

July 2022

Right to negotiate guideline

This guideline sets out how the ‘right to negotiate’ process (RTN) under the Native Title Act is applied to proposed Acts under the Mining Act in NSW

1. What this guideline covers

This guideline:

- sets out how the Department applies the ‘right to negotiate’ process (RTN) under the Native Title Act 1993 (Cth) (NTA) to proposed acts under the Mining Act 1992 (NSW) (Mining Act) in NSW
- is designed to assist each of the key stakeholders in participating in the RTN with the objective of maximising the likelihood of a favourable outcome for each participant
- is intended to facilitate compliance with the NTA
- contains resources and information to assist parties meet their legal obligations.

This guideline does not cover:

- the circumstances when the Department will apply the RTN
- other future act processes under the NTA such as the ‘expedited procedure’, or indigenous land use agreements, or
- guidance as to the amount of native title compensation or other benefits that might be payable or negotiated for acts which diminish or affect native title rights and interests.

Parties are encouraged to obtain their own legal advice in relation to the RTN.

In NSW, Aboriginal cultural heritage is protected by the *National Parks and Wildlife Act 1974* (NSW). Compliance with the RTN does not relieve a person from the need to comply with their obligations under the *National Parks and Wildlife Act 1974* (NSW).

2. The ‘right to negotiate’ (RTN)

This section sets out an overview of the RTN as applied by the Department in NSW.

2.1. What does the RTN involve?

The RTN is contained in Subdivision P of Division 3 of Part 2 of the NTA.

The RTN is a statutory process under the NTA that must be completed before the Minister can do certain acts under the Mining Act.

Example: Where the RTN applies to the grant of a mining lease under the Mining Act, the RTN must be completed before the grant of the mining lease can proceed.

The Negotiation Parties (we set out below who they are) must negotiate in good faith with a view to obtaining the agreement of the Native Title Party or Parties¹ 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’ (see further below).

If 6 months have elapsed since the Notification Day (see below) and the Negotiation Parties have not reached agreement, any one of the Negotiation Parties may refer the matter to the National Native Title Tribunal (NNTT) for a determination.

2.2. Who participates in the RTN?

The parties involved in the negotiation process for the RTN are referred to as the ‘Negotiation Parties’ (section 30A of the NTA). They are:

- **Native Title Party:** this will be the Registered Native Title Body Corporate/s and/or Registered Native Title Claimants who are identified in accordance with section 29(2)(a) and (b) of the NTA, or section 30(1)(a) of the NTA
- **Grantee Party:** the party making the relevant application under the Mining Act, and
- **Government Party:** the State of NSW (State). The Department represents the State for the purposes of being the Government Party.

2.3. What are the stages in the RTN?

The Department’s approach to the RTN is separated into the following stages:

- **Commencement:** The Grantee Party requests the RTN to be undertaken and pays the Department the necessary advertising costs.
The Grantee Party may provide the Grantee Party RTN Submission (see section 3) (the **Grantee Party RTN Submission**) at this stage, or later in the process.
- **Notification:** The Department issues the relevant Section 29 Notices (see section 4) to start the RTN.
- **Information:** The Department will provide the Native Title Party with the Grantee Party’s RTN Submission. Under the NTA the Department will provide the Native Title Party an opportunity to make submissions to the Department, whether orally or in writing in relation to the particular act and the effect this may have on their native title rights and interests.
- **Negotiation:** The Negotiation Parties must negotiate in good faith with a view to obtaining the agreement of the Native Title Party to the doing of the ‘act’ or the doing of the act subject to conditions to be complied with by any of the parties.
- **Agreement:** Where the Negotiation Parties reach agreement, the RTN is complete once the Section 31 Agreement is signed (see section 7).
- **Arbitration:** If 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.

2.4. What can negotiations cover?

The NTA does not limit the matters that can be the subject of a negotiation.

Section 33 of the NTA provides that the negotiations may include the following:

¹ There may in some circumstances be more than one Native Title Party for a RTN. For brevity, Native Title Party in this document refers to both the singular and the plural.

(1) Without limiting the scope of any negotiations, they may, if relevant, include the possibility of including a condition that has the effect that native title parties are to be entitled to payments worked out by reference to:

- (a) the amount of profits made; or
- (b) any income derived; or
- (c) any things produced;

by any grantee party as a result of doing anything in relation to the land or waters concerned after the act is done.

(2) Without limiting the scope of any negotiations, the nature and extent of the following may be taken into account:

- (a) existing non native title rights and interests in relation to the land or waters concerned;
- (b) existing use of the land or waters concerned by persons other than native title parties;
- (c) the practical effect of the exercise of those existing rights and interests, and that existing use, on the exercise of any native title rights and interests in relation to the land or waters concerned.

2.5. What costs are associated with the RTN?

The expected costs involved in a RTN include:

- Advertising costs (section 29 notice). These costs are incurred by the Department and are reimbursed by the Grantee Party. The expected cost range is generally \$2,300 to \$3,000, noting that these costs may increase if multiple acts are notified or if specific land parcels are identified for exploration licences.
- legal costs
- the costs of negotiation meetings such as venue hire and catering, and
- travel and accommodation expenses.

The Department meets its own costs in participating in the negotiations.

3. Commencement Stage

3.1. How does the RTN commence?

In order for the Department to commence the RTN, the Grantee Party should:

- advise the Department that they wish to commence the RTN – this may be via mail, email, the lodgement of Form AD19 or an application form where the RTN option has been selected e.g. Form EL1 – Application for an exploration licence
- provide a diagram of the area proposed to be subject to the RTN process for inclusion in the Section 29 Notice, and
- pay the Section 29 Notice advertising costs (the amount will be advised by the Department to the Grantee Party).
- The Grantee Party may also submit a Grantee Party RTN Submission at this stage (doing so may assist in the timely commencement and progression of negotiations).

3.2. What is included in the Grantee Party RTN Submission?

The purpose of the Grantee Party RTN Submission is to share important information at the start of the RTN to give the Negotiation Parties the maximum chance of reaching agreement.

The Grantee Party RTN Submission can be provided either as part of the application to commence the RTN process or afterwards, however formal negotiations are not able to commence unless a Grantee Party RTN Submission has been provided.

The Grantee Party RTN submission requires the Grantee Party to provide the Department with information that the Department:

- needs to commence the RTN
- can provide the Native Title Party to understand the background to the RTN and make a submission to the Department (see below in section 5.3).

The Grantee RTN Submission relates specifically to the act that is proposed to be done (i.e., the granting of a licence or lease, or the giving of Minister's Consent to prospect. The submission must include:

- background on the Grantee Party
- information about the proposed act (prospecting activities or mining operations). This should, where possible, include maps and plans.
- information about the potential impacts of the proposed act on the land and the natural and cultural environments, for example, for mining lease applications, an environmental impact statement or other planning document that have been prepared for development consent or approval may assist
- information, including maps where possible, about any affected Aboriginal objects and/or Aboriginal places protected under the National Parks and Wildlife Act 1974 that might be impacted by the proposed activities
- a copy of any Aboriginal archaeological information obtained for the land in any surveys conducted by or on your behalf.

Note: Submissions will vary in detail. Proposed mining operations are expected to provide more in-depth information than more speculative prospecting operations.

4. Notification stage

4.1. Overview of the Notification Stage

The NTA contains strict notification requirements for the commencement of the RTN.

Notification is the first step in the negotiation process and advises the Native Title Party that the Grantee Party wishes to undertake the notified act and wishes to negotiate an agreement for the doing of the 'act' or the doing of the act subject to conditions to be complied with by any of the parties.

Notification is the responsibility of the Department.

This section sets out how the Department will approach the notification of a RTN under section 29 of the NTA.

4.2. Commencement of the Notification stage

The Department will commence the Notification Stage within 4 weeks of receiving the Grantee Party's request to commence the RTN process and payment of advertising costs.

4.3. Section 29 Notice

The Department must give notice of the RTN and the proposed act in accordance with section 29 of the NTA (Section 29 Notice). This will involve providing notice to:

- all registered native title body corporates for the area
- all registered native title claimants for the area
- any representative Aboriginal body under the NTA for the area
- the Grantee Party, and
- the Registrar of the NNTT.

4.4. Public notice

If there is not one or more registered native title body corporates for the entire area of the proposed act, the Department must also notify the public by advertising in a locally circulating newspaper and relevant special interest publication (the Department currently advertises in the Koori Mail and The Land newspapers).

The public notice will contain a statement to the effect that persons have until 3 months after the Notification Day to take certain steps to become a Native Title Party in relation to the notice.

The default statement is included at the bottom of this page. You can find alternative statements and guidance on their use in the departmental writing style guide available on the intranet.

Example: At the time of the Notification Day, there may be no registered native title claim. The public notice provides an opportunity for persons to become a Native Title Party by making a native title claim and having it registered within the prescribed periods in the NTA.

The notice will contain a clear description of the area affected by the act, a description of the nature of the act and a statement about how further information can be obtained.

4.5. Notification day

The Section 29 Notice and the public notice will include a notification day (Notification day) as required under s 29(4)(a) of the NTA.

Where public notice is provided, the Department will choose a Notification day a minimum of 2 weeks after the date the notice is published.

Otherwise, the Department will choose a Notification day a minimum of 2 weeks after the date notice is provided to the relevant parties.

This time allocation is for notices to be received or come to the attention of the persons being notified.

The notification date may be extended (usually an additional 2 weeks), particularly over holiday periods.

4.6. Who is the Native Title Party?

At the end of the 4-month notification period, and where there is no registered native title body corporate for the entire area of the proposed act, the Department will confirm any Native Title Party (i.e. registered Native Title Claimants) as a negotiation party for the RTN process.

Where a Native Title Party is identified, the Department will proceed to the Information Stage.

The Government Party will then contact the Native Title Party and the Grantee Party for the RTN. See section 5.2 below.

The Grantee Party may also undertake its own assessment to confirm any Native Title Party as a negotiation party for the RTN process. For assistance in determining the Native Title Party for the RTN, the Grantee Party can contact the NNTT.

4.7. What if there is no Native Title Party?

If there is no Native Title Party at the end of the notification period, the act can proceed without further reference to the RTN.

4.8. Becoming a Native Title Party

A Native Title Party must be either a Registered Native Title Body Corporate or a Registered Native Title Claimant and have an interest in the land subject to the notification. Persons who hold a native

title interest in the land and are not currently either of these categories must become Registered Native Title claimants within the Notification Period in order to be considered a Native Title Party under the negotiation process.

Persons wishing to register a Native Title claim can receive assistance from the NNTT. Further information can be obtained [here](#).

5. Information stage

5.1. Objective of the Information stage

This section sets out what the Department refers to as the ‘information stage’ (Information Stage).

The objective of the Information Stage is for the Negotiation Parties to be introduced to each other and to share information that will facilitate a successful negotiation.

5.2. Introduction and sharing of information

At the end of the notification period the Department will write to the Native Title Party and the Grantee Party and:

- introduce and share the contact details it holds for the Native Title Party, the Grantee Party and for the Department
- provide the Grantee Party RTN Submission to the Native Title Party and seek their submission (Native Title Party RTN Submission) as required under section 31(1)(a) of the NTA’, and
- provide a Section 31 Template Agreement for the purpose of section 31(1)(b) of the NTA.

5.3. The Native Title Party RTN Submission

As set out above, the Department will provide the Grantee Party RTN Submission to the Native Title Party and seek the Native Title Party submission on the doing of the relevant act under section 31(1)(a) of the NTA (Native Title Party RTN Submission).

The Native Title Party RTN Submission is requested to be provided within 8 weeks of the Grantee Party RTN Submission being provided to them.

The Native Title Party RTN Submission can be provided in writing or orally.

Once received, the Department will forward a copy of the Native Title Party RTN Submission to the Grantee Party.

6. Negotiation stage

6.1. Overview

Under the RTN, the Negotiation Parties must negotiate in good faith with a view to obtaining agreement of the Native Title Party to the doing of the particular ‘act’ or doing the act subject to conditions to be complied with by any of the Negotiation Parties.

The Negotiation Parties may choose to commence or continue their negotiations before the Native Title Party RTN Submission is received.

6.2. What does ‘good faith’ mean?

The NTA requires that the Negotiation Parties conduct the negotiations in ‘good faith’.

Negotiating in good faith requires the parties to act honestly and reasonably with a view to reaching an agreement on whether or not the act should go ahead.

Negotiation must be about the effect of the proposed act on the registered native title rights and interest but can cover a range of subject matters.

Good faith considerations include:

- Communicating with the other parties within a reasonable time
- Making appropriate commitments to the negotiation process
- Making proposals and counterproposals with a view to achieving agreement, and
- Providing relevant information or making inquiries of other parties where insufficient information is available to enable informed choices on how to proceed in negotiations.

An arbitral body must not make a determination if it is satisfied that a party (other than the native title party) has not acted in good faith (s.36(2) of the NTA).

If you have any concerns or queries around what constitutes good faith you should obtain legal advice.

6.3. Government Party

An authorised delegate of the Department will represent the Minister in the negotiations. Their contact details will be provided to the Native Title Party and the Grantee Party.

The nature and extent of the Government Party's role in the negotiation will depend on the totality of each negotiation. The Government Party will adopt an open, case-by-case approach to negotiations. The Government Party will engage in negotiations with a view to reaching an agreement.

The Department will seek the agreement of the Native Title Party and the Grantee Party on the Government's level of its involvement in the negotiations. Where the Department has limited involvement in the negotiations, the Native Title Party and the Grantee Party must keep the Department regularly updated on the progress of the negotiations.

6.4. Mediation assistance

At any stage of the negotiations a Negotiation Party may approach the NNTT for mediation assistance. Under the NTA the NNTT must mediate among the parties to assist in obtaining their agreement.

Details of the NNTT's mediation assistance can be found [here](#).

7. Agreement Stage

7.1. Section 31 Agreement

If negotiations are successful, the Negotiation Parties will sign an agreement under section 31 of the NTA (Section 31 Agreement).

The Department will provide a Section 31 Template Agreement to the Native Title Party and the Grantee Party as part of the Information Stage (see section 5.2). The Department will consider and negotiate any requested amendments to the Template Agreement.

Where agreement is reached, the Department's preference is that the Negotiation Parties sign a minimum of three original Section 31 Agreements to allow each of the Negotiation Parties to retain an original copy of the signed agreement. The Department (the Minister) will be the last to sign.

The Department will, on behalf of the Negotiation Parties, lodge the signed Section 31 Agreement with the NNTT, which keeps a public record of Section 31 Agreements.

Once the Section 31 Agreement has been properly executed by the Negotiation Parties the RTN process is complete.

7.2. Ancillary agreements

Often a separate agreement, ‘ancillary’ to the Section 31 Agreement, is entered into between the Native Title Party and Grantee Party. This Ancillary Agreement may contain confidential commercial arrangements, such as the payment of compensation, land access arrangements, and the protection of native title rights and interests and Aboriginal cultural heritage. This confidential agreement is not usually submitted to the NNTT

8. Arbitration stage

If the Negotiation Parties do not reach an agreement after 6 months from the Notification day, any of the Negotiation Parties may refer the matter to the National Native Title Tribunal (NNTT) for a determination under section 35 of the NTA.

The NNTT can make the following determinations:

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

The Negotiation Parties can continue to negotiate at the same time as the arbitration process. Where agreement is reached, the application to the NNTT is taken to be withdrawn.

The NNTT must take all reasonable steps to make a determination as soon as reasonably practicable.

Further information in relation to future act determination applications is available [here](#).

9. Frequently asked questions

1. When do I need to undertake the RTN?

The RTN process must be completed prior to the determination of an application that will affect native title rights and interests. This includes:

- assessment lease applications
- mining lease applications
- exploration licence applications
 - An applicant for an exploration licence may elect:
 - for the imposition of the ‘native title condition’ known as a ‘standard exploration licence’. Where this occurs the native title condition is included as a condition of the exploration licence, which can then be granted by the Minister without the holder undertaking the RTN. The condition provides that the holder cannot explore on native title land, without first obtaining the Minister’s consent. The Minister can only grant consent after completion of the RTN.
 - for the RTN process to be undertaken prior to grant. Where this occurs the RTN must be completed before the Minister grants the exploration licence. Once granted, the exploration licence will not include the native title condition.
- Applications for the grant of Minister’s consent to prospect on land subject to native title in compliance with the ‘native title condition’ on an exploration licence*.

* The native title condition states that ‘*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*’

We recommend speaking to the Department for further clarity.

2. What happens if only a small part of the application area is affected by a registered native title claim or native title determination?

We recommend speaking to the Department in these circumstances.

It may be possible to vary an application to remove any impact on land where native title may exist. For example, by removing a particular parcel of land from the application.

3. Can the Grantee Party discontinue the RTN?

If the Grantee party elects not to proceed with the RTN, at any stage of the process, the Department requires the Grantee Party to promptly notify the Department and the Native Title Party in writing. Discontinuing the RTN may have implications for the application. The Department recommends the Grantee Party obtain legal advice on this issue.

The RTN may be discontinued if the part of the application area affected by a registered native title claim or native title determination is removed from the application or if the application is withdrawn or an existing exploration licence is cancelled or expires.

4. Can the RTN be commenced and then 'put on hold'?

We recommend speaking to the Department in these circumstances.

Under the RTN the Negotiation Parties are required to negotiate in good faith. Delays and inactivity may be considered to be not negotiating in good faith.

A Grantee Party should also seek its own legal advice on this issue.

5. Can the application that triggered the RTN be transferred to another person during the RTN process?

We recommend speaking to the Department in these circumstances.

Under the Mining Act some applications are not transferable and the RTN may need to be completed before the transfer can occur.

6. If the RTN is undertaken prior to the grant of an exploration licence, is the native title condition included in the granted exploration licence?

Where the RTN is completed prior to the grant of an exploration licence and the 'act' notified is the grant of an exploration licence, the Department will not impose the native title condition on the granted exploration licence.

7. Once the RTN is undertaken, what happens to an exploration licence that is subject to the NT condition?

Where Minister's consent has been granted, the native title condition will continue to remain on the exploration licence but the titleholder may prospect on the land that was subject to the RTN, for the life of the title or until the Minister's Consent is revoked.

8. Does the protection of Aboriginal cultural heritage form part of the RTN?

In NSW Aboriginal cultural heritage is protected by the National Parks and Wildlife Act 1974 (NSW). While Aboriginal cultural heritage matters will often form part of the RTN and resulting process a title holder must continue to comply with their obligations under the National Parks and Wildlife Act 1974 (NSW).

9. What happens where a native title claim is made after the RTN process is complete?

Where a native title claim is made over part, or all of the area, after the completion of the RTN, the new claim does not affect either the Department's capacity to grant and renew the title subject to the RTN process or the title holder's ability to exercise their rights under this title.

10. What happens where a native title determination has been made over the area where the RTN is being undertaken?

We recommend speaking to the Department in these circumstances.

Reference should be made to the native title determination to ascertain the status of the relevant land.

11. Does this Guideline apply to subsurface tenements?

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. The RTN process is required to be undertaken over an area where native title rights and interests may be affected.

12. Where does native title exist in NSW?

Native title is presumed to exist where native title has not been determined or there is no clear evidence that it has been extinguished.

13. What can I do if the RTN process is taking too long, or negotiations have stalled?

At any stage of the negotiations a Negotiation Party may approach the NNTT for mediation assistance. For further information, refer to section 8.

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