister's consent under section 30 of the Mining Act to explore on 'exempted areas' is a separate and additional requirement to Minister's consent under the Native Title Condition.

## 3.2. Option 2 – Native title extinguished

Determinations that native title exists, or does not exist, in a particular area are made by the Federal Court of Australia (or in rare cases the High Court). However, where native title is yet to be determined, for the purposes of granting an EL, if an applicant can satisfy the Minister that native title has been extinguished in relation to the entire area of an EL application, the EL can be granted without the Native Title Condition.

The applicant must advise MEG at the time of making the application that it believes native title has been extinguished in relation to the proposed licence area and provide the necessary documents of evidence and information to MEG.

In some cases, the application will include a parcel of land that was included in a previous report in which MEG accepted that native title was extinguished in that area. If this is the case, MEG does not require an applicant to repeat the extinguishment assessment. The applicant can establish that native title has been extinguished over the area by providing MEG with:

- the earlier report, and/or
- correspondence from MEG accepting that native title has been extinguished.

Native title is unlikely to be extinguished over public or vacant Crown land, such as:

a. state forests
b. national parks
c. public reserves

[3] Correct at the time of writing but may be subject to change.

d. areas subject to non-exclusive leases or licences from the Crown

e. coastal areas, or

f. beds and banks of some watercourses.

To assist applicants, MEG has developed a guideline demonstrating the standard required to be met when asserting to the Minister that native title has been extinguished. The guideline provides more detailed information on extinguishment of native title, common land tenures and the documentation required when asserting native title extinguishment.

## 3.3. Option 3 – Right to Negotiate

An applicant can complete the RTN before the grant of an EL (or for Minster's consent on an existing EL if subject to the Native Title Condition). The applicant should consider whether native title may exist before commencing the RTN process.

The RTN process commences with the issue of a section 29 notice under the NTA. If the notification area is not the subject of a native title determination the section 29 notice is publicly advertised.

If there are no native title parties at the end of the notification period, the RTN process is complete.

If there is a native title party at the end of the notification period, being 4 months from the notification date included in the s29 notice, the RTN process will involve tripartite negotiations between the:

- native title party or parties, being any registered native title body corporate/s and/or registered native title claimants for the area to which the RTN applies
- grantee party, being the party making the relevant application under the Mining Act, and
- government party, being the state of NSW (represented by MEG)

It is a requirement that the parties must negotiate in good faith with a view to obtaining the agreement of the native title party or parties to the doing of the particular 'act'. The aim of the negotiation process is an agreement (Section 31 Agreement) between the negotiation parties. The native title party and the grantee party also typically enter an additional agreement, often referred to as an 'ancillary agreement'.

Once agreement is reached, the RTN process is complete and the decision can be taken to grant the EL (without the Native Title Condition).

If at least 6 months have elapsed since the notification day and the negotiation parties have not reached agreement, any one of the negotiation parties may refer the matter to the NNTT for a determination. The NNTT may determine:

- the act may be done
- the act may be done subject to conditions to be complied with by any of the negotiation parties, or
- the act must not be done.

Many successful negotiations continue beyond six months without referral to the NNTT.

MEG has developed a separate guideline about the RTN process.

More information can also be obtained on the NNTT website.

## 3.4. Option 4 – low impact exploration licences

An applicant may choose to apply for a low impact exploration licence (LIEL).

LIELs are a different class of exploration licence as they limit the exploration activities that can be undertaken to 'low impact' activities only.

Before a LIEL can be granted (and at each renewal), MEG must serve notice on all:

- registered native title bodies corporate for the application area
- registered native title claimants, and
- NTSCORP Limited.

A benefit of a LIEL is that it is excluded from the RTN provisions of the NTA. However, before undertaking prospecting operations authorised by the licence an access arrangement with any registered native title body corporate or registered native title claimants and other landholders must be obtained.

The kinds of prospecting operations that can be undertaken under a LIEL are[4]:

**Exploration for minerals and coal using the following methods:**

a. aerial surveys
b. geological and surveying field work that does not involve clearing (as defined below)
c. sampling by hand methods
d. ground-based geophysical surveys that do not involve clearing
e. drilling and activities associated with drilling and the establishment of a drill site that do not involve clearing or site excavation (as defined below), other than the minimum necessary to establish a drill site
f. environmental field work that does not involve clearing.

**For the purposes of paragraph (e) the following are not permitted:**

- side hill excavation for access or drill pads, as would be necessary on steep slopes
- drilling in a watercourse or any stream diversion
- cutting down or pushing over trees
- clearing of densely vegetated areas, or
- clearing or excavation for the purpose of obtaining access to drill sites.

**Clearing**

a. In the case of grass, scrub or bush, 'clearing' means the removal of vegetation by disturbing root systems and exposing underlying soil, but does not include:
   - flattening or compaction vegetation by vehicles, where vegetation remains living
   - slashing or mowing vegetation to facilitate access tracks, provided root systems remain in place and vegetation remains living, or
   - clearing noxious or introduced plant species.
b. In the case of trees, 'clearing' means cutting down, ringbarking or pushing over trees.

**Excavation**

'Excavation,' means the use of machinery to dig below the 'topsoil horizon', but does not include:

- minor levelling of a site to allow the drill rig to operate on a level surface for safety reasons e.g. to provide a safe working area or for fire prevention, or
- construction of a small sump for operational purposes.

**Topsoil horizon**

The 'topsoil horizon' means the top level or layer of soil, which is generally less than 30 cm thick.

[4] Taken from the Low Impact Exploration Licence order dated 8 October 1999.

As the prospecting operations permitted under a LIEL are 'low impact' they may not be suited to all proposed exploration programs. Applicants should consider this before applying.

### 3.4.1. Converting a LIEL to an EL

When a LIEL is converted to an EL, the special native title process that excluded the LIEL from the RTN process no longer applies and cannot 'carry over' to the EL.

Like a normal grant of an EL, the NTA must be complied with and the applicant must choose one of the other options in this section. Applicants may choose a standard EL with the Native Title Condition included, meaning the RTN is not required to enable the conversion.

Because of this conversion process it is important that an applicant considers whether their objectives are better suited to a standard EL before a LIEL is applied for. MEG is happy to discuss these options with an applicant before making an application.

Before converting a LIEL to an EL, the titleholder will need to provide an updated work program detailing their proposed prospecting activities that is assessed and approved by MEG.

## 3.5. Option 5 – Don't include native title land

MEG may consider applications that choose not to include parcels of native title land in the proposed licence area before grant. Where the proposed licence area does not contain any native title land, the NTA will not apply.

Where an applicant doesn't include parcels of native title land in the proposed licence area and doesn't include the Native Title Condition on the proposed licence, the applicant must satisfy the Minister that native title has been extinguished for the balance of the land i.e. the land proposed to be included in the licence area - refer to Option 2 above on extinguishment.

## 3.6. Option 6 – ILUA

In some cases, an 'Indigenous Land Use Agreement' (ILUA) may provide for the grant of an exploration licence. An ILUA is a voluntary agreement between a native title party and another party for the undertaking of a future act, such as the grant of an exploration licence.

ILUAs are commonly used to validate non-mining acts to which the RTN or other future act provisions of the NTA do not apply. While the grant of an EL may be validated via an ILUA, it is not common for this approach to be adopted in NSW.

ILUAs also contain compensation provisions for the effect of the future act(s) on native title rights and interests. If an applicant is relying on an ILUA for the grant of an exploration licence, the applicant must:

- disclose the existence of the ILUA in the application
- provide a copy of the register extract from the Register of Indigenous Land Use Agreements
- provide sufficient information to MEG that will enable MEG to determine if the ILUA permits the grant of the exploration licence. This may include a complete copy of the ILUA.

The NNTT has additional information on ILUAs available here.

Where an applicant is considering the use of an ILUA, MEG recommends the applicant first seek legal advice in relation to the benefits and disadvantages.

## 3.7. Expedited procedure

The 'expedited procedure' is an alternative version of the RTN that is sometimes undertaken in other states. Presently, the 'expedited procedure' is not applied to the grant of exploration licences in NSW.

## 3.8. Summary of options for exploration licences

Table 1 below sets out the advantages and disadvantages of each option.

Table 1 Summary of various NTA processes for the grant of an EL

| Option | Advantages | Disadvantages | Comments |
|---|---|---|---|
| 1 – Standard process: apply Native Title Condition | Application may be granted quickly in compliance with the NTA.<br>RTN does not need to be completed before grant.<br>RTN is only triggered where exploration on native title land is required.<br>RTN is not triggered if there is no need to explore on native title land. | Compliance with the RTN is deferred.<br>This may require careful timing and planning around undertaking prospecting activities on native title land as the RTN process can take time to complete. | Quickest, easiest option for most exploration licence applications.<br>Better suited to exploration licence applications where there is no urgency to commence prospecting on native title land. |
| 2 – Native title extinguished | MEG is satisfied that native title is extinguished for the purposes of granting an EL | Will delay the grant of the exploration licence until the Minister is satisfied that native title has been extinguished. This can take time, especially where there are many land parcels.<br>More costly than a standard exploration licence due to the applicant's costs of gathering native title extinguishment evidence and information. | Better suited to exploration licence applications where there is no urgency to commence exploration immediately. |
| 3 – Right to negotiate | The holder of the exploration licence has certainty that there is no need for further compliance with the NTA to explore on native title land. | The RTN can be resource intensive and requires compliance with statutory timeframes.<br>RTN needs to be completed before the exploration licence is granted. | Better suited to exploration licence applications that cover large areas of native title land where exploration is intended.<br>Due to the cost of the RTN process, this option may not be suitable for circumstances where there is no intent to explore on native title land. |
| 4 – Low Impact Exploration Licences (LIEL) | The RTN process is not triggered for the grant of a LIEL. | A LIEL only permits limited (low impact) exploration activities.<br>Other procedural consequences apply, such as negotiating access arrangements with | Applicants are advised to contact MEG to discuss this option because of the limited range of activities permitted and the potential need to undertake additional processes if the applicant wishes to convert the LIEL to an EL. |

| | | | |
|---|---|---|---|
| | | NT parties and complying with statutory timeframes including a four-month notification period.<br>If a titleholder wants to convert a LIEL to an EL, they must follow another native title process before the EL can be granted. | Better suited to exploration licence applications that cover large areas of native title land and where early access to native title land is required for low impact exploration activities. |
| 5 – Don't include native title land | The holder of the exploration licence has certainty the NTA does not apply. | Will delay the grant of the exploration licence until the Minister is satisfied that native title has been extinguished in relation to the land covered by the licence. This can take time where there are many land parcels.<br>Exploration cannot be undertaken on the land not included because it is not within the licence area. If exploration is required on the land not included later a new exploration licence will be needed and the appropriate provisions of the NTA must be complied with. | Better suited to smaller exploration licence applications or where native title land is easily identified and there is no need to explore on the native title land. |
| 6 – ILUA | The ILUA provides for the grant of the EL pursuant to the requirements of the NTA. | Unless there is an ILUA already in place, ILUAs are not typically negotiated for exploration licences due to the time and resources required to negotiate and register an ILUA with the NNTT. | Legal advice should be sought before commencing the ILUA process.<br>Very uncommon in NSW for the grant of an EL. |

# 4. Applications for assessment leases and mining leases

This section sets out how the NTA will apply to the grant of assessment leases (ALs) and mining leases (MLs).

Applicants for ALs and MLs in NSW generally have 5 options to achieve compliance with the NTA. The 5 options are set out below, in the order of most common to least common.

## 4.1. Option 1 – RTN

Applicants can complete the RTN before the grant of an AL or ML. The applicant should consider whether native title may exist before commencing the RTN process.

The RTN process commences with the issue of a section 29 notice under the NTA. If the notification area is not the subject of a native title determination the section 29 notice is publicly advertised.

If there are no native title parties at the end of the notification period, the RTN process is complete.

If there is a native title party at the end of the notification period, being four months from the notification date included in the s29 notice, the RTN process will involve tripartite negotiations between the:

- native title party or parties, being any registered native title body corporate/s and/or registered native title claimants for the area to which the RTN applies
- grantee party, being the party making the relevant application under the Mining Act, and
- government party, being the state of NSW (represented by MEG)

It is a requirement that the parties must negotiate in good faith with a view to obtaining the agreement of the native title party or parties to the doing of the particular 'act'. The aim of the negotiation process is an agreement (Section 31 Agreement) between the negotiation parties. The native title party and the grantee party also typically enter an additional agreement, often referred to as an 'ancillary agreement'.

Once agreement is reached, the RTN process is complete and the decision can be taken to grant the AL or ML.

If at least 6 months have elapsed since the notification day and the negotiation parties have not reached agreement, any one of the negotiation parties may refer the matter to the NNTT for a determination. The NNTT may determine that:

- the act may be done
- the act may be done subject to conditions to be complied with by any of the negotiation parties, or
- the act must not be done.

Many successful negotiations continue beyond six months without referral to the NNTT.

MEG has developed a separate guideline about the RTN process.

More information can also be obtained on the NNTT website.

## 4.2. Option 2 – Native title extinguished

Determinations that native title exists, or does not exist, in a particular area are made by the Federal Court of Australia (or in rare cases the High Court). For the purposes of granting an AL or ML, if an applicant can satisfy the Minister that native title has been extinguished in relation to the entire application area, the NTA will not apply.

The applicant must advise MEG at the time of making the application that it believes that native title has been extinguished in relation to the proposed lease area and provide the necessary documents and information to MEG.

In some cases, the application will include a parcel of land that was included in a previous report in which MEG accepted that native title was extinguished in that area. If this is the case, MEG does not require an applicant to repeat the extinguishment assessment. The applicant can establish that native title has been extinguished in the area by providing MEG with:

- the earlier report, and/or
- correspondence from MEG confirming that native title has been extinguished.

Native title is unlikely to be extinguished over public or vacant Crown land, such as:

a. state forests
b. national parks
c. public reserves
d. areas subject to non-exclusive leases from the Crown
e. coastal areas, or
f. beds and banks of some watercourses.

To assist applicants, MEG has developed a guideline demonstrating the standard required to be met when asserting to the Minister that native title has been extinguished. The guideline provides more detailed information on extinguishment of native title, common land tenures and the documentation required when asserting native title extinguishment.

## 4.3. Option 3 – Don't include native title land

An applicant can choose not to include parcels of native title land in the proposed lease area before grant. Where the proposed lease area does not contain any native title land, the NTA will not apply.

Where an applicant doesn't include parcels of native title land in a proposed lease area, the applicant must, either:

- satisfy the Minister that native title has been extinguished in the remaining land subject to the application (option 2), or
- comply with the RTN process (option 1).

## 4.4. Option 4 – ILUA

In some cases, an 'indigenous land use agreement' (ILUA) may provide for the grant of an AL or ML. An ILUA is a voluntary agreement between a native title party and another party for the undertaking of a future act, such as the grant of an AL or ML.

ILUAs are usually used to validate non-mining acts to which the RTN or other future act provisions of the NTA do not apply. While the grant of an AL or ML may be validated via an ILUA, it is not a common approach in NSW.

ILUAs also contain compensation provisions for the effect of the future act(s) on native title rights and interests.

If an applicant is relying on an ILUA for the grant of an AL or ML, the applicant must:

- disclose the existence of the ILUA in the application
- provide a copy of the register extract from the Register of Indigenous Land Use Agreements, and
- provide sufficient information to MEG as part of the application that will enable MEG to determine if the ILUA permits the grant of the AL or ML. This may include a full copy of the ILUA.

The NNTT has additional information on ILUAs available here.

Where an applicant is considering the use of an ILUA, MEG recommends that the applicant first seek legal advice in relation to the benefits and disadvantages.

## 4.5. Option 5 – Mining leases for infrastructure facilities

MEG is considering the application of the 'infrastructure facility' provisions under s24MD(6B) of the NTA for mining leases and further guidance will be provided as it becomes available.

## 4.6. The Native Title Condition is not available for ALs or MLs

The determinations (see section 3.1) relating to the Native Title Condition, only apply to ELs and do not extend to ALs or MLs.

# 5. Applications for renewal of authorities

## 5.1. Overview

The renewal of an authority is an act that may affect native title, and if so, it can trigger a requirement to comply with the NTA.

When a renewal application for an authority is lodged, MEG will undertake an assessment to determine:

- whether the NTA will apply to the renewal, and
- if the NTA applies to the renewal, which of the relevant provisions in the NTA will apply.

While every authority needs to be individually assessed, as general guidance:

- where native title has been demonstrated to have been extinguished, to the satisfaction of the Minister, there is no need to comply with the NTA for the renewal
- compliance with the NTA will be required where an authority is renewed over land where native title exists
- in most cases the renewal of the authority will not trigger the need for an ILUA or RTN process, and
- generally, a new native title claim or determination will not affect a renewal.

## 5.2. Common examples of renewal application outcomes

Table 2 below sets out general guidance on the likely NTA process for the most common renewals. Each of the circumstances are subject to several qualifications and should be used as a guide only.

Table 2 Likely NTA process for renewals – guide only

| No. | Description | NTA outcome |
|---|---|---|
| 1 | The EL was granted or renewed under the determinations (Native Title Condition was applied). | The renewal of the authority will be processed under the determinations (and the Native Title Condition will continue to be applied). |
| 2 | The authority was granted on or before 23 December 1996. | The renewal of the authority will most likely be processed as a 'past act'/ 'intermediate period act' or as a future act that may meet the tests under section 26D(1) of the NTA (see below). |
| 3 | The authority was granted or renewed in compliance with the RTN process. | The renewal of the authority that was validated in the RTN will most likely be a future act that may meet the tests under section 26D(1) of the NTA (see below). |
| 4 | Native title has been demonstrated to have been extinguished, to the satisfaction of the Minister | The NTA will not apply to the renewal. |
| 5 | There is an ILUA that applies to the renewal of the authority. | The ILUA will be relied upon for the renewal of the authority. |

## 5.3. Renewals where section 26D(1) applies

Section 26D(1) is a section in the NTA that allows for the renewal of an authority without requiring the RTN in certain circumstances.

Where a renewal of an authority is validated as a future act that meets the test under section 26D(1) of the NTA, the renewal is excluded from the RTN process.

However, renewal under section 26D(1) of the NTA will not be available where the applicant:

- seeks a longer renewal term (see section 26D(1)(d) of the NTA)
- seeks additional rights (see section 26D(1)(e) of the NTA), or
- seeks an increased area (see section 26D(1)(c) of the NTA (which additionally is not permissible under the Mining Act).

**Example**

An EL is granted following compliance with the RTN process for a term of 2 years. As the RTN process has been carried out before grant, the EL would not include the Native Title Condition. If renewal of the EL is sought for 3 years, it will either:

- need to go through the RTN process again, or
- have the Native Title Condition applied, or
- negotiate an ILUA

This is because a longer renewal term was sought.

If the renewal term sought was only 2 years, then the renewal could proceed without the application of the Native Title Condition or the RTN (provided there is otherwise no increase in rights).

## 5.4. Renewals where the Native Title Condition is applied

Where a renewal of an EL is sought, MEG generally continues to apply the Native Title Condition, so that the determinations will continue to apply to the renewal. The renewed licence would thus be excluded from the RTN by the determinations in the same way as the grant of the licence was excluded from the RTN by the determinations.

Where the RTN has been completed and Minister's consent has been granted, the Native Title Condition will remain on the EL and the titleholder may prospect on the land that was subject to the RTN.

# 6. Consolidation of mining leases

The consolidation of mining leases can trigger the NTA.

The RTN will apply to a consolidation unless the act is excluded from the RTN process under the NTA. Whether a consolidation is excluded from the RTN will depend on the particulars of the leases and may depend on:

- whether native title exists in relation one or more of the leases to be consolidated, and
- the particulars of the leases subject to consolidation (e.g. grant date, previous compliance with the RTN and relevant terms of the lease instruments).

While every application for consolidation is assessed for NTA compliance by MEG, applicants for the consolidation of mining leases should contact MEG to discuss the proposed consolidation prior to making an application. They should also seek their own legal advice in relation to the process.

# 7. Transfers of authorities

Where an application for a transfer of an authority is made, MEG will assess whether the NTA applies and the appropriate NTA compliance pathway. Generally, a full transfer with no change to its conditions will not be a future act and compliance with the NTA is not required.

A partial transfer to create 2 authorities may be a future act and may trigger requirements under the NTA if native title isn't extinguished in the area to be partially transferred.

If there is an agreement with a native title party, such as an ancillary agreement to a section 31 deed made under the RTN, the transferee may be required to assume these obligations. The transferee should conduct due diligence to understand these obligations and ensure that these can be met before a transfer is agreed.

# 8. Variation of authorities

Where an application for the variation of an authority is received from the holder, or a variation is proposed on the initiative of the relevant decision maker, MEG will assess whether the variation is an act affecting native title and if so, the appropriate NTA compliance pathway.

# 9. Addition of minerals and petroleum to mining leases

An application under section 77 or section 78 of the Mining Act to add an additional mineral to an existing mining lease, or to add petroleum to an existing mining lease for coal, will not generally have any effect on native title, and so will not be a future act that requires validation under the NTA. However, the addition of minerals needs to be considered on a case-by-case basis and MEG will assess the appropriate NTA compliance pathway.

# 10. Frequently asked questions

## 1. Who is responsible for complying with the NTA?

MEG assists the Minister with the administration of the Mining Act. The Minister (and the NSW Government in general) is responsible for complying with the NTA in respect of decisions on authorities under the Mining Act. This guideline sets out (in part) some of the more common examples of this.

Applicants and titleholders are also required to comply with the NTA.

In some circumstances, such as the RTN process and compliance with the Native Title Condition, the relevant applicant or titleholder will also have additional obligations under the NTA.

## 2. How do you determine if native title is extinguished?

Please refer to MEG's native title extinguishment guideline here.

## 3. Will MEG apply the expedited procedure to the grant of an EL?

No - presently the 'expedited procedure' is not applied to the grant of ELs in NSW.

## 4. If the mining lease application relates only to a subsurface area, is there a need to comply with the NTA?

Yes. Native title is presumed to exist where there is no determination that native title is extinguished and there is no clear evidence that it has been extinguished, including at depth.

## 5. I've been through the RTN for the grant of Minister's consent for my EL. Do I need to go through the RTN to renew my EL?

No, provided the Native Title Condition remains on the EL.