Mining, Exploration and Geoscience
Department of Regional NSW

Guideline

An overview of native title and the Petroleum (Onshore) Act 1991

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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 *Petroleum (Onshore) Act 1991*.

This guideline is introductory and is intended to complement other MEG guidance. This guideline includes links to other MEG guidance.

This guideline:

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

1.1. What this guideline covers

- Applications for petroleum exploration licences and petroleum special prospecting authorities (see part 3)
- Applications for petroleum assessment leases and petroleum production leases (see part 4)
- Renewal of titles (see part 5)
- Transfer of titles (see part 6)
- Variation of titles (see part 7).

Under the Petroleum Act, a petroleum title means a petroleum exploration licence, a petroleum assessment lease, a petroleum production lease, or a petroleum special prospecting authority. This document uses the shortened version 'title' when referring to these collectively and 'titleholders' to mean the holders or grantees of such titles.

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 Petroleum Act where the NTA may apply.

1.3. Additional information

For information about the Right to Negotiate process and the various steps required, see the Right to Negotiate guideline.

For information about native title extinguishment and MEG's requirements if you are asserting that native title is extinguished, see the 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.

For an introduction to native title and a general overview of how MEG applies the NTA in administering the Mining Act, see the guideline An overview of native title and the Mining Act – minerals and coal.

The National Native Title Tribunal (NNTT) website contains information about 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.

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

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

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

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 Petroleum 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.

2.4. When does the NTA apply?

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

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

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 titleholder. Native title holders could also seek damages.

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

3. Applications for petroleum exploration licences and petroleum special prospecting authorities

Applicants for new petroleum exploration licences (PELs) and petroleum special prospecting authorities (PSPAs) 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 PELs or PSPAs by applying option 1 (applying the 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 a PEL or PSPA is to apply the Native Title Condition. We refer to this as a Standard PEL or Standard PSPA. 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 a PEL or PSPA to be granted without going through the Right to Negotiate (RTN) process, provided the PEL or PSPA 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.

MEG will process all applications for the grant of PELs or PSPAs by applying the Native Title Condition, unless an alternative option is requested.

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 a PEL or PSPA has been granted that contains the Native Title Condition.

As with all other conditions on title, it is the titleholder's responsibility to ensure that the Native Title Condition is complied with where this is applied to a PEL or PSPA. Prior to undertaking any activities on land within the PEL or PSPA to which the Native Title Condition applies, the titleholder should investigate to ensure that their proposed activities comply with this condition. The titleholder should retain this evidence and be prepared to share it with MEG if requested.

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

- the PEL or PSPA 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 PEL or PSPA was granted under another valid option, such as option 4 (low impact prospecting title).

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

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

Where the holder of a standard PEL or PSPA (i.e. one 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 PELs or PSPAs, not applications. Once the RTN process has been finalised, Minister's consent can be granted to prospect over the entire PEL or PSPA 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 PEL or PSPA, 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 70 of the Petroleum 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 a PEL or PSPA, if an applicant can satisfy the Minister that

[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.

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

native title has been extinguished in relation to the entire area of the application, the PEL or PSPA 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 or authority 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 for that parcel of land. 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
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 a PEL or PSPA (or for Minster's consent on an existing PEL or PSPA 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, other than some administrative requirements undertaken by MEG, 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 Petroleum 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 an agreement is reached, and the s31 agreement is signed by all parties, the RTN process is complete, and the decision can be taken to grant the PEL or PSPA (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 6 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 prospecting titles

An applicant may choose to apply for a low impact PEL or a low impact PSPA, collectively known as low impact prospecting titles.

Low impact prospecting titles are a different class of prospecting title as they limit the exploration activities that can be undertaken to low impact activities only.

Before a low impact prospecting title can be granted (and at each renewal), MEG must serve notice on:

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

A benefit of a low impact prospecting title is that it is excluded from the RTN provisions of the NTA. However, before undertaking prospecting operations authorised by the title, 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 low impact prospecting title are[4]:

Exploration for petroleum 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) to establish a drill site, other than the equivalent to the minimum necessary for a conventional mineral diamond drilling rig permissible in a low impact exploration licence under the NSW Mining Act
f. environmental field work that does not involve clearing.

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

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

- 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.

For the purposes of this determination, the terms “clearing”, “excavation” and “topsoil horizon” have the following meanings:

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:
   - the flattening or compaction vegetation by vehicles, where vegetation remains living
   - the slashing or mowing vegetation to facilitate access tracks, provided root systems remain in place and vegetation remains living, or
   - the 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.

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

3.4.1. Converting a low impact petroleum prospecting title to a standard PEL or PSPA

When a low impact petroleum prospecting title is converted to a standard PEL or PSPA, the NTA must be complied with, and the applicant must choose one of the other options in this section. Applicants may choose a standard PEL or PSPA 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 PEL or PSPA before a low impact petroleum prospecting title is applied for. MEG is happy to discuss these options with an applicant before they lodge an application.

Before converting a low impact petroleum prospecting title to a PEL or PSPA, 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 title area before grant. Where the proposed title 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 title area and doesn't include the Native Title Condition on the proposed title, 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 title 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 a title. An ILUA is a contract between a native title party and another party for the undertaking of a future act, such as the grant of a PEL.

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 a PEL or PSPA may be validated via an ILUA, it is not common for this approach to be adopted in NSW.

ILUAs may 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 a PEL or PSPA, 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 PEL or PSPA.

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 about 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 in NSW.

3.8. Summary of options for petroleum exploration licences and petroleum special prospecting authorities

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

Table 1 Summary of various NTA processes for the grant of a PEL or PSPA

Option	Advantages	Disadvantages	Comments
1 – Standard process: apply Native Title Condition	Application may be granted quickly in compliance with the NTA. RTN does not need to be completed before grant. RTN is only triggered where exploration on native title land is required. RTN is not triggered if there is no need to explore on native title land.	Compliance with the RTN (if required) is deferred. 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 PEL or PSPA applications. Better suited to PEL or PSPA 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 a PEL or PSPA	Will delay the grant of the PEL or PSPA until the Minister is satisfied that native title has been extinguished. This can take time, especially where there are many land parcels. More costly than a standard PEL or PSPA due to the applicant's costs of gathering native title extinguishment evidence and information.	Better suited to PEL or PSPA applications where there is no urgency to commence exploration immediately.
3 – Right to negotiate	The holder of the PEL or PSPA has certainty that NT requirements have been met to explore on native title land.	The RTN can be resource intensive and requires compliance with statutory timeframes. RTN needs to be completed before the PEL or PSPA is granted. Note the RTN can be done after grant if the native title condition is included.	Better suited to PEL and PSPA applications that cover large areas of native title land where exploration is intended. 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.

Option	Advantages	Disadvantages	Comments
4 – Low Impact PELs or PSPAs	The RTN process is not triggered for the grant of a low impact PEL or PSPA	A low impact PEL or PSPA only permits limited (low impact) exploration activities. Other procedural consequences apply, such as negotiating access arrangements with NT parties and complying with statutory timeframes including a four-month notification period (prior to grant and for each renewal). If a titleholder wants to convert a low impact PEL or PSPA to a PPL, they must follow another native title process before the PPL can be granted.	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 low impact PEL or PSPA to a PPL. Better suited to 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 PEL or PSPA has certainty the NTA does not apply.	Will delay the grant of the PEL or PSPA until the Minister is satisfied that native title has been extinguished in relation to the land covered by the application. This can take time where there are many land parcels. Exploration cannot be undertaken on the land not included because it is not within the PEL or PSPA area. If exploration is required on the land not included later a new PEL or PSPA will be needed and the appropriate provisions of the NTA must be complied with.	Better suited to smaller PEL and PSPA 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 PEL or PSPA pursuant to the requirements of the NTA.	Unless there is an ILUA already in place, ILUAs are not typically negotiated for PEL or PSPAs 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. Very uncommon in NSW for the grant of an PEL or PSPA.

4. Applications for petroleum assessment leases and petroleum production leases

This section sets out how the NTA will apply to the grant of petroleum assessment leases (PALs) and petroleum production leases (PPLs).

Applicants for PALs and PPLs in NSW generally have 4 options to achieve compliance with the NTA. The 4 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 a PAL or PPL. 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, other than some administrative requirements undertaken by MEG, 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 Petroleum 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, and the s31 agreement is signed by all parties, the RTN process is complete, and the decision can be taken to grant the PAL or PPL.

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 a PAL or PPL, 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 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 for that parcel of land. 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 adopts this approach, they must satisfy the Minister that native title has been extinguished in the remaining land subject to the application (option 2).

If the Minister is not satisfied that native title is extinguished in the land, the applicant must comply with the RTN process (option 1) or further modify their application area.

4.4. Option 4 – ILUA

In some cases, an ILUA may provide for the grant of a PAL or PPL. 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 a PAL or PPL.

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 a PAL or PPL 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 a PAL or PPL, 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 PAL or PPL.

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. The Native Title Condition is not available for PALs or PPLs

The determinations (see section 3.1) relating to the Native Title Condition, only apply to PELs and PSAPs, and do not extend to PALs or PPLs.

5. Applications for renewal of titles

5.1. Overview

The renewal of a title 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 a title 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 title 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 a title is renewed over land where native title exists
- in most cases the renewal of the title will not trigger the need for an ILUA or RTN process, as other native title renewal processes apply, and
- generally, a new native title claim or claim 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 PEL or PSPA was granted or renewed under the determinations (Native Title Condition was applied).	The renewal of the PEL or PSPA will be processed under the determinations (and the Native Title Condition will continue to be applied).
2	The title was granted on or before 23 December 1996.	The renewal of the title 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 title was granted or renewed in compliance with the RTN process.	The renewal of the title 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 title.	The ILUA will be relied upon for the renewal of the title.

5.3. Renewals where section 26D(1) applies

Section 26D(1) of the NTA allows for the renewal of a title without requiring the RTN in certain circumstances.

Where a renewal of a title is validated as a future act that meets the tests 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 fails those tests by seeking:

- a longer renewal term (see section 26D(1)(d) of the NTA)
- additional rights (see section 26D(1)(e) of the NTA), or
- an increased area {see section 26D(1)(c) of the NTA) noting that there is no power to do so anyway under section 19(4A) of the Petroleum Act.

Example

A PEL 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 PEL would not include the Native Title Condition. If renewal of the PEL is sought for 3 years, the renewal cannot meet the test in s.26D(1)(d) and will:

- need to go through the RTN process again, or
- have the Native Title Condition applied, or
- be validated via an ILUA.

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 a PEL or PSPA is sought, MEG generally continues to apply the Native Title Condition, so that the determinations will continue to apply to the renewal. The renewed PEL or PSPA would thus be excluded from the RTN by the Determinations in the same way as the grant of the PEL or PSPA 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 PEL or PSPA and the titleholder may prospect on the land that was subject to the RTN.

6. Transfers of titles

Where an application for a transfer of a title 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 titles 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, the transferee may be required to assume the titleholder's obligations. The transferee should conduct due diligence to understand these obligations and ensure that these can be met before a transfer is agreed.

7. Variation of titles

Where an application for the variation of a title 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.

8. Frequently asked questions

8.1. Who is responsible for complying with the NTA?

MEG assists the Minister with the administration of the Petroleum Act. The Minister (and the NSW Government in general) is responsible for complying with the NTA in respect of decisions on titles under the Petroleum 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.

8.2. How do you determine if native title is extinguished?

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

8.3. Will MEG apply the expedited procedure to the grant of an PEL or a PSPA?

No - presently the expedited procedure is not applied to the grant of PELs or PSPAs in NSW.

8.4. If the petroleum 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.

8.5. I've been through the RTN for the grant of Minister's consent for my PEL or PSPA. Do I need to go through the RTN to renew my PEL or PSPA?

Refer to Section 3.1.1 and section 5.4.