

# Queensland Government Native Title Work Procedures

## Module M&N - The freehold test and more

*Commonwealth Native Title Act 1993: s.24MA - 24MD and s.24NA*

March 2019

## Version History

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1		August 2017
2	Clarification of dealings which pass the freehold test	March 2019

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## Introduction

Module M and N deal with proposed dealings (legislative and non-legislative) that meets one of the freehold tests or is an offshore dealing. Procedural rights vary depending upon the type of dealing.

## Application

If your proposed future act does not pass this module it will be invalid as against native title unless you proceed by way of -

- A registered Indigenous Land Use Agreement
- A non-claimant application where that option is available.

## Effect on native title

If the proposed dealing is the compulsory acquisition of native title (which meets all the criteria set-out at Requirement 4), then the effect on native title is extinguishment.

For all other proposed dealings, the non-extinguishment principle applies.

## Compensation

Compensation for the effect of the dealing on native title rights and interests is payable under Module M and N if there is a successful claim for compensation. Compensation is payable by the State where the act is attributable to the State, unless the law of the State provides that another person is liable to pay the compensation. For example, section 144(3B) of the *Native Title (Queensland) Act 1993* (NTQA) provides that where a person who is not the State acquires the rights and interests, that person is liable to pay compensation.

## Helpful Hints and Definitions

Term	Definition
Freehold test (legislative)	The proposed dealing must satisfy either of the following tests: <ul style="list-style-type: none"><li>a) the act applies in the same way to the native title holders concerned as it would if they instead held ordinary title to the land (or to the land adjoining, or surrounding, the waters) affected</li><li>b) the effect of the act on the native title in relation to the land or the waters is not such as to cause the native title holders to be in a more disadvantageous position at law than they would be if they instead held ordinary title to the land (or to the land adjoining, or surrounding, the waters).</li></ul>
Freehold test (non-legislative)	The proposed dealing must satisfy either of the following tests: <ul style="list-style-type: none"><li>(a) If the native title holders instead held ordinary freehold over the proposed dealing area, would the legislation under which the dealing is being done (not the NTA) allow the proposed dealing to be done?</li><li>(b) If the native title holders instead held ordinary freehold over the land adjoining or surrounding the waters (the waters being the proposed dealing area), would the legislation under which the dealing is being done (not the NTA) allow the proposed dealing to be done?</li></ul>

Term	Definition
Infrastructure facility	<p>Includes any of the following:</p> <ul style="list-style-type: none"> <li>(a) a road, railway, bridge or other transport facility</li> <li>(b) a jetty or port</li> <li>(c) an airport or landing strip</li> <li>(d) an electricity generation, transmission or distribution facility</li> <li>(e) a storage, distribution or gathering or other transmission facility for: <ul style="list-style-type: none"> <li>(i) oil or gas; or</li> <li>(ii) derivatives of oil or gas</li> </ul> </li> <li>(a) a storage or transportation facility for coal, any other mineral or any mineral concentrate</li> <li>(b) a dam, pipeline, channel or other water management, distribution or reticulation facility</li> <li>(c) a cable, antenna, tower or other communication facility</li> </ul> <p>any other thing that is similar to any or all of the things mentioned in paragraphs (a) to (h) and that the Commonwealth Minister determines in writing to be an infrastructure facility for the purposes of this paragraph.</p>
Onshore / offshore	<p>As a general rule, an onshore area for the State of Queensland extends down to the low water mark and includes internal bodies of waters such as rivers, canals and heavily enclosed bays. It would also include islands off the coast of Queensland, such as Fitzroy Island down to the low water mark.</p> <p>However, what constitutes 'onshore' and what constitutes 'offshore' may be difficult to work out, particularly in relation to bays. E.g. coastal waters in the form of bays enclosed within the 'jaws of the land' form part of the inland waters and are considered onshore.</p> <p><b>Note:</b> If you are unsure, seek advice from Aboriginal and Torres Strait Islander Land Services (ATSILS) through your Native Title Contact Officer.</p> <p><b>Note:</b> In some cases, the proposed dealing area may fall within both an onshore area and an offshore area. If this is the case, you must firstly assess the onshore part of the proposed dealing area and then assess the offshore part of the proposed dealing area.</p>
Legislative dealings	<p>It is important to recognise that dealings may be legislative as opposed to non-legislative (eg. the grant of a tenure or authority). Legislative dealings are the making of new legislation, amending existing legislation or repealing existing legislation.</p> <p>Legislation includes Acts, and Subordinate Legislation, e.g. Regulations, certain statutory instruments.</p>

Term	Definition
	<p>To determine whether the proposed dealing is legislative, refer to the table below</p> <p><b>Note:</b> Module M and N only applies if the making, amendment or repeal of legislation affects native title. If the legislation is simply regulating how a future activity takes place, e.g. by putting in place a permitting regime, then the legislation is not likely to affect native title. (However, in that situation it is the subsequent grant of a permit under the legislation that <i>affects</i> native title.)</p>
Mine	<p>Includes:</p> <ul style="list-style-type: none"> <li>a) explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c))</li> <li>b) extract petroleum or gas from land or from the bed or subsoil under waters</li> <li>c) quarry</li> </ul> <p>but does not include extract, obtain or remove sand, gravel, rocks or soil from the natural surface of land, or of the bed beneath waters, for a purpose other than:</p> <ul style="list-style-type: none"> <li>d) extracting, producing or refining minerals from the sand, gravel, rocks or soil</li> <li>e) processing the sand, gravel, rocks or soil by non-mechanical means.</li> </ul>
Non-legislative dealings	<p>These dealings are usually done under legislation that provides the power to do the proposed dealing, e.g. the grant of a tenure or authority.</p>
Ordinary freehold	<p>Means ordinary title to land. This means that the freehold title must be an estate in fee simple in the land that can be granted to or held by any person, i.e. the legislation must not dictate who can hold the freehold title. E.g., if the legislation provides that only the State can hold the land, or an Aboriginal land trust can only hold the land, then it is not ordinary title.</p>
Waters	<p>Includes:</p> <ul style="list-style-type: none"> <li>(a) sea, river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters</li> <li>(b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in (a))</li> <li>(c) the shore, or subsoil under or airspace over the shore, between high water and low water.</li> </ul>

## Requirement 1: The proposed dealing is not listed exclusions table

The proposed dealing must not be listed in the Requirement 1 Exclusions Table. The table below sets out those dealings that do not pass the freehold test (refer to Helpful Hints and Definitions for the basis for excluding certain dealings).

**Table 1 - Requirement 1 Exclusions**

Excluded proposed dealings	
1	Dealings under the <i>Land Act 1994</i> other than dealings below high water mark and public utility easements
2	The issue of quarry material sales permits under s.46 of the <i>Forestry Act 1959</i>
3	Another dealing ATSILS has advised that does not pass the freehold test

If the proposed dealing is listed in the Requirement 1 Exclusions Table, Module M and N does not apply. Go to **Module O**.

If the proposed dealing is not listed in the Requirement 1 Exclusions Table, Requirement 1 is satisfied. Go to Requirement 2.

## Requirement 2: Categorising your proposed dealing

The proposed dealing will fall into one of four categories.

From the Requirement 2 Dealing Categories Table, select which dealing category the proposed dealing falls into and go to the relevant requirement.

**Table 2 - Requirement 2 Dealing Categories**

Dealing category		Requirement
1	Mining or associated with mining (non-legislative) (onshore)	Go to Requirement 3
2	Compulsory acquisition (non-legislative) (onshore)	Go to Requirement 4
3	Offshore dealings	Go to Requirement 5
4	All other onshore dealings	Go to Requirement 6

## Requirement 3: Mining or associated with mining (non-legislative) (onshore)

If the proposed dealing is mining or associated with mining:

1. Identify the proposed dealing sub-category
2. Ensure further requirements (if any) are met
3. Provide the relevant procedural rights.

**Table 3 - Requirement 3 Proposed dealing sub-category**

Proposed dealing sub-category	Examples	Any further requirements	Procedural rights type
1	Creation of a new right to mine.	<ul style="list-style-type: none"> <li>• The grant of a mining lease.</li> <li>• The making of a special Act of Parliament automatically granting a mining lease to Western Coal Ltd.</li> </ul>	<p>No further requirements.</p> <p>Go to Procedural Rights Type C in Requirement 7.</p>

Proposed dealing sub-category		Examples	Any further requirements	Procedural rights type
2	Variation of a right to mine to extend the area.	The amendment of a mining lease to extend the original area from 1 hectare to 2 hectares.	No further requirements.	Go to Procedural Rights Type C in Requirement 7.
3	Renewal, re-grant or re-making, or extension of the term, of a right to mine that <b>does not</b> extend the area, increase the term or create additional rights: (meets section 26D, <i>Native Title Act 1993</i> (NTA) see below).	<p>The renewal of a mining lease originally granted in 2000 under the right to negotiate provisions of the NTA where the renewal does not extend the area, the term or create additional rights.</p> <p>If the right to mine is granted on or before 23 December 1996, go to Module IC if you have not already done so.</p>	<p>The right to mine must have been granted -</p> <ol style="list-style-type: none"> <li>1. On or before 23 December 1996</li> <li>2. Under the right to negotiate provisions.</li> </ol>	Go to Procedural Rights Type A in Requirement 7.
4	Renewal, re-grant or re-making, or extension of the term, of a right to mine that <b>does</b> extend the area, increase the term or creates additional rights.		No further requirements.	Go to Procedural Rights C in Requirement 7.
5	<p>Construction of an infrastructure facility associated with mining.</p> <p>See definition of 'infrastructure facility' below.</p>	Capricornia Coal Ltd currently has a mining lease for the extraction of coal. It made an application for the grant of a mining lease under section 234(1)(b) of the <i>Mineral Resources Act 1989</i> on an adjoining area to allow the construction of a coal transport facility. A coal transport facility falls within the definition of infrastructure facility. It is a facility that is associated with mining as the facility will provide transport for the coal extracted from the adjoining mining lease to another area where a wash plant is located.	No further requirements.	If the proposed dealing passes the freehold test, go to Procedural Rights A and B in Requirement 7.
6	Any other mining related dealing.		Refer to ATSILS through your Native Title	



Proposed dealing sub-category	Examples	Any further requirements	Procedural rights type
		Contact Officer, to confirm if it passes the freehold test	

## Requirement 4: Compulsory acquisition (non-legislative) (onshore)

If the proposed dealing is a compulsory acquisition of native title rights and interests, you must satisfy the following criteria:

Criterion 1: Compulsory acquisition Acts

Criterion 2: Compulsory acquisition of non-native title rights and interests

Criterion 3: Complying with practices and procedures

Criterion 4: Sub-categories

### Criterion 1: Compulsory Acquisition Acts

The proposed dealing must be the compulsory acquisition of the whole or part of any native title rights and interests under a law of the State that permits both:

- (a) The compulsory acquisition by the State of native title rights and interests
- (b) The compulsory acquisition by the State of non-native title rights and interests in relation to land or waters.

The table below lists legislation which satisfies Criterion 1.

**Table 4 - Criterion 1 Examples**

Legislation under which Criterion 1 is satisfied	
1	<i>Acquisition of Land Act 1967</i>
2	<i>Electricity Act 1994</i>
3	<i>Petroleum and Gas (Production and Safety) Act 2004</i>
4	<i>State Development and Public Works Organisation Act 1971</i>
5	<i>Transport Planning and Coordination Act 1994</i>

If the proposed dealing is a compulsory acquisition under one of the Acts listed in the Criterion 1 Examples table, Criterion 1 is met. Go to Criterion 2.

If the compulsory acquisition is occurring under another compulsory acquisition Act, refer to ATSILS through your Native Title Contact Officer.

## Criterion 2: Compulsory acquisition of non-native title rights and interests

The whole, or equivalent part, of all non-native title rights and interests, in relation to the proposed dealing area, must also be acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of native title rights and interests.

If Criterion 2 is met, go to Criterion 3.

If Criterion 2 is not met, Requirement 5 is not satisfied and Module M and N does not apply. Go to **Module O**.

## Criterion 3: Complying with practices and procedures

The practices and procedures in acquiring the native title rights and interests must not cause the native title holders to be at any greater disadvantage than the holders of non-native title rights and interests when their rights and interests are acquired.

Practices and procedures definition: is more than affording the same procedural rights. It means that the same opportunities must be afforded. The State needs to treat all people the same. E.g. If within a compulsory acquisition process the State pays for an affected person's travel costs, so they can have their objections heard, or sends officers out to meet with affected parties, the State must also extend these practices to the native title holders.

If Criterion 3 is met, go to Criterion 4.

If Criterion 3 is not met, Requirement 5 is not satisfied and Module M and N does not apply. Go to Module O.

## Criterion 4: Sub-categories

The compulsory acquisition will fall into one of three sub-categories in the table below.

Select which sub-category applies, and apply the procedural rights identified, from the table below.

**Table 5 - Criterion 4 Sub-categories**

Sub-category	Examples	Procedural rights type	
1	Compulsory acquisition for the State, statutory authority of the Crown, or local authority.	The compulsory acquisition of native title and interests by the State under the <i>Acquisition of Land Act 1967</i> for a new hospital for Queensland Health.	Go to Procedural Rights Type A in Requirement 7
2	Compulsory acquisition for a third party for an infrastructure facility.	The compulsory acquisition of native title and interests by the State under the <i>State Development and Public Works Organisation Act 1971</i> for Air Express Limited to enable the construction of a new private international freight airport.	Go to Procedural Rights Types A and B in Requirement 7
3	Compulsory acquisition for a third party but not	The compulsory acquisition of native title rights and interests by the State under the <i>State Development and Public Works Organisation</i>	Go to Procedural Rights Type C in Requirement 7

for an infrastructure facility.	<i>Act 1971</i> for New Frontiers Incorporated for a spaceport.	
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## Requirement 5: Offshore dealings

If your proposed dealing is an off-shore dealing then provide Procedural Rights Type D.

## Requirement 6: All other onshore dealings

For all other proposed dealings, they will fall into one of three sub-categories in the table below.

**Table 6 - Requirement 6 Proposed dealing Sub-categories**

Dealing sub-categories		Next step	Example	Procedural rights type
1	Legislative	Refer to ATSILS through your Native Title Contact Officer.	Making, amending or repealing an Act or regulation	Refer to ATSILS through your Native Title Contact Officer
2	On land	The proposed dealing must satisfy the following freehold test:  If the native title holders instead held ordinary freehold over the proposed dealing area, would the legislation under which the dealing is being done (not the NTA) allow the proposed dealing to be done?	Grant of a Development Approval for vegetation clearing	Go to Procedural Rights Type A in Requirement 7
3	Within waters	The proposed dealing must satisfy the following freehold test:  If the native title holders instead held ordinary freehold over the land adjoining or surrounding the waters (the waters being the proposed dealing area), would the legislation under which the dealing is being done (not the NTA) allow the proposed dealing to be done?  <b>Note:</b> Ordinary freehold cannot be held over waters so the freehold test is applied to the land adjoining or surrounding the waters	The grant or issue of a lease below high water mark under <i>the Land Act 1994</i>  The grant or issue of a Quarry Material Allocation Notice or a Riverine Protection Permit under the <i>Water Act 2000</i>	Go to Procedural Rights Type A in Requirement 7

## Requirement 7: Procedural rights

The information below explains what procedural rights are.

Procedural rights means:

- (a) A right to be notified of the proposed dealing
- (b) Opportunity to comment

- (c) A right to object to the proposed dealing
- (d) Any other right that is available as part of the procedures that are to be followed when it is proposed to do the dealing.

**Note:** Procedural rights do not include all rights. E.g. Where the State legislation requires that you seek the consent of a freehold owner, this is not a procedural right but a substantive right. You are not required to provide a substantive right under Module M and N.

Procedural rights are done before the proposed dealing is done.

The procedural rights relevant to the doing of the proposed dealing will be contained in:

- (a) The relevant State legislation, i.e. those procedural rights that must be provided under the relevant State legislation under which the proposed dealing is done.
- (b) Procedural fairness. Does your department or agency extend procedural fairness (also known as natural justice) to affected persons when doing this type of dealing? This question also raises the issue of whether procedural fairness should be provided (if it is not), but this is matter for your department or agency.

Procedural fairness or natural justice: A duty to observe fair procedures when making decisions which directly and individually affect a person's rights, interests or legitimate expectations. There is a strong presumption that procedural fairness must be observed in the exercise of public power. There are two procedural fairness rules:

- (a) The hearing rule: entitles a person whose interests are liable to be affected to be given notice of relevant matters and a reasonable opportunity to present his or her case.
- (b) The rule against bias: ensures the objective appearance of impartiality and the absence of prejudice.

Procedural fairness requires that, before a person's interests are affected, notice be given of any relevant matters and an appropriate opportunity to be heard provided. Adequate notice extends to giving persons sufficient time to prepare their case so that they can present it in the fullest sense.

Opportunity to comment: This procedural right gives the native title representative body an opportunity to provide argument and information about native title interests to the decision-maker. The opportunity to comment is to ensure that any possible impact of the proposed dealing on native title rights and interests is considered before any decision is made to proceed with the proposed dealing. It is not a right of veto.

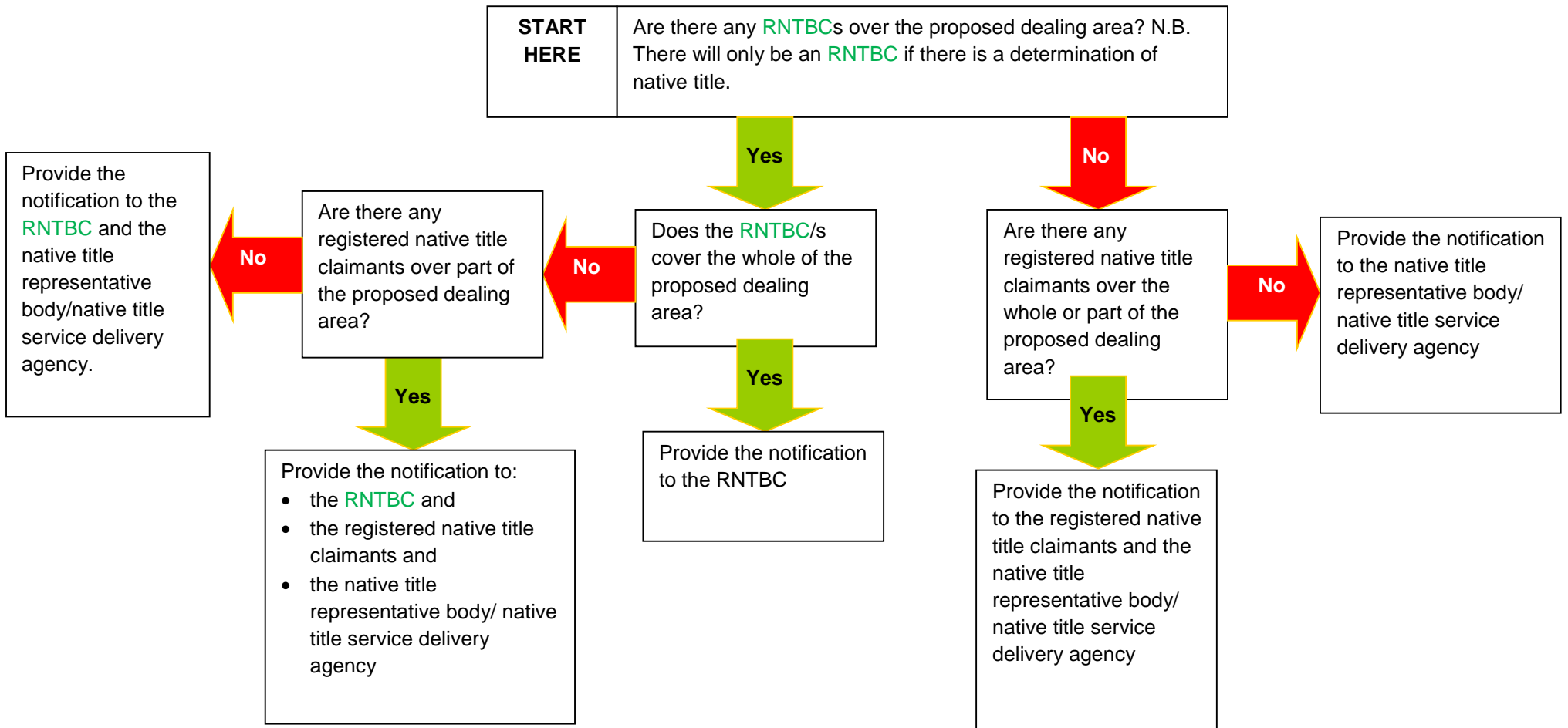
The information below sets out what each of the Procedural Rights types entails.

**Table 7 - Procedural Rights Type A - Same procedural rights (onshore area) process**

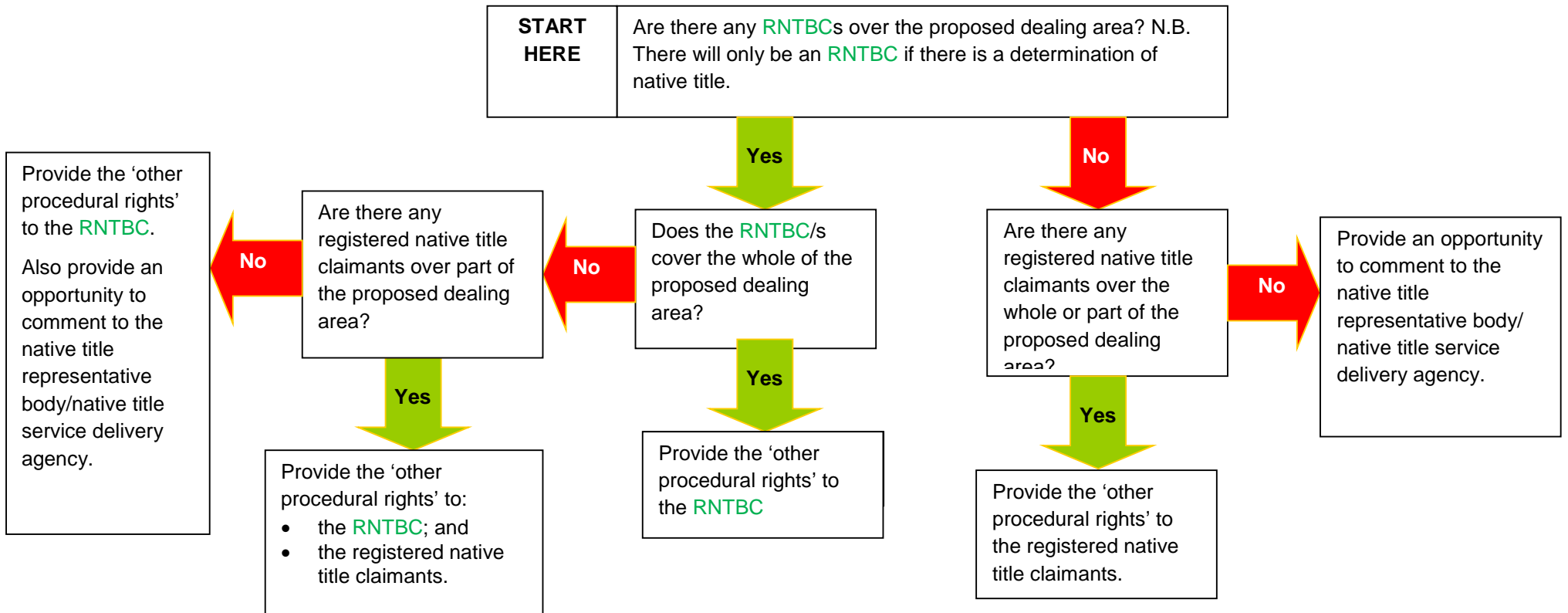
Explanation	Examples
<p>The native title holders and any registered native title claimants (the native title party) are entitled to the same procedural rights that a freeholder receives if the proposed dealing was instead done on freehold land or in water adjoining or surrounding their freehold land. Therefore, what procedural rights would you provide to a person holding freehold title for the doing of this dealing?</p> <p>Where there are procedural rights given to a freehold owner, then you must give the same procedural rights (if any) to the native title parties in accordance with Flowcharts 1 and 2.</p>	<ul style="list-style-type: none"> <li>• The proposed dealing is the construction of works. The legislation provides a power to do works on land but that a notice of entry must first be provided to a freehold owner three days prior to entering their land to do the works. Therefore, you must provide the same notice to the native title parties.</li> </ul>

Explanation	Examples
<p>Flowchart 1 shows you what to do if one of the procedural rights is a right to be notified. The notification templates to be used are noted within the table.</p> <p>Flowchart 2 shows you what to do if you need to also provide other types of procedural rights, i.e. other than a right to be notified. Such other procedural rights could include an opportunity to comment, a right to make submissions, a right to be consulted, etc. You will need to amend the notification template accordingly to reflect the other type of procedural rights. Where the only native title party is the native title representative body/native title service delivery agency, instead of providing the 'other procedural rights', an opportunity to comment is provided.</p> <p>Where no procedural rights are given to a freehold owner, then no procedural rights are given to the native title party. Proceed with the proposed dealing.</p> <p><b>Note:</b> Remember to use QNTIME to identify the native title parties (and their addresses) and what areas of the proposed dealing area are covered by a registered native title claim, a determination of native title, or which native title representative body/native title service delivery agency is relevant for the proposed dealing area.</p> <p>Where there is a determination of native title but no Registered Native Title Body Corporate (RNTBC) (check the details in the QNTIME entry), treat it like a registered native title claim.</p>	<ul style="list-style-type: none"> <li>• For a compulsory acquisition of native title rights and interests, the native title parties are entitled to the same procedural rights afforded to a freehold owner in the compulsory acquisition process under the relevant legislation. Follow the procedural process in the relevant legislation.</li> </ul> <p><b>Note:</b> Where the proposed dealing is the compulsory acquisition of native title, the notification is a Notice of Intention to Resume. Talk to your acquisition area to find out if they have an appropriate template for the taking of native title rights and interests. If not, seek advice from ATSILS through your Native Title Contact Officer.</p>

**Flowchart 1: Right to be notified**



**Flowchart 2: Other procedural rights (i.e. other than the right to be notified)**



**Table 8 - Procedural Rights Type B - Objection process**

Explanation	
Step 1: Notification	The notification is given to: <ul style="list-style-type: none"> <li>any native title representative bodies in the area</li> <li>all registered native title bodies corporate</li> <li>all registered native title claimants</li> <li>the Native Title Registrar.</li> </ul>
Step 2: Objection period	The registered native title claimants and RNTBCs may object, within 2 months, to the doing of the proposed dealing in so far as it affects their native title rights and interests.
Step 3: Consultation	The State must consult with any registered native title claimants or RNTBCs, who object, about ways to minimise the impact on native title and access to the land or waters concerned.
Step 4: Hearing of any objection by an Independent Body	The objector can request the objection be heard by an Independent Body or person. The Independent Body or person can make a determination. The determination can only be disregarded if: <ol style="list-style-type: none"> <li>the State Minister, who has responsibility for Indigenous Affairs, is consulted</li> <li>that consultation is taken into account; and</li> <li>it is in the interest of the State not to comply with the determination.</li> </ol> NB. The Independent Body is the Land Court in its Cultural Heritage Division.

**Table 9 - Procedural Rights Type C - Right to negotiate process**

Explanation
<p>The right to negotiate (RTN) is a valuable procedural right (for certain future acts) which registered native title claimants and RNTBCs are entitled to receive and take part in. It is a good faith negotiation between the parties (the State, the proponent and the native title parties) with a view to reaching an agreement about the doing of a proposed dealing. If agreement cannot be reached within a certain timeframe, there is an arbitrated outcome through a decision of the National Native Title Tribunal.</p> <p>Refer to <b>Module P</b> for the procedural rights for the right to negotiate process.</p>

**Table 10 - Procedural Rights Type D - Same procedural rights (offshore area) process**

Explanation	Examples
The native title holders and any registered native title claimants (the native title parties) are entitled to the same procedural rights a non-native title party with an interest in the offshore area would receive. Therefore, what procedural rights would you need to provide a non-native title party with an interest in the offshore area if you did the proposed dealing in an offshore area?	Government proposes to allow mining and restrict fishing in a particular offshore area. A native title holder with native title



Explanation	Examples
<p>Where there are procedural rights given to a non-native title party with an offshore interest, then you must give the same procedural rights (if any) to the native title parties in accordance with Flowchart 1 and 2.</p> <p>Flowchart 1 shows you what to do if one of the procedural rights is a right to be notified. The notification templates to be used are noted within the table.</p> <p>Flowchart 2 shows you what to do if you need to also provide other types of procedural rights, i.e. other than a right to be notified. Such other procedural rights could include an opportunity to comment, a right to make submissions, a right to be consulted, etc.. You will need to amend the notification template accordingly to reflect the other type of procedural rights. Where the only native title party is the native title representative body/native title service delivery agency, instead of providing the 'other procedural rights', an opportunity to comment is provided.</p> <p>Where no procedural rights are given to a non-native title party with an interest in the offshore area, then no procedural rights are given to the native title parties. Proceed with your proposed future act.</p> <p><b>Note:</b> Remember to use QNTIME to identify the native title parties (and their addresses) and what areas of the proposed dealing area are covered by a registered native title claim, a determination of native title, or which native title representative body/native title service delivery agency is relevant for the proposed dealing area.</p> <p>Where there is a determination of native title but no RNTBC (check the details in the QNTIME entry), treat it like a registered native title claim.</p>	<p>fishing rights has the same rights (if any) as the holder of a fishing licence under relevant legislation, to be notified, etc., of the proposed action.</p> <p><b>Note:</b> Where the proposed dealing is the compulsory acquisition of native title, the notification is a Notice of Intention to Resume. Talk to your acquisition area to find out if they have an appropriate template for the taking of native title rights and interests. If not, seek advice from ATSILS through your Native Title Contact Officer.</p>

## Finalising your Assessment

If all the requirements for Module M and N are satisfied, finalise your Native Title Assessment using **Annexure 7.1**.