

Module M&N

Sections 24MA – 24MD and section 24NA

Future acts at the end of the batting order

DOES THE PROPOSED FUTURE ACT FIT WITHIN THIS MODULE?

You have reached the end of the batting order. This means that your proposed future act did not fall within a preceding Module.

If your proposed future act does not fall within this Module, then it will be invalid as against native title (Module O) unless you proceed by way of –

- (a) a registered Indigenous Land Use Agreement (Module Q); or
- (b) a non-claimant application (Module R), where applicable.

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Part 1 What future acts are covered by this Module?

This Module covers a future act that did not fall within a preceding Module and which passes at least one of the four Tests set out in **Division A** below.

If your proposed future act does not pass any of these tests, it will be invalid as against native title (**Module O**) unless you proceed by way of –

- (a) a registered Indigenous Land Use Agreement (**Module Q**);
or
- (b) a non-claimant application (**Module R**) where that option is available.

This Module is set out in 2 Divisions –

- A. A series of decisions to make your assessment
- B. Effect on native title, compensation and decision-making

Division A – A series of decisions to make your assessment

Part 2 How do I use this Module?

The **Decision boxes** set out in this Part are a series of decisions that will help you decide whether:

- (a) this Module applies to your proposed future act; and
- (b) if so, what procedural rights must be afforded to the native title parties.

You will need to work through each of the decision boxes in order. Each decision box points you to where more information, explanations and examples can be found to assist you in making the decision for that box.

Decision 1 – *Assess whether your proposed dealing area is within an onshore area or an offshore area.*



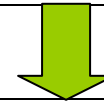
Go to page 7 for information to help with your decision.



Decision 2 – *Assess whether your proposed future act is a legislative or non-legislative act.*



Go to page 8 for information to help with your decision.



Decision 3 – *Based upon your assessments in Decision 1 and Decision 2, decide which of the following tests apply ...*

| Your assessments from Decisions 1 and 2 ... | Applicable Test |
|--|-----------------|
| Onshore legislative | C |
| Onshore non-legislative AND proposed dealing area is on land | A |
| Onshore non-legislative AND proposed dealing area is within waters | B |
| Offshore legislative | D |
| Offshore non-legislative | D |



Go to page 9 for Test A, page 11 for Test B, page 12 for Test C and page 14 for Test D.



If your proposed future act does not pass the applicable test this Module does not apply. Proceed to **Module O**.

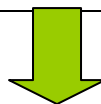


Decision 4 – Now that your proposed future act has passed one of the above tests, assess which category and subcategory its falls within;

| Category | Subcategory |
|---|--|
| 1 – Mining or associated with mining within an onshore area | 1 - Creation of a new right to mine 2 - Variation of a right to mine to extend the area 3 - Renewal etc. of a right to mine that does not increase rights or extends the area 4 - Renewal etc of a right to mine that increases rights or extends the area 5 - Construction of an infrastructure facility associated with mining |
| 2 – Compulsory acquisition within an onshore area | 1 - For the State, statutory authority of the Crown or a local authority 2 - For a third party for the acquisition of an infrastructure facility 3 - For a third party but not for an infrastructure facility |
| 3 – All other future acts on an onshore area | No subcategories |
| 4 – Future acts done on offshore areas | No subcategories |



Go to page 15 for explanations and examples for these categories and subcategories.



Decision 5 – Based upon your assessment for Decision 4 as to which category and subcategory (classification) is applicable to your proposed future act, look at the table below to see which procedural rights type applies to your classification.

| Decision 4 Classification | | Procedural rights type | |
|---------------------------|----------------|------------------------|---|
| Category | Subcategory | | |
| 1 | 1 | C | |
| | 2 | C | |
| | 3 | A | |
| | 4 | C | |
| | 5 | A | B |
| 2 | 1 | A | |
| | 2 | A | B |
| | 3 | C | |
| 3 | No subcategory | A | |
| 4 | No subcategory | D | |



Go to page 23 for an explanation of “procedural rights” and for an explanation of each “procedural rights type” go to –

- page 25 for A
- page 30 for B
- page 31 for C
- page 32 for D.

Decision 1 Location - Is your proposed future act in relation to an onshore or offshore area?

The NTA makes a distinction between future acts done on an onshore area or an offshore area.

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.

However, what constitutes “onshore” and what constitutes “offshore” can be a difficult question, particularly in relation to bays. For example, coastal waters in the form of bays enclosed within the jaws of the land forming part of the inland waters are considered onshore. However, what is the criteria for such waters to be considered sufficiently landlocked – is it the open mouth or jaws of a man or of a crocodile?¹ The Australian Courts continue to struggle with this question.

Question

Is your proposed dealing area –

- (a) on land - mainland Queensland or an island off the coast of Queensland? or
- (b) in onshore waters – waters extending down to the low water mark, or within a watercourse or within a heavily enclosed bay?

If your answer is YES – your answer for DECISION 1 is ONSHORE.

If your answer is NO – your answer for DECISION 1 is OFFSHORE.

N.B. If you are not sure please contact ATSILS through your NTCO for advice.



In some cases, your proposed future act may fall within both an onshore area and an offshore area. If this is the case, go through the decision series first for the onshore area part of the proposed dealing area, then go through the steps again for the offshore part of the proposed dealing area.

¹ Justice Hill in *The Fagernes*, L.R. [1926] P.185 at p.189 - noted in *Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FCA (6 July 1998)

Decision 2 Type of dealing - Is your proposed future act a legislative or non-legislative act?

The NTA also makes a distinction between future acts that are legislative and those that are not, ie. non-legislative.

Legislative acts are the making of new legislation, amending existing legislation or repealing existing legislation.

The term “legislation” includes –

- Acts, eg. *Mineral Resources Act 1989*; and
- Subordinate Legislation, eg. Regulations, certain statutory instruments.

Making legislation is the enactment of a Bill as an Act, or the making by the Governor in Council of subordinate legislation.

Amending legislation is making changes to existing legislation through the enactment of an amending Bill or the amending by the Governor in Council of subordinate legislation.

Repealing legislation is causing existing legislation to cease to have effect.

If you are unsure if your proposed future act is a “legislative act” contact your department’s/agency’s legal area or ATSILS through your NTCO.

IMPORTANT



Remember for this Module to apply the making, amendment or repeal of legislation still must be a future act (i.e. an act that 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 be a future act. In this case, it is the subsequent **grant** of a permit under the permitting regime (the legislation) that is the future act.

If you are unsure whether the making, amendment or repeal of legislation is a future act, contact ATSILS through your NTCO.

Non-legislative future acts are usually done under legislation that provides the power to do the future act.

Some examples of non-legislative future acts include -

- The grant of a mining lease under the *Mineral Resources Act 1989*.
- The grant of a trustee lease over a reserve for jetty purposes (gazetted in 2000) under the *Land Act 1994*.
- The compulsory acquisition of native title rights and interests for a new school under the *Acquisition of Land Act 1967*.

Question

Is your proposed future act legislative or non-legislative in nature?

If your answer is LEGISLATIVE – your answer to DECISION 2 is LEGISLATIVE.

If your answer is NON-LEGISLATIVE – your answer to DECISION 2 is NON-LEGISLATIVE.

Decision 3 Applicable test - Which of the four Tests (if any) applies to your proposed future act?

In order for your proposed future act to fall within this Module it must pass at least one of the following four **Tests**. Use **Decision Box 3** (page 4) to assess which **Test** may be applicable to your proposed future act.

Test A

For your proposed future act to pass **Test A** the proposed dealing must be capable of being done in relation to the land over the proposed dealing area assuming the native title holders instead held freehold title over the proposed dealing area.



What does this mean?

This means that the legislation you are operating under must allow you to do the future act on freehold land. You must be able to answer YES to the following question –

If my proposed dealing area was instead freehold land able to be held by anyone (ie. pretend it is freehold land), would the legislation I am operating under allow me to do the proposed future act on that freehold land?

For example, the grant of a mining lease passes this test, as a mining lease can be granted over freehold land. In contrast, the grant of a lease under the *Land Act 1994* does not pass the freehold test as that type of lease cannot be granted over freehold land.

“freehold title”

The NTA describes this as “ordinary title” to the land.² 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, ie. the legislation must not dictate who can hold the freehold title. For example, 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”.



If your future act satisfies the above requirement it passes **Test A**.

Proceed to **Decision Box 4** at page 5 to assess which category, subcategory and procedural rights apply to your proposed future act.

² Section 253, NTA

Test B

For your proposed future act to pass **Test B** the proposed dealing area must be –

- (a) in relation to waters only, eg. in a river, an area below high water mark, etc; and
- (b) capable of being done in relation to the **waters concerned** if the native title holders instead held freehold title to the land adjoining, or surrounding, the waters.



What does this mean?

This means that the legislation authorising the proposed future act over the waters (ie. the proposed dealing area covers waters) does not prohibit the doing of that future act in waters adjoining or surrounding freehold land. You must be able to answer NO to the following question-

Does the legislation authorising the proposed future act prohibit the future act being done in waters adjoining or surrounding freehold land?

For example, if the legislation allows the State to construct a floating pontoon in waters but prohibits it being constructed in waters adjacent to freehold land, then the future act does not pass this test.

“waters”³

“waters” includes:

- (a) sea, river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters;
- (b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in (a)); or
- (c) the shore, or subsoil under or airspace over the shore, between high water and low water.



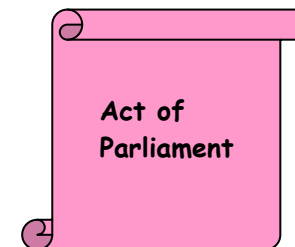
If your future act satisfies the above requirement it passes **Test B**. Proceed to **Decision Box 4** at page 5 to assess which category, subcategory and procedural rights apply to your proposed future act.

³ Section 253, NTA

Test C

For your proposed future act to pass **Test C**, it must either –

- (a) apply to the native title holders in the **same way** as it would if they instead held freehold title to the land (or to the land adjoining, or surrounding, the waters) affected;



What does this mean?

The Explanatory Memorandum⁴ explains that this requirement is generally intended to cover a legislative act that creates a law of a particular kind, eg. the making of legislation that permits mining on freehold land and non-freehold land.

To comply with this requirement, the legislation must –

- (a) at least apply to freehold land or be ‘tenure blind’ (applies to all tenures), eg. the legislation cannot provide that a mining lease can only be granted over non-freehold land; and
- (b) provide native title holders with the same rights that a freeholder receives, eg. a freehold owner must not receive special treatment under the legislation that is not also extended to any other affected parties including native title holders.

freehold title”⁵

The NTA describes this as “ordinary title” to the 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, ie. the legislation must not dictate who can hold the freehold title. For example, 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”.

⁴ Table 15.1, Explanatory Memorandum to the *Native Title Amendment Bill 1997*

⁵ Section 253, NTA

“waters”⁶

“waters” includes:

- (a) sea, river, a lake, a tidal inlet, a bay, an estuary, a harbour or subterranean waters;
- (b) the bed or subsoil under, or airspace over, any waters (including waters mentioned in (a)); or
- (c) the shore, or subsoil under or airspace over the shore, between high water and low water.

OR

- (b) not cause the native title holders to be in a **more disadvantageous position** at law than they would be if they instead held freehold title to the land (or to the land adjoining, or surrounding, the waters).

What does this mean?

The Explanatory Memorandum⁷ explains that this requirement is intended to cover a legislative act that amends existing legislation so that it can apply to land or waters over which native title exists, eg. the amendment of legislation that permits mining on land that is subject to freehold title so that once amended it will also permit mining, on the same terms, on non-freehold land.

In this case, the native title holders are not in a more disadvantageous position than a freeholder.

In contrast, an amendment to legislation to prevent mining only on freehold land would place native title holders in a more disadvantageous position than a freeholder, as it would continue to allow mining on land over where native title continues to exist.

⁶ Section 253, NTA

⁷ Table 15.1, *Explanatory Memorandum to the Native Title Amendment Bill 1997*



If your future act satisfies the above requirement, it passes **Test C**.

Proceed to **Decision Box 4** (at page 5) to assess which procedural rights apply to your proposed future act.

Test D

For your proposed future act to pass **Test D** the only requirement is that the proposed dealing area only relates to an offshore area. There are no other requirements.



If your future act satisfies the above requirement, it passes **Test D**.

Proceed to **Decision Box 4** (at page 5) to assess which procedural rights apply to your proposed future act.



If your proposed future act does not pass any of the **Tests** in Step 3, proceed to **Module O**.

Decision 4 Categorising and subcategorising your proposed future act

Now that your proposed future act has passed one of the Tests in **Decision 3**, you need to decide which category and subcategory applies to your proposed future act. Use **Decision Box 4** (page 5) to see which of the following four categories, and relevant subcategories, may be applicable.

Example

Your proposed future act is the grant of a mining lease under section 234(1)(b) of the *Mineral Resources Act 1989* to permit the construction of an infrastructure facility associated with mining.

The future act takes place onshore (Decision 1), is non-legislative in nature and relates to land (Decision 2) and has passed Test A (Decision 3). **Decision Box 4** suggests that your proposed future act falls within Category 1 Subcategory 5.

Now that you think you know the applicable category and subcategory, read through the explanation and examples below to confirm your preliminary assessment.

Category 1 - Mining or associated with mining

To fall within this category, the proposed future act must either –

- (a) create, vary or renew etc a right to mine; or
- (b) involve the construction of an “infrastructure facility” associated with mining.



The definition of “mine”⁸ includes –

- (a) *explore or prospect for things that may be mined (including things covered by that expression because of paragraphs (b) and (c)); or*
- (b) *extract petroleum or gas from land or from the bed or subsoil under waters; or*
- (c) *quarry;*

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:

- (d) *extracting, producing or refining minerals from the sand, gravel, rocks or soil; or*
- (e) *processing the sand, gravel, rocks or soil by non-mechanical means.*

The definition of “infrastructure facility”⁹ includes any of the following –

- (a) *a road, railway, bridge or other transport facility;*
- (b) *a jetty or port;*
- (c) *an airport or landing strip;*
- (d) *an electricity generation, transmission or distribution facility;*
- (e) *a storage, distribution or gathering or other transmission facility for:*
 - (i) *oil or gas; or*
 - (ii) *derivatives of oil or gas;*
- (f) *a storage or transportation facility for coal, any other mineral or any mineral concentrate;*
- (g) *a dam, pipeline, channel or other water management, distribution or reticulation facility;*
- (h) *a cable, antenna, tower or other communication facility;*
- (i) *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, by legislative instrument, to be an infrastructure facility for the purposes of this paragraph.*

⁸ Section 253, NTA

⁹ Section 253, NTA

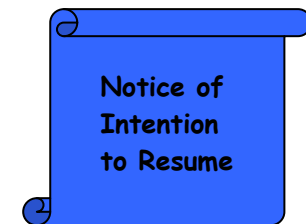
| C A T E G O R Y 1 | Sub-category | Examples | Procedural rights type |
|---|--|---|------------------------|
| | 1. Creation of a new right to mine | <ul style="list-style-type: none"> The grant of a mining lease to Minerals Incorporated Pty Ltd. The making of a special Act of Parliament automatically granting a mining lease to Western Coal Ltd. The grant of a sales permit for quarrying that permits quarrying beyond the natural surface of the land. | C |
| | 2. Variation of a right to mine to extend the area | <ul style="list-style-type: none"> The amendment of a mining lease to extend the original area from 1 ha to 2 ha. | C |
| | 3. Renewal etc of a right to mine that – (a) does NOT fall within sub-category 2 above and Module IC; but (b) falls within section 26D, NTA. | <ul style="list-style-type: none"> 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><i>For section 26D of the NTA to apply –</i></p> <p>(a) <i>the original grant must have been validly granted on or before 23 December 1996 or have been validly granted under the right to negotiate provisions; and</i></p> <p>(b) <i>the area is not extended;</i></p> <p>(c) <i>the term is not extended, ie. if the original grant was for 10 years the renewed term cannot be for 12 years; and</i></p> <p>(d) <i>no additional rights are created.</i></p> | A |

| | | | |
|--|--|---|------------------------|
| C A T E G O R Y 1 | 4. Renewal etc of a right to mine that does NOT fall within – (a) subcategories 2 & 3 above; (b) Module IC; and (c) section 26D, NTA. | <ul style="list-style-type: none"> The extension of the term of a sales permit for quarrying originally granted in 2002 under the right to negotiate provisions that will also extend the area of the sales permit from 1 to 2 hectares. | C |
| | 5. Construction of an <i>infrastructure facility</i> associated with mining | <ul style="list-style-type: none"> 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 raw coal extracted from the adjoining mining lease to another area where a wash plant is located. | A and B |

Category 2 - Compulsory Acquisition

For your proposed future act to fall within this category –

- (1) the compulsory acquisition of the whole or part of any native title rights and interests must be done under a law of the Commonwealth or State that permits both –
- (a) the compulsory acquisition by the State of native title rights and interests;
 - and



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

For example, the compulsory acquisition is done under the - ¹⁰

- *Acquisition of Land Act 1967*
- *Electricity Act 1994*
- *Petroleum and Gas (Production and Safety) Act 2004*
- *State Development and Public Works Organisation Act 1971*
- *Transport (Gladstone East End to Harbour Corridor) Act 1996*
- *Transport Planning and Coordination Act 1994*

AND

(2) the whole, or equivalent part, of all non-native title rights and interests, in relation to the proposed dealing area, will 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;

Example

The State wishes to use part of an area of a current pastoral lease adjoining the town for the construction of a country health clinic. Native title has not been wholly extinguished over the pastoral lease and therefore the State will need to acquire any native title rights and interests existing over that area of the pastoral lease under the Acquisition of Land Act 1967. However, section 24MD makes it clear that the non-native title rights and interests must also be acquired. Therefore, the State will also need to resume the leasehold interests over that area under the Land Act 1994 to satisfy this request. It would also be an option for the State to seek from the lessee the voluntary surrender of the area from the lease. In which case there would be an no other interests over the area at the time native title was compulsorily acquired.

AND

¹⁰ Section 144, *Native Title (Queensland) Act 1993*

(3) the practices and procedures in acquiring the native title rights and interests do 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”

This 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. For example, 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.

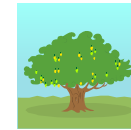
| C A T E G O R Y 2 | Sub-category | Examples | Procedural rights type |
|--|--|---|------------------------|
| | 1. For the State, statutory authority of the Crown or local authority | <ul style="list-style-type: none"> The compulsory acquisition of native title and interests by the State under the <i>Acquisition of Land Act 1967</i> for a new hospital for Queensland Health. | A |
| 2. For a third party for the acquisition of an <i>infrastructure facility</i> defined in section 253 of the NTA. | <ul style="list-style-type: none"> 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. | A and B | |

| | | | |
|--|--|---|--|
| <p>C A T E G O R Y 2</p> | | <p>“infrastructure facility” – section 253, NTA</p> <p><i>(a) This term is defined in the NTA and includes any of the following –</i></p> <ul style="list-style-type: none"><i>(a) a road, railway, bridge or other transport facility;</i><i>(b) a jetty or port;</i><i>(c) an airport or landing strip;</i><i>(d) an electricity generation, transmission or distribution facility;</i><i>(e) a storage, distribution or gathering or other transmission facility for:<ul style="list-style-type: none"><i>(i) oil or gas; or</i><i>(ii) derivatives of oil or gas;</i></i><i>(g) a storage or transportation facility for coal, any other mineral or any mineral concentrate;</i><i>(h) a dam, pipeline, channel or other water management, distribution or reticulation facility;</i><i>(i) a cable, antenna, tower or other communication facility;</i><i>(j) 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.</i> | |
|--|--|---|--|

| | | | |
|--|---|--|----------|
| | 3. For a third party but NOT for an <i>infrastructure facility</i> defined in section 253, NTA. | <ul style="list-style-type: none"> The compulsory acquisition of native title rights and interests by the State under the <i>State Development and Public Works Organisation Act 1971</i> for New Frontiers Incorporated for a spaceport. | C |
|--|---|--|----------|

Category 3 – All other future acts on onshore areas

Your proposed future act falls within this category if it is onshore and did not fall within Categories 1 and 2.



| C A T E G O R Y 3 | Sub-category | Examples | Procedural Rights Type |
|---|-----------------------------|---|------------------------|
| | There are no subcategories. | <ul style="list-style-type: none"> The dedication of an area below the high water mark as a jetty reserve under the <i>Land Act 1994</i>. The making of legislation that dedicates a reservation over a particular onshore area. The grant of a development approval under the <i>Sustainable Planning Act 2009</i>. | A |



Category 4 - Future acts done on offshore areas

Your proposed future act falls within this category if done on an offshore area.

| C A T E G O R Y 4 | Sub-category | Examples | Procedural Rights Type |
|---|----------------------------|--|------------------------|
| | There are no subcategories | <ul style="list-style-type: none"> The grant of a mining lease under the <i>Offshore Minerals Act 1998</i>. <p>N.B. If your proposed future act is the compulsory acquisition of native title rights and interests, contact ATSILS through your NTCO.</p> | D |

Decision 5 Assessing the procedural rights type for your proposed future act

Now that you have decided in **Decision 4** which category and subcategory applies, use the table at **Decision Box 5** (page 6) to ascertain the corresponding *procedural rights type* that applies to your proposed future act, ie. Type A, B, C or D. An explanation of each procedural rights type is provided below. The explanation includes any additional requirements to be satisfied before you proceed to afford the relevant procedural rights.



“procedural rights”

What is captured by the term “*procedural rights*”? **This explanation is particularly relevant to procedural rights types A and D.**

“*Procedural rights*” are defined in section 253 of the NTA to mean, in relation to an act-

- (a) a right to be notified of the act; or

- (b) a right to object to the act; or
- (c) any other right that is available as part of the procedures that are to be followed when it is proposed to do the act.



Procedural rights do not include all rights. For example, 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 this Module.

Procedural rights are things that are done **BEFORE** the future act is done.

The *procedural rights* relevant to the doing of the future act will be contained in –

1. The relevant State legislation – those *procedural rights* that must be provided under the relevant State legislation under which the future act is done.
2. Procedural fairness – does your department or agency extend procedural fairness (also referred to 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.

Therefore the term “procedural rights” EQUALS procedural rights under the relevant State legislation PLUS procedural fairness.



What is procedural fairness?¹¹

The term “procedural fairness”, or “natural justice”, can be explained as 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.



¹¹ The explanation in this information box are extracts (with some amendments to simplify language) from Laws of Australia accessed from Lawbook Online - <http://legalonline.thomson.com.au/tla/resultSummary.jsp?limit=20&tlaTitle=2.5>

The rules of procedural fairness traditionally reduce to two: (a) the hearing rule and (b) the rule against bias.

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. The rule against bias is concerned to ensure the objective appearance of impartiality and the absence of prejudice.

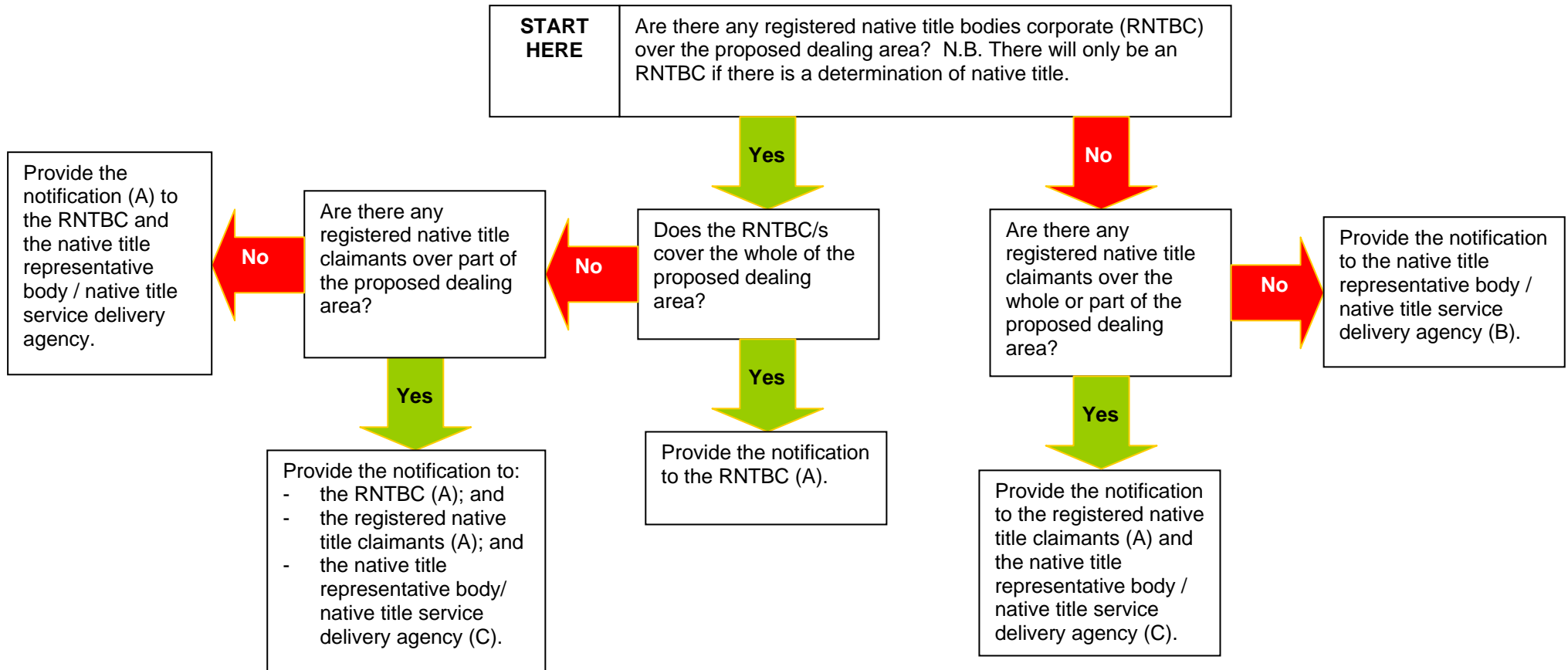
Procedural fairness requires that, before a person's interests are affected, notice should be given of any relevant matters and an appropriate opportunity to be heard provided. Adequate notice necessarily extends to giving persons sufficient time to prepare their case so that they can present it in the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

| Procedural rights type | Explanation | Further requirements |
|------------------------|---|----------------------|
| A | <p>Same procedural rights (onshore area) – section 24MD(6A) process</p> <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 you instead did the proposed future act on freehold land. Therefore, what procedural rights would you provide to a person holding freehold title for the doing of this dealing?</p> <p><i>For example, your 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.</i></p> <p><i>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.</i></p> | None |

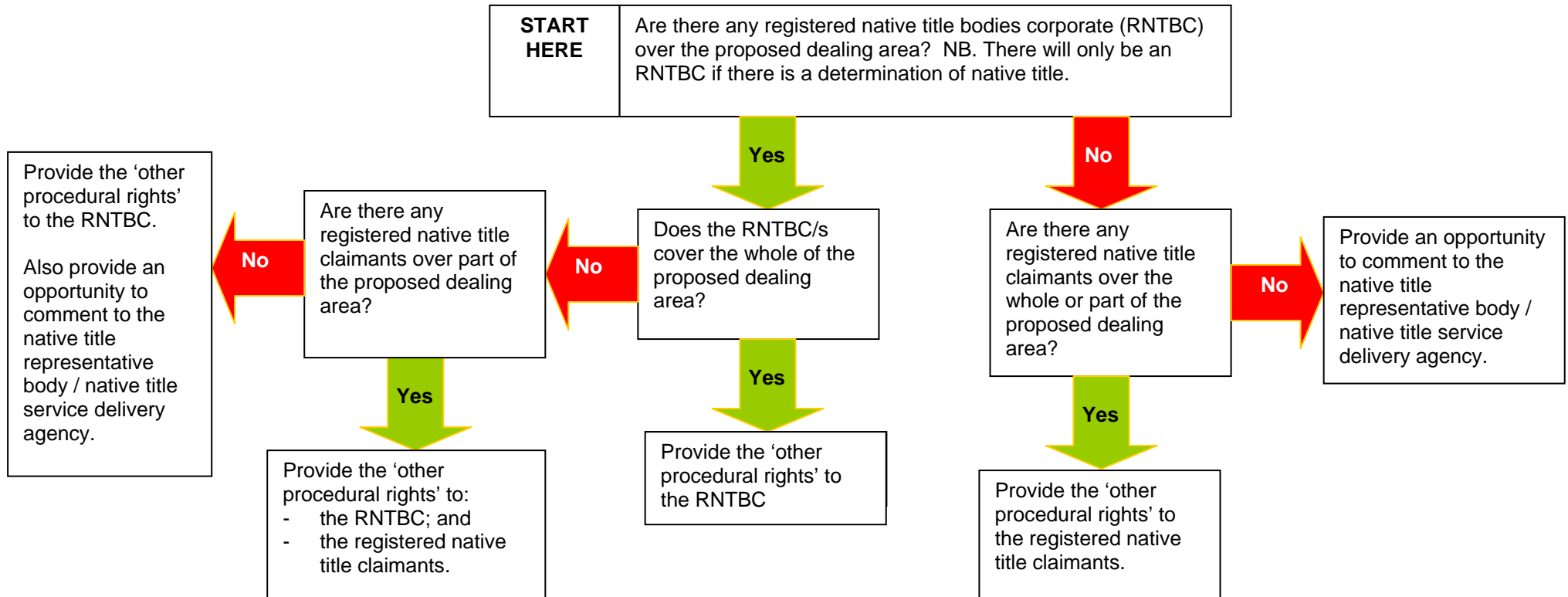
| Procedural rights type | Explanation | Further requirements |
|------------------------|---|----------------------|
| | <p>Where NO procedural rights are given to a freehold owner, then NO procedural rights are given to the native title party. Proceed with your proposed future act. Where there are 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 the following flowcharts.</p> <div style="display: flex; align-items: center; margin-top: 10px;">  <p>Where your proposed dealing is the compulsory acquisition of native title, the notification is a Notice of Intention to Resume. Talk to the 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 NTCO.</p> </div> | |
| | <div style="display: flex; align-items: center; margin-bottom: 10px;">  <p>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 area.</p> </div> <p>NB. Where there is a determination of native title but no registered native title body corporate (check the details in the QNTIME entry), treat it like a registered native title claim.</p> | |
| | <p><i>Flowchart 1</i> 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><i>Flowchart 2</i> shows you what to do if you need to also provide other types of procedural rights, ie. other than a</p> | |

| Procedural rights type | Explanation | Further requirements |
|------------------------|---|----------------------|
| | <p>right to be notified. Such other procedural rights could include a right 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> | |
| | <div data-bbox="416 580 533 675" data-label="Image"> </div> <p>What is an opportunity to comment?</p> <p>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 future act on native title rights and interests is considered before any decision is made to proceed with the future act. It is not a right of veto.</p> | |

FLOWCHART 1 – Right to be notified




FLOWCHART 2 - Other procedural rights (ie. other than the right to be notified)



| Procedural rights type | Explanation | Further requirements |
|------------------------|---|----------------------|
| B | <p>Section 24MD(6B) process –</p> <p><i>Step 1 – Notification</i> – The notification is given to:</p> <ul style="list-style-type: none"> ▪ any native title representative bodies in the area; ▪ all registered native title bodies corporate; ▪ all registered native title claimants; and ▪ the Native Title Registrar. <p><i>Step 2 - Objection period</i> – The registered native title claimants and registered native title bodies corporate may object, within 2 months, to the doing of the future act in so far as it affects their native title rights and interests.</p> <p><i>Step 3 – Consultation</i> – The State must consult with any registered native title claimants or registered native title bodies corporate, who object, about ways to minimise the impact on native title and access to the land or waters concerned.</p> <p><i>Step 4 - Hearing of any objection by an Independent Body</i></p> <p>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 (a) the State Minister, who has responsibility for Indigenous Affairs, is consulted; (b) that consultation is taken into account; and (c) it is in the interest of the State not to comply with the determination.</p> <p>NB. The Independent Body is the Land Court in its Cultural Heritage Division (see section 32E of the <i>Land Court Act 2000</i>).</p> | None |

| Procedural rights type | Explanation | Further requirements |
|------------------------|---|----------------------|
| C | <p>Right to negotiate process</p> <p>The right to negotiate (RTN) is a valuable procedural right (for certain future acts) which registered native title claimants and registered native title bodies corporate 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 future act. 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 Module P for the procedural right process.</p> | None |

| Procedural rights type | Explanation | Further requirements |
|---|--|----------------------|
| <p style="text-align: center;">D</p> | <p>Same procedural rights (offshore area) – section 24NA process</p> <p>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 dealing in an offshore area?</p> <p><i>For example, a government proposes to allow mining and restrict fishing in a particular offshore area. A native title holder with native title fishing rights has the same rights (if any) as the holder of a fishing licence under relevant legislation or administration, to be notified etc. of the proposed action.¹²</i></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>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 the following flowcharts.</p> <div style="display: flex; align-items: flex-start; margin-top: 20px;"> <div style="margin-right: 10px;">  </div> <div> <p>Where your proposed dealing is the compulsory acquisition of native title, the notification is a Notice of Intention to Resume. Talk to the 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 NTCO.</p> </div> </div> | <p>None</p> |



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 area.

NB. Where there is a determination of native title but no registered native title body corporate (check the details in the QNTIME entry), treat it like a registered native title claim.

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.

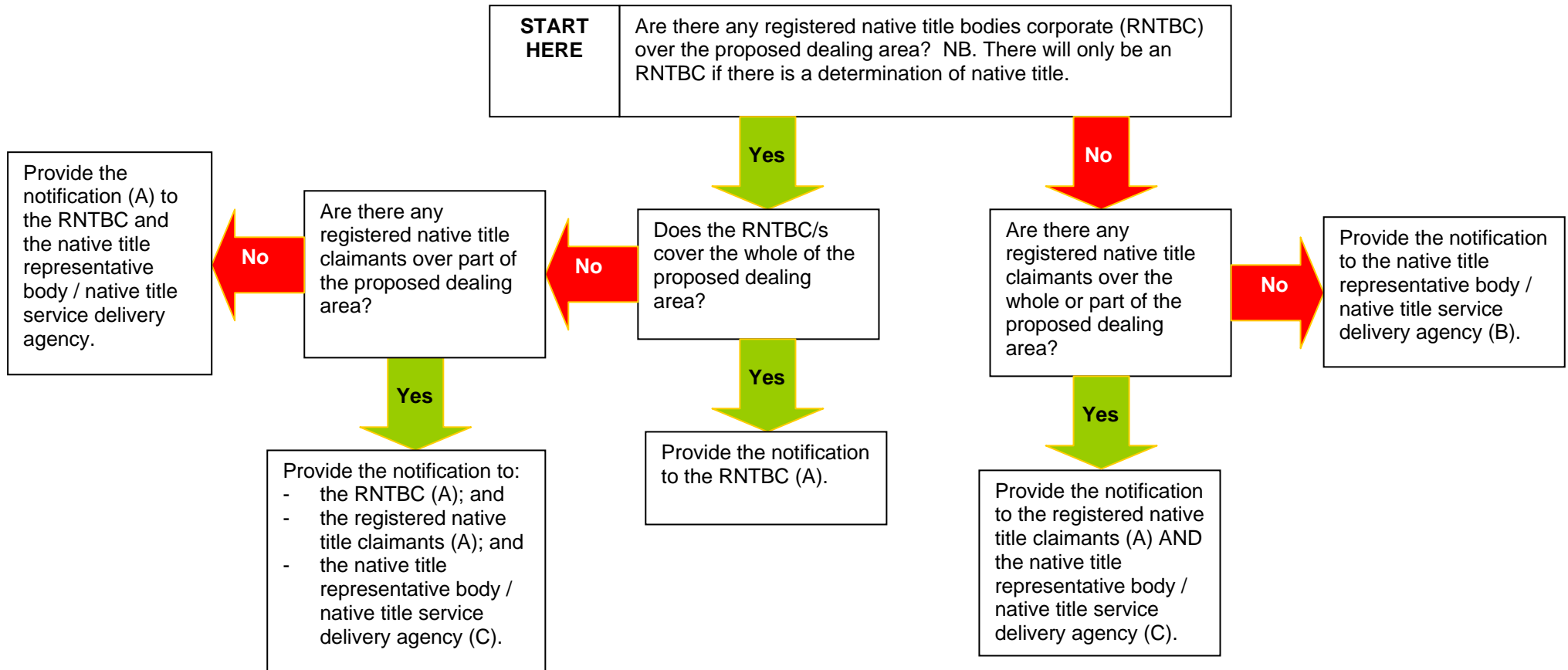
Flowchart 2 shows you what to do if you need to also provide **other types of procedural rights**, ie. other than a right to be notified. Such other procedural rights could include a right to comment, a right to make submissions, a right to be consulted, etc. You will need to amend the notification template 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.



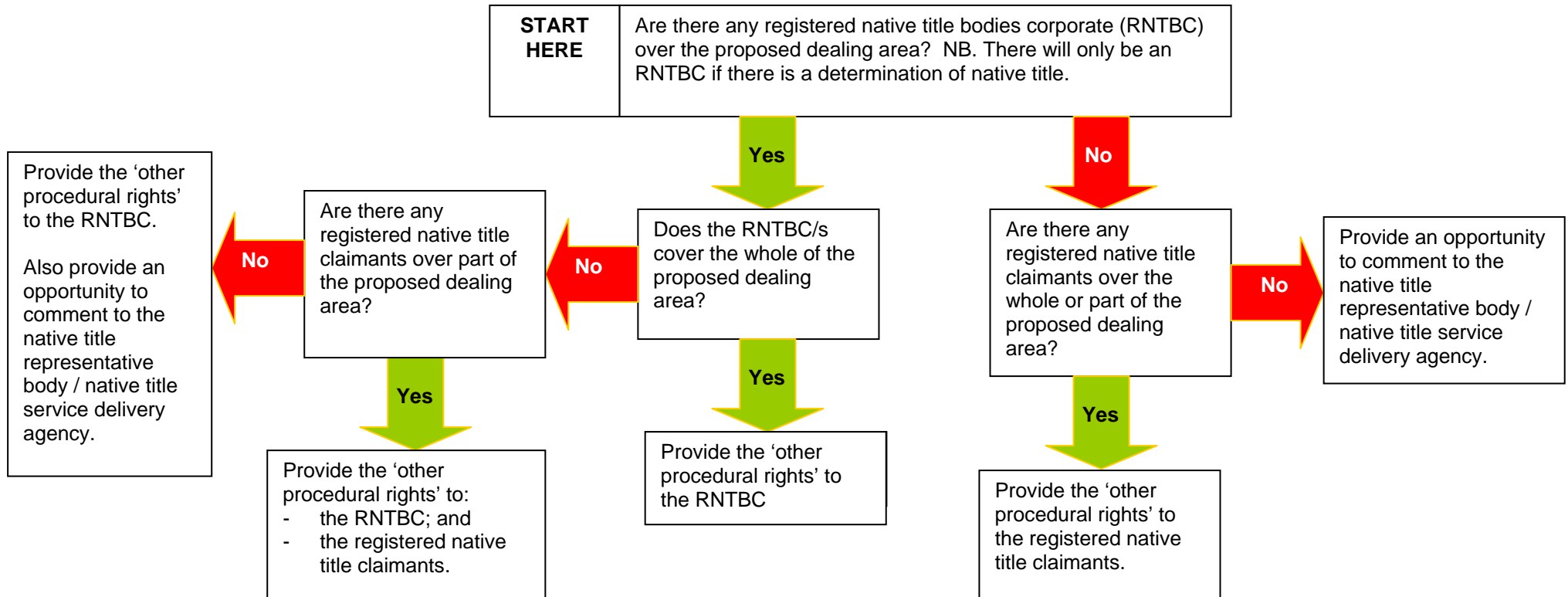
What is an opportunity to comment?

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 future act on native title rights and interests is considered before any decision is made to proceed with the future act. It is not a right of veto.

FLOWCHART 1 – Right to be notified



FLOWCHART 2 - Other procedural rights (ie. other than the right to be notified)



B. Effect on native title, compensation and decision-making

Part 3 What is the effect on native title rights and interests by an act done under this Module?

If the future act is the acquisition of native title rights and interests, then it extinguishes those native title rights and interests.

Extinguishment

Extinguish means permanently extinguish. This means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect. For example, if a public work was constructed over Lot A on Plan 6789 and later was removed, the native title rights and interests cannot revive.

Example - The compulsory acquisition of native title rights and interests.

For all other future acts under this Module, the non-extinguishment principle applies.

Non-extinguishment principle

This means that native title rights and interests affected by the doing of the future act continue to exist and are not extinguished. However, while the future act exists, those native title rights and interests are suppressed and cannot be exercised or enjoyed.

Example - The grant of a mining lease.

Part 4 Is compensation payable for the doing of the future act?

Compensation for the effect of the future act on native title rights and interests is payable under this section if there is a successful claim for compensation under the NTA.

If there is a law of the State that provides a person other than the Crown is liable to pay compensation, then that person must pay the compensation to the native title parties. If there is no such law, then compensation is payable by the State where the act is attributable to the State.

In relation to the compulsory acquisition of native title rights and interests on non-exclusive agricultural leases or non-exclusive pastoral leases, the native title holders cannot recover compensation from the lessee but must recover it from the State where the act is attributable to the State.

Part 5 Who makes the decision whether this module applies?

There are no actual delegations to make decisions in relation to native title under the Native Title Work Procedures, the NTA or the NTQA.

The native title assessment process is just one part of your decision-making process when making a decision under legislation, eg. a decision to grant a mining lease, carry out a compulsory acquisition process. By carrying out a native title assessment, you are ensuring your decision complies with the NTA.

However, please ensure that, where requested in this Module, you provide all details about your proposed future act to Aboriginal and Torres Strait Islander Land Services through your NTCO.

If you are unsure how to proceed, contact your NTCO for advice. If the NTCO is unsure how to proceed, Aboriginal and Torres Strait Islander Land Services must be contacted for advice.

If this Module does not apply to the proposed future act,
please proceed to **Module O**.