

NATIVE TITLE PROCEDURES

MINERAL RESOURCES ACT 1989

Parts 12, 17, 18 and 19

MANUAL FOR APPLICANTS FOR

MINING LEASES

APRIL 2001 EDITION

DEPARTMENT OF NATURAL RESOURCES AND MINES

Native Title Procedures
Mineral Resources Act 1989
Parts 12, 17, 18 & 19

**MINING
LEASES**

April 2001 Edition

**Manual for Applicants for
MINING LEASES**



**Queensland
Government**
Natural Resources
and Mines

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PREFACE TO APRIL 2001 EDITION

This Manual has been prepared to assist intending applicants for Mining Leases under the *Mineral Resources Act 1989* to become familiar with the procedures for dealing with native title in the application process.

These procedures (the ‘alternative State provisions’) replace those previously required under the Commonwealth *Native Title Act 1993*, chiefly those known as the ‘right-to-negotiate’ provisions. They are now included in the *Mineral Resources Act 1989* and they commenced on 18 September 2000.

This Manual has been prepared on the basis of the *Mineral Resources Act 1989* and the *Land and Resources Tribunal Act 1999* after they were amended by the *Native Title Resolution Act 2000* in September 2000. This followed approval of the alternative State provisions by the Commonwealth Attorney-General under the *Native Title Act 1993* in June 2000 and scrutiny by the Commonwealth Parliament through disallowance motions in the Senate in August 2000.

The native title procedures for mining leases now included in the *Mineral Resources Act 1989* are essentially a State-based ‘right-to-negotiate’ process, with the advantages of being integrated with other provisions of the *Mineral Resources Act 1989*, and of using the Queensland Land and Resources Tribunal to resolve disputes at the same time as other tenement matters are being heard.

This edition of the Manual differs from the Commencement Edition issued in September 2000 in that some additional clarifications are provided resulting from use of the procedures in practice. The additions in this Edition are shown in a different font.

Disclaimer: This Manual is not a legal document and is issued as a general guide only. It does not replace the detailed provisions of the legislation with which you must comply. You should become familiar with the legislation pertaining to your situation and if necessary seek your own legal advice.

INTRODUCTION

This manual is designed to assist applicants for Mining Leases on land where native title may exist, to comply with the procedures now required by the new Parts 12 and 17, 18 and 19 of the *Mineral Resources Act 1989* (MRA) and Section 24MD of the *Native Title Act 1993* (NTA). These procedures, which allow native title rights and interests to be taken into account, are additional to the normal procedures of Part 7 of the MRA.

These procedures are the ‘alternative State provisions’ for mining permitted under Section 43 of the Commonwealth *Native Title Act 1993* (NTA). They were inserted into the MRA by the *Native Title (Queensland) State Provisions Amendment Act (No 2) 1998*, the *Native Title (Queensland) State Provisions Amendment Act 1999*. They were approved by the Commonwealth Attorney-General on 1 June 2000 and after some amendment survived a disallowance motion in the Senate on 30 August 2000. The amendments were incorporated in the *Native Title Resolution Act 2000*. The alternative State provisions commenced on 18 September 2000.

The procedures for Mining Leases solely for infrastructure purposes associated with mining are those required under Section 24MD(6B)(b) of the NTA.

Some of the procedures involve the Land and Resources Tribunal which replaces the previous Wardens Court.

ON WHICH LAND DO THE NATIVE TITLE PROCEDURES APPLY ?

Land where compliance is necessary

Compliance with the native title procedures is necessary on all land where native title may still exist (**‘non-exclusive’ tenures**), except in certain particular circumstances as described below. It is irrelevant whether or not a native title claim has been lodged over the area.

Main categories of such land of significance to exploration and mining are:

1. Pastoral Leases
2. Reserves, State Forests
3. Aboriginal Freehold Land and Torres Strait Islander Freehold Land
4. Some freehold land held by the State (previously a non-exclusive tenure and still undeveloped)
5. Occupation Licences
6. Permits to Occupy
7. Unallocated State Land
8. Beds and banks of boundary water courses
9. Roads not mentioned in ‘extinguishing tenures’ below.

Land where compliance is *not* necessary

Compliance is not necessary on land where native title is taken to have been extinguished, (**‘extinguishing’ tenures**), predominantly land which is:

1. Freehold (other than State freehold as above); or
2. Certain leasehold land tenures that have given exclusive possession to the lessees, (ie **‘exclusive tenures’** as set out in Part 3 of Schedule 1 of the *Native Title Act 1993*). Land tenures in this category important in mineralised areas are Grazing Homestead Perpetual Leases (GHPLs), Grazing Homestead Freeholding Leases (GHFLs), Mining Homestead Perpetual Leases (MHPLs), Agricultural Farms (AFs), various other agricultural leases and certain term or special leases; or
3. Areas that can be shown to have once been covered by freehold or exclusive tenures but are now under a lesser form of tenure. Examples are areas of freehold, GHPL etc that have been converted to State Forest or other State reserves, or areas that have reverted to un-allocated State land (note however that land with this history which is now held or set aside for the benefit of Aboriginal or Torres Strait Islanders or is occupied by Aboriginal people or Torres Strait Islanders is not included);or
4. Certain roads* that have been dedicated and:
 - are less than 120.7m wide and entirely surrounded by freehold or exclusive land tenures; or
 - are less than 120.7m wide not surrounded by freehold or exclusive tenures but which have been constructed and established; or
 - are greater than 120.7m wide and have been constructed and established – native title is taken to be extinguished to the extent of 60.35m from the centre line; or
 - have been created entirely from previously existing freehold or exclusive tenures; or
5. Other public infrastructure such as railways, pipelines, fully developed reserves (eg for schools) etc; or
6. Areas of actual disturbance on old Mining Leases and other mining tenements validly granted before 1975.

Considerable tenure examination and tenure history research is needed to identify land mentioned in paragraphs 3-6 above.

(* as set out in the policies of Native Title Services in the Department of the Premier and Cabinet- see that Department's web site)

OVERVIEW OF THE PROCEDURES FOR MINING AND EXPLORATION TENEMENTS

The following is an overview of the procedures for all exploration and mining tenements, to set those for Mining Leases in perspective.

The procedures are designed to run parallel with all other requirements of the Mineral Resources Act.

Applications for all tenements over non-exclusive tenures require the notification of three categories of native title parties either before or shortly after lodgement of an application.

The three categories are as follows. 1. Registered Native Title Bodies Corporate are the representatives of individual native title holders whose native title has been confirmed ('determined') by the Federal Court. There are only a few such bodies in Queensland to date. 2. Registered Native Title Claimants are individuals whose claims have been acknowledged ('registered') by the National Native Title Tribunal as complying with the initial steps of the claim process, but whose claims have not yet been determined by the Federal Court. (Note: there are some claims that are not registered, either because they are new or have not met the registration test). 3. Representative Aboriginal/Torres Strait Islander Bodies are regional organisations assisting native title claimants. The Cape York Land Council is an example.

Consultation or negotiation is required with Registered Native Title Parties. These are those Registered Native Title Bodies Corporate and Registered Native Title Claimants existing at the time a procedure is required.

For prospecting permits allowing prospecting and low-impact exploration tenements, the procedures require consultation with registered native title parties on the protection of native title rights and interests and the reaching of an access agreement before entry onto the land.

For high-impact exploration tenements, consultation and negotiation with registered native title parties is required to enable the grant of the tenement. The native title parties are entitled to object. If agreement for grant cannot be negotiated, the matter is heard by the Land and Resources Tribunal. The Minister may overrule the Tribunal only in limited circumstances.

For Mining Leases and Mining Claims, consultation and negotiation with registered native title parties is required for the grant of the tenement. The native title parties are entitled to object. If agreement for grant cannot be negotiated, the matter is heard by the Land and Resources Tribunal in conjunction with any other hearing necessary under the Mineral Resources Act. Again, the Minister may overrule the Tribunal only in limited circumstances.

Mining Leases solely for infrastructure purposes are not subject to the alternative State provisions, but must comply with section 24MD(6B)(b) of the NTA as well as the MRA.

Mediation is available if requested in the consultation and negotiation phases of all processes, usually from the Mining Registrar or the Land and Resources Tribunal in the first instance.

Settling of compensation for disturbance to native title interests is required before the grant of a Mining Lease or Mining Claim on land where native title has been recognised (ie where there is a registered native title body corporate), either by agreement or a determination by the Tribunal. Where native title has not yet been recognised but there are registered native title claimants, if agreement with the claimants is not possible, the Tribunal determines an amount to be paid into trust. If the grant of a Mining Claim or Mining Lease needs to be heard by the Tribunal, and there is no agreement on compensation at that stage, the Tribunal must determine the compensation, or decide an amount to be paid into trust as the case may be, at the same hearing rather than at a later date.

When there are no registered bodies corporate or registered claimants at the time of grant but these become registered later, they may request a compensation agreement or apply to the Tribunal for compensation to be determined or an amount to be paid into trust at any time after grant.

Settling of compensation is not required before the grant of Prospecting Permits, Exploration Permits, Mineral Development Licences, but registered native title parties may request a compensation agreement or apply to the Tribunal for compensation or an amount to be paid into trust, as the case may be, at any time after grant.

MINING LEASES

Mining Leases are granted for the purposes of carrying out mining operations and are the main production tenure. They are used by a wide range of holders from the individual prospector to the largest mining companies, and may be over any area and for any term. They require a Prospecting Permit, an Exploration Permit or a Mineral Development Licence as a prerequisite. Under Part 7 of the MRA there are provisions for notification of applications and objections from any person, and any objections are heard in the Land and Resources Tribunal. The Tribunal recommends to the Minister on grant or rejection, after which the Minister may or may not recommend the grant to the Governor in Council. The Minister may overrule the Tribunal in certain circumstances. Before a Mining Lease is granted compensation to landowners must be determined, either by negotiated agreement or determination in the Tribunal. Mining leases may also be granted for infrastructure purposes associated with mining.

ARE ANY MINING LEASES EXEMPT FROM THE PROCEDURES?

Mining Leases in areas subject to a registered indigenous land use agreement (ILUA)

If an ILUA applies to the grant of the relevant type of Mining Lease, the procedures required by that ILUA apply instead of those in Part 17 of the MRA. MRA Section 420

Any ILUA should have also addressed the matters of compensation and renewal.

Mining Registrars can advise you if there is a relevant ILUA in an area of mining interest.

If an ILUA is reached and registered by the National Native Title Tribunal after the native title procedures of the MRA are commenced, the provisions of the ILUA then apply and the native title procedures of the MRA are then discontinued.

Mining Leases in ‘approved opal and gem mining areas’

Under section 26C of the NTA the Commonwealth Minister may approve certain areas of intense opal or gem mining as ‘approved opal and gem mining areas’ where lesser procedures are required.

The native title procedures of Part 17 of the MRA are not required for applications for Mining Leases in these areas **provided that they are conditioned so that:**

- mining is permitted over no more than 5ha ;
- the term is for no longer than 5 years; and
- the mining is for opal or gems only.

Section 594

There are no such approved areas at the time of compilation of this manual, but Mining Registrars can advise if any are approved in the future.

Mining Leases in areas subject to a 'right to negotiate' agreement under the Commonwealth NTA.

The procedures also do not apply in cases where a 'right-to-negotiate' process for the grant of a Mining Lease under section 26 of the Commonwealth Native Title Act has been completed or is being undertaken.

Section 419

Mining Leases solely below the high water mark.

The procedures do not apply to Mining Leases solely below the high water mark as the original 'right to negotiate' of the Commonwealth *Native Title Act 1993* does not apply in such circumstances.

NTA Section 26(3)

Mining Leases resulting from a legally enforceable right etc created before 23 December 1996.

Mining Leases resulting from a legally enforceable right, or a written offer, commitment, arrangement or undertaking, made before 23 December 1996, are exempt from the 'right-to-negotiate' under Section 24IB of the NTA, and hence from the alternative State provisions.

An example would be the grant of a Mining Lease stemming from an entitlement under one of the 'agreement' Acts.

Some Mining Leases resulting from the conditional surrender of existing Mining Leases

Some Mining Leases resulting from the conditional surrender of old granted leases and over the same area may not require the use of the native title procedures, depending on the circumstances of the original grant and the surrender conditions. Head Office of the Department should be contacted for advice on individual situations.

WHICH MINING LEASES MUST COMPLY WITH THE PROCEDURES?

All Mining Leases over non-exclusive land other than those above must comply with the native title procedures.

There are two different sets of procedures required, for different circumstances, namely for:-

- Mining Leases solely for infrastructure facilities associated with mining; and
- All Mining Leases for minerals.

Mining Leases solely for infrastructure facilities associated with mining

These types of Mining Leases are not subject to the 'right to negotiate' process under the NTA, and consequently there are no alternative State provisions for them. However applications for them must comply with the lesser procedures of Section 24MD (6A) and (6B) of the NTA, as well as the usual procedures of Part 7 of the MRA. For convenience of applicants these two sets of procedures have been integrated in chapter 1 below. However it should be noted that this integration is for simplicity only and has no statutory basis. However if the procedures of section 24MD (6A) and (6B) are not followed, the State cannot grant a Mining Lease of this type.

Note that the procedures apply only to Mining Leases solely for infrastructure, and if mining of any minerals is also included, the procedures for other Mining Leases set out below must be followed.

Mining Leases for minerals on non-exclusive land

The Commonwealth NTA requires the 'right-to-negotiate' process for the grant of Mining Leases unless alternative State provisions have been approved under Section 43 of the NTA. The alternative State provisions which have been approved by the Commonwealth for such Mining Leases are set out in Parts 17 and 18 of the MRA and are outlined in chapters 2 and 5 below.

ARE THERE ANY DEALINGS WITH MINING LEASES APART FROM GRANTS THAT REQUIRE THE NATIVE TITLE PROCEDURES?

Certain **renewals** of Mining Leases require compliance with the native title procedures. The requirements are set out in chapter 3 below.

Certain other **subsidiary approvals** also require compliance with the native title procedures. These are applications for:

- Adding additional Surface Area to a Mining Lease;
- Approval to conduct drilling or other activities on land not in the Surface Area of a Mining Lease;
- Adding minerals or an additional purpose to a Mining Lease (in most cases).

The requirements for these approvals are set out in chapter 4 below.

Conditional surrenders of some Mining Leases to allow new Mining Leases may require compliance with the procedures as they may create new 'rights to mine'. This depends on the circumstances of the original grant and the surrender conditions. Head Office of the Department should be contacted for advice on individual situations. If the procedures are required they must be followed as for the grant of new Mining Leases.

Assignments or transfers of Mining Leases are exempt from the procedures, but after an assignment is approved by the Minister you must notify any native title bodies corporate or registered native title claimants as for other land holders. Section 300(11) as amended

NOMINATING ON APPLICATION

In your initial application for a Mining Lease, you should :-

- (1) state whether you believe the application is entirely over extinguishing tenures, or includes at least some non-exclusive tenures;
- (2) if the latter is the case, you should state:
 - whether the land is subject to a relevant ILUA; or
 - whether the land is within an approved opal or gem mining area; or
 - whether the application is solely for infrastructure facilities associated with mining.

If none of these in (2) apply, you must use the procedures in chapter 2 below

1. NATIVE TITLE PROCEDURES FOR MINING LEASES SOLELY FOR INFRASTRUCTURE FACILITIES ASSOCIATED WITH MINING

Section 24MD(6B)(b) of the Native Title Act

The following procedures are those required by section 24MD(6B)(b), of the NTA, integrated as much as possible with the non-native title provisions of the MRA. It should be noted that this integration is for convenience only and has no statutory basis. However if the procedures of section 24MD(6B)(b) are not followed, the State cannot grant a Mining Lease of this type.

Note that the procedures apply only to Mining Leases solely for infrastructure, and if mining of any minerals is also included, the procedures for other Mining Leases set out below must be followed. The procedures apply across all non-exclusive land.

Infrastructure Facilities Associated with Mining

These are defined by section 253 of the NTA to include any of the following:

- a) a road, railway, bridge, or other transport facility;*
- b) a jetty or a port;*
- c) an airport or a landing strip;*
- d) an electricity generation, transmission or distribution facility;*
- e) a storage, distribution or gathering or other transmission facility for oil or gas or their derivatives;*
- 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 above and that the Commonwealth Minister determines in writing to be an infrastructure facility for the purposes of this definition.*

Notification

After lodging your application for a Mining Lease of this type, the Department will arrange for a notice about your application and project to be sent to all registered native title bodies corporate, registered native title claimants and representative Aboriginal/Torres Strait Islander bodies, and for a notice to be inserted into a newspaper circulating locally and in a special purpose publication (such as an Aboriginal newspaper). The Department may re-coup the costs of these notices from you.

Objections

Any registered native title bodies corporate or registered native title claimants may object to the grant of application, in so far as it affects their native title rights and interests, within 2 months of being notified. Native title parties will be informed to forward their objections initially to the Mining Registrar, with a copy to you.

Consultation

You must consult with any registered native title bodies corporate and registered native title claimants who object to the grant of the Mining Lease about ways of minimising the impact of the grant of the Mining Lease on registered native title rights and interests in relation to the land, about access to the land, and about the way any thing authorised by the Mining Lease might be done. You may do this in a way you see fit, but the guidelines set out for consultation about other Mining Leases (see below) could be a suitable framework.

Results of Consultation

If you reach an understanding with the native title objectors about the grant of the lease, you should ask them to notify the Mining Registrar that they withdraw their objections, and the Mining Lease can then proceed to grant in the usual manner.

If you cannot reach such an understanding within a reasonable time frame, you should ask the native title objectors whether they wish to pursue their objections. If they do, you should ask them to inform the Mining Registrar accordingly, so that a hearing in the Tribunal can be arranged. If they do not wish to pursue their objections, you should ask them to withdraw them and notify the Mining Registrar accordingly. The Mining Registrar should be informed of your request. The Mining Lease can then proceed to grant in the usual manner. If the objections are not withdrawn within a reasonable period, the Mining Registrar will refer the application to the Tribunal as if the objections were being pursued.

Hearing

If a native title objector requests the Mining Registrar to proceed to a hearing, the Mining Registrar will fix a date with the Tribunal, if a date has not already been set for the hearing of other objections. The Tribunal will attempt to co-ordinate the hearing of the native title objections along with other matters, but there is no statutory requirement for this and two separate hearings may be needed.

If the Tribunal upholds a native title objection or determines that conditions relating to registered native title rights and interests should be imposed, the Minister must comply with the decision, including in any recommendation to the Governor-in-Council, unless the Minister overrules it as below.

Reporting to Minister by Tribunal

The Tribunal will advise the Minister of its decision on the native title objections at the same time that it makes its recommendation to the Minister under section 269 of part 7 of the Act.

Overruling the Tribunal's Decision

The Minister can overrule the Tribunal's decision on the native title objections, but only if:

- it is in the interests of Queensland to do so; and
- the Minister principally responsible for indigenous affairs has been given a copy of the Decision and is consulted about it and the Minister's proposed substituted decision; and
- the consultation is taken into account.

2. NATIVE TITLE PROCEDURES FOR MINING LEASES FOR MINERALS ON NON-EXCLUSIVE LAND Part 17 (Div 4) and Part 18 of the Mineral Resources Act

The procedures for applications for these Mining Leases comply with section 43 of the NTA. They provide for notification, consultation and negotiation in good faith for the grant of the tenement, objections to the grant if desired, and hearing by the Tribunal of objections or failure of the negotiations toward grant.

Note that when a notice is required to be sent to a native title party, it must be *received* by the end of the stipulated period.

The procedures are as follows:

Notification

Within a period of 3 months before lodging your application for the Mining Lease, or within 28 days after the certificate of application for the Mining Lease is endorsed by the Mining Registrar, you must notify in writing all registered native title bodies corporate, registered native title claimants and representative Aboriginal/Torres Strait Islander bodies for the land involved at the time (the native title notification parties), and the Registrar of the National Native Title Tribunal, of your intention to lodge the application or that you have lodged it. Mining Registrars can supply a standard form for this notification. ...Section 652

The Mining Registrar or the National Native Title Tribunal can help you with the addresses and contacts for the native title parties, and you should find out these in advance so that you are ready to issue the notices as soon as the certificate of application is issued.

You must also at the same time insert a public notice to the same effect in a newspaper circulating generally in the area of the application, and in a relevant special interest publication (eg an Aboriginal newspaper). Section 652

Within 2 days of giving the notice to the native title parties and inserting the public notices, you must give the Mining Registrar notice of your compliance with the above (there is a standard form for this). To do this you must attach a copy of the notice you gave to the native title parties, and copies of the pages of the newspaper and special interest publication containing the public notices as soon as these become available. If the Mining Registrar considers that any of the notices are defective, you may be directed to re-issue them within a certain period. Section 654

In this notification you must nominate a 'notification day (native title issues)', by which it can be reasonably assumed that the above notices have been received and the advertisement has come to the notice of the native title parties, and a 'closing day (native title issues)', by which any new native title claims must be lodged. This must be at least 3 months from the notification day (native title issues). Section 653

Notification Details

Section 653

The written notice must include the following:

- *the name and postal address of the applicant, (and for convenience the phone number);*
- *the notification day (native title issues)- ie the day by which it can be reasonably assumed that the notices of the application will have been received or come to the attention of the relevant people;*
- *the closing day (native title issues)-this must be at least 3 months after the notification day*
- *how a person may become a registered native title party;*
- *that registered native title parties have a right-*
 - to be consulted about the proposed Mining Lease;*
 - to object to the granting of the proposed Mining Lease; and*
 - to negotiate with a view to reaching agreement about the granting of the proposed Mining Lease*
- *that objections must*
 - be made in writing in the approved form; and*
 - be lodged with the Mining Registrar at any time before a Negotiated Agreement is reached or before the application is referred to the Tribunal for a Native Title Issues Decision; and*
 - state the facts and circumstances relied upon in support of the ground of objection*
- *a clear description of the land, and its location (for the written notices, this should include a topographic map);*
- *a description of the nature of the proposed Mining Lease;*
- *that the proposed Mining Lease, if granted, will be granted by the Governor-in-Council;*
- *how further information about the proposed mining lease can be obtained from you and the Mining Registrar.*

As soon as practicable after the closing day, you must give the Mining Registrar a form with a list of the names and addresses of all registered native title parties at that time (ie all registered native title bodies corporate or registered native title claimants), and any entities that may become registered (ie groups who have lodged claims but are not yet registered native title claimants). Section 656(1)

If any entities become such registered native title parties within one month after the closing day, you must give the Mining Registrar a second form with a list of their names and addresses also. Section 656(2)

The Mining Registrar may be able to assist with these names, but for up to date information you may need to contact the National Native Title Tribunal or the Federal Court. The Mining Registrar can assist with contact details for these bodies.

Early ending of native title procedures

If after the closing day there are no registered native title parties or entities that may become so, or if the registered native title parties and any entities that may become so in the 1 month after the closing day advise the Mining Registrar in an approved form that they do not object to the grant of the Mining Lease and do not wish to be consulted about it, the Mining Lease can then proceed to grant in the usual manner. Section 657

Compensation

Despite the above, the Mining Lease cannot be granted until compensation is settled with any registered native title bodies corporate and registered native title claimants for the land either by agreement or determination by the Tribunal. Sections 707-715

Notice of grant

Within 28 days of receiving notice of the grant of a Mining Lease, you should give written notice to the registered native title parties advising of the grant of the Mining Lease and stating its conditions. Section 688

Consultation and negotiation in good faith

Unless early ending of the native title procedures applies, you are obliged to consult and negotiate *in good faith* with any registered native title parties, including any which become registered within 1 month after the closing day, with a view to obtaining their agreement to the grant of the Mining Lease (a Negotiated Agreement) and any conditions to be complied with if it is granted.

The State is also a party to this consultation and negotiation process, unless you, the registered native title parties and the State advise, in a form to the Mining Registrar, that the State is not to be a party, or is to take only a specified role. Sections 658-660

The time for consultation and negotiation lasts for 6 months from the notification day (the pre-referral period), unless the parties agree within the 6 months for it to be extended, and advise the Mining Registrar of the new date. However, if an Environmental Impact Statement (EIS) is required, the time ends either 3 months from the day the Environmental Impact Statement is publicly notified under another State or Commonwealth Act, or a later agreed date as above, or 6 months from the notification day, whichever is the later. Section 669

Mediation

At any time before a Negotiated Agreement is reached or the Mining Lease is referred to the Tribunal for a Native Title Issues Decision, you or another consultation and negotiation party may ask for mediation to help in resolving issues relevant to the consultation.

The mediation may be carried out by a mediator chosen by you and the other parties, or if agreement on this cannot be reached, you or the other parties may ask the Tribunal for mediation by the Tribunal or a mediator chosen by it.

The mediation must be carried out in the pre-referral period unless all parties agree for it to be extended. The mediation may end at any time by a decision of the mediator or by agreement of all parties.

Section 662

Matters for Consultation and Negotiation in Good Faith

Sections 659-665

As part of the consultation and negotiation in good faith, you must consult the registered native title parties about ways of minimising the effect of the grant of the Mining Lease on their registered native title rights and interests in relation to the land, including any access to the land and the way in which anything authorised by the Mining Lease may be done.

The registered native title parties must consult the other parties about the effect of the grant of the Mining Lease on their registered native title rights and interests.

The consultation must have regard to the Guidelines set out below.

Negotiation is not limited to the above matters, but you are not required to negotiate on matters unrelated to the impact of the grant on the registered native title rights and interests, or on matters unrelated to the Mining Lease.

The consultation and negotiation can take into account the nature and extent of non-native title rights and interests, existing use of the land by other parties, and the practical effects of the exercise of the non-native title rights and interests and the existing uses of the land on the exercise of native title rights and interests.

You must make every reasonable effort to reach a negotiated agreement for the grant of the Mining Lease and any conditions to be complied with. However failure of another party to negotiate in good faith as required cannot be held against you in this respect.

Guidelines for Consultation

Sections 663-664

For you as applicant

You should give each registered native title party a copy of the application for the Mining Lease (excluding any statement about your financial and technical resources).

You should convene at least one meeting to provide a reasonable opportunity for all registered native title parties to be given a presentation about the proposed Mining Lease. The presentation should be directed at providing an understanding of the anticipated nature, extent and impact of the mining project.

This meeting or meetings may be at a place agreed by you and the native title parties, or in a town or city where there is an office of the representative Aboriginal/Torres Strait Islander body, or in the town or city where the Mining Registrar's office is located. However it should be at a time and place to maximise attendance. If you have convened the meeting properly but the other parties do not attend, you are taken to have complied with your obligations.

You should complete this phase of the consultation and negotiation process within 4 months of the notification day.

For the registered native title parties

As soon as practicable after you as applicant have completed the consultation above, each registered native title party should advise all the other parties about the impact the proposed Mining Lease is likely to have on the party's registered native title rights and interests.

Objections

At any time before a Negotiated Agreement is reached or the Mining Lease is referred to the Tribunal for a Native Title Issues Decision, a registered native title party may lodge with the Mining Registrar an objection to the proposed Mining Lease on the ground that it would affect the party's registered native title rights and interests, or on any other matter relating to the grant.

The native title party must give you a copy of the objection and accompanying material on which it is based.

An objection can be withdrawn at any time during the consultation and negotiation period, with a notice of this being sent to you.

Section 668

Agreement from consultation and negotiation in good faith

If you and the other consultation and negotiation parties reach an agreement (a Negotiated Agreement) for the grant of the Mining Lease as a result of the consultation and negotiation, you and the other parties must give a certificate to the Mining Registrar stating that an agreement has been obtained for the grant of the lease, and provide a copy of the agreement. You must also give a copy of the certificate to the Tribunal. There is a standard form for this certificate.

If the agreement contains conditions, the conditions have the effect of the terms of a contract between you and the other consultation and negotiation parties.

If possible the Negotiated Agreement should also contain agreements about compensation and about renewal, to avoid the necessity for separate compensation and renewal processes (see below).

If a Negotiated Agreement is reached, the native title parties must withdraw any objections they have lodged.

Once an agreement has been reached the Mining Lease will then proceed to grant in the usual manner.

Sections 666, 667, 668

Compensation

Despite the above, the Mining Lease cannot be granted until compensation is settled with any registered native title bodies corporate and registered native title claimants for the land either by agreement or determination by the Tribunal.

Sections 707-715

Notice of grant

Within 28 days of receiving notice of the grant of a Mining Lease, you should give written notice to the registered native title parties advising of the grant of the Mining Lease and stating its conditions.

Section 688

Referral of application for Mining Lease to the Land and Resources Tribunal

If 6 months or a longer agreed period have passed since the notification day (or, if an Environmental Impact Statement has been called for, 3 months since the Statement has been advertised as available for inspection), and a Negotiated Agreement has not been reached, you or another consultation and negotiation party may refer the application to the Tribunal for a decision (a Native Title Issues Decision). This must be done in a standard form lodged with the Mining Registrar, and copies given to the other parties.

If no referral form has been lodged but there is an objection from a native title party that has not been withdrawn, the application is taken to have been referred to the Tribunal, who will be notified accordingly by the Mining Registrar.

If there is no referral within 3 months of the end of the pre-referral period described above, the Minister may reject the application.

Section 669

Continued negotiation and mediation

Despite a Mining Lease application being referred to the Tribunal, you and the other consultation and negotiation parties may continue trying to reach a Negotiated Agreement up until the Tribunal makes a Native Title Issues Decision. If an Agreement is reached, all referrals to the Tribunal are taken to be withdrawn and objections must also be withdrawn.

Section 670

Combined hearing by Tribunal

Where a referral has been made to the Tribunal or an objection lodged by a registered native title party, the hearing of the Mining Lease under Part 7 of the MRA takes the form of a combined hearing, consisting of:

- a) the hearing of objections and other matters mentioned in section 268 of part 7; and
- b) the hearing for a Native Title Issues Decision, including the hearing of objections from native title parties under part 17.

Section 671

There is flexibility in setting the date for this combined hearing. If it is possible to set a date for a hearing of the matters in a) above, but a Negotiated Agreement has not been reached or a referral of the Mining Lease lodged with the Tribunal, the Mining Registrar may, if you agree, set a date for a hearing as if it were not a combined hearing. The Tribunal will hear these matters, and then adjourn until a Negotiated Agreement is reached or the application is referred, at which point it will reconvene the hearing. However the Mining Registrar may also decide to defer any hearing until it is clear whether the application will be referred to the Tribunal. Alternatively, if the application has been referred but it is not yet possible to set a date for the hearing of matters in a) above, the Mining Registrar must wait until this is possible before setting a date for the combined hearing.

Section 677

At any time after the referral of a Mining Lease application to the Tribunal, the Tribunal may give directions to the consultation and negotiation parties, including directions for producing and giving of:

- a statement by you as applicant including a copy of the material you provided to the native title parties in consultation;
- a statement from each registered native title party stating the anticipated effect of the grant of the Mining Lease on the party's registered native title rights and interests; and
- submissions on the matters the Tribunal will be required to take into account in making its Native Title Issues Decision.

Section 673

Native Title Issues Decision by Tribunal

The Native Title Issues Decision will be one of the following:

- a) that the proposed Mining Lease may be granted;
- b) that the proposed Mining Lease may be granted but subject to conditions, which may be either conditions of the grant, or contract conditions, or both types;
- c) that the proposed Mining Lease should not be granted.

Section 675

Matters Taken into Account by Tribunal

Section 677

In making its Native Title Issues Decision the Tribunal must take into account the following:

- a) *The effect of the grant of the Mining Lease on:*
 - *the enjoyment by the registered native title parties of their registered native title rights and interests; and*
 - *the way of life, culture and traditions of any of the registered native title parties; and*
 - *the development of social, cultural and economic structures of any of the registered native title parties; and*
 - *the freedom of access by any of the registered native title parties to the land; and*
 - *the freedom of any of the registered native title parties to carry out rites, ceremonies or other activities of cultural significance on the land in accordance with their traditions; and*
 - *any area or site on the land of particular significance to the registered native title parties in accordance with their traditions;*
- b) *The interests, proposals, opinions or wishes of the registered native title parties in relation to the management, use or control of the land that will be affected by the grant of the Mining Lease;*
- c) *The economic or other significance of the grant of the Mining Lease to Australia, Queensland, the area in which it is situated, and to Aboriginal and Torres Strait Islanders who live in the area;*
- d) *Any public interest in the granting of the Mining Lease;*
- e) *Any other matter the Tribunal considers relevant.*

In deciding the effect of the grant of the Mining Lease on the above matters, the Tribunal must also take into account the nature and extent of the existing non-native title rights and interests in relation to the land; and the existing use of the land by persons other than registered native title parties.

The Tribunal must also take into account all objections lodged under the native title provisions and any other documents lodged.

The Tribunal must also establish whether there are any issues relevant to its decision on which the parties are in agreement, and must take these issues into account in making its decision.

If at the end of the combined hearing you have not reached a compensation agreement with the registered native title parties, the Tribunal will proceed to also make a compensation decision for the application (if there are registered native title claimants involved compensation for them will be in monetary form and must be paid into trust). Section 675

The Native Title Issues Decision must be complied with by the Minister, including in any recommendation to the Governor in Council for the grant of the Mining Lease, unless the Minister overrules the Decision as below. Section 680

The Native Title Issues Decision should be made within 6 months of the referral of the application to the Tribunal. Section 679

The Tribunal may also make a deferred decision about certain matters that cannot be resolved at the time of the combined hearing. Section 678

Any contract conditions in the Native Title Issues Decision have effect as if they were included in the terms of a contract between the parties. Sections 675, 687

Reporting to Minister by Tribunal

The Tribunal will advise the Minister of the Native Title Issues Decision at the same time that it makes its recommendation to the Minister under section 269 of part 7 of the Act.

In cases where the Native Title Issues Decision is that the application should not be granted, the Tribunal can still recommend under section 269 that the application should otherwise be granted (so as to give the Minister a full picture of the merits of the application), but it cannot be granted unless the Native Title Issues Decision is overruled as below. Sections 676, 680

Overruling Native Title Issues Decision

The Minister can overrule the Native Title Issues Decision, but only if:

- it is in the interests of Queensland or the national interest to do so; and
- the overruling occurs within 2 months of the Decision.

If the Native Title Issues Decision is overruled, the Minister makes a substituted decision, and gives a copy to the Tribunal, to you as applicant, and to the other consultation and negotiation parties.

The substituted decision can not overrule a decision by the Tribunal on compensation. If the substituted decision is that the Mining Lease be granted rather than rejected, or if the conditions of grant are changed, the Minister must refer the matter back to the Tribunal for a decision on compensation or revision of the existing compensation decision.

Urgency Notice

If the Tribunal has not made a Native Title Issues Decision, or a Negotiated Agreement has not been reached, within 4 months of the Mining Lease being referred to the Tribunal, the Minister may give the Tribunal an urgency notice to hear the matter and make a Native Title

Issues Decision within a stated period. If the Tribunal does not comply with this, the Minister may make a decision which has the effect of a Native Title Issues Decision. The detailed circumstances when this may occur and the procedures are set out in the legislation.

Compensation

Compensation must be settled with registered native title bodies corporate and registered native title claimants, as well as with other land owners, before the grant of the Mining Lease, either by agreement or determination of the Tribunal.

If you reach a Negotiated Agreement with the registered native title bodies corporate and registered native title claimants as above, it is advantageous for it to include agreement about compensation, otherwise a separate compensation agreement or a determination by the Tribunal is necessary.

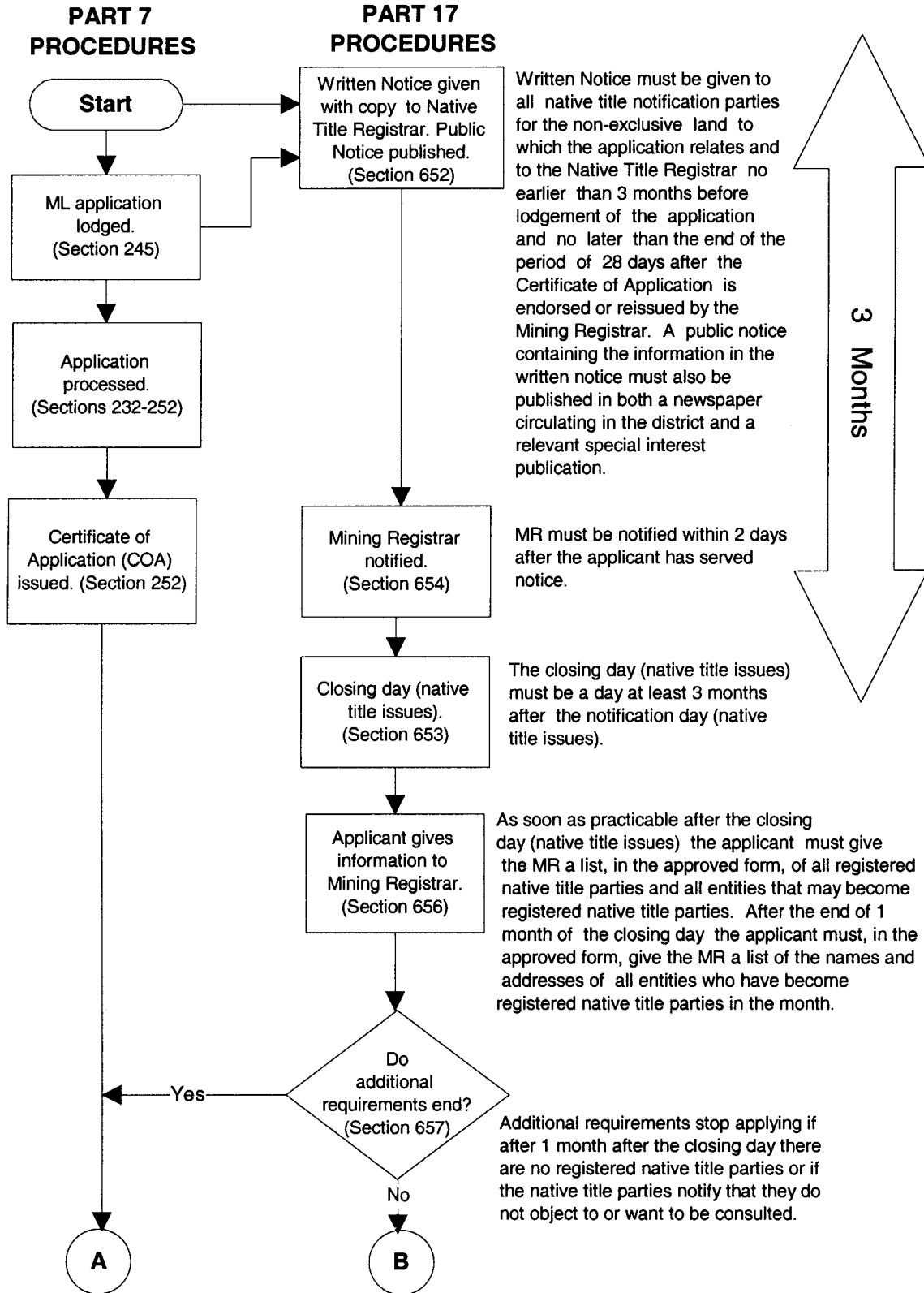
If a Negotiated Agreement is not possible and a hearing by the Tribunal is necessary, and if by the end of a hearing you have not reached a compensation agreement with the native title parties, the Tribunal must determine compensation for them (any compensation determined for registered native title claimants is paid into trust).

Notification of grant

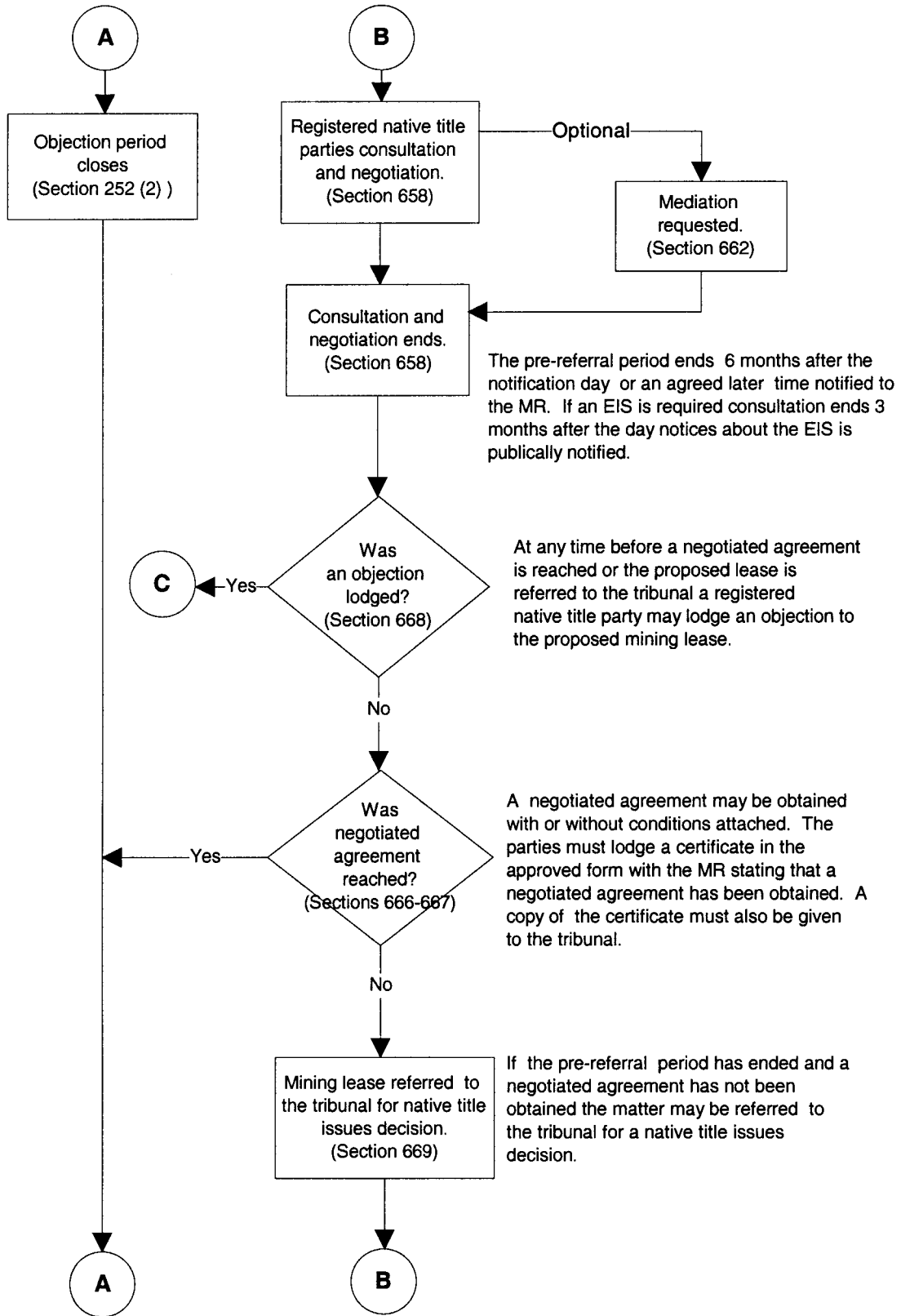
Within 28 days of receiving notice of the grant of a Mining Lease, you must give written notice to the registered native title parties advising of the grant of the Mining Lease and stating its conditions and any contract conditions. Failure to comply with this requirement is an offence for which there is a penalty.

Section 688

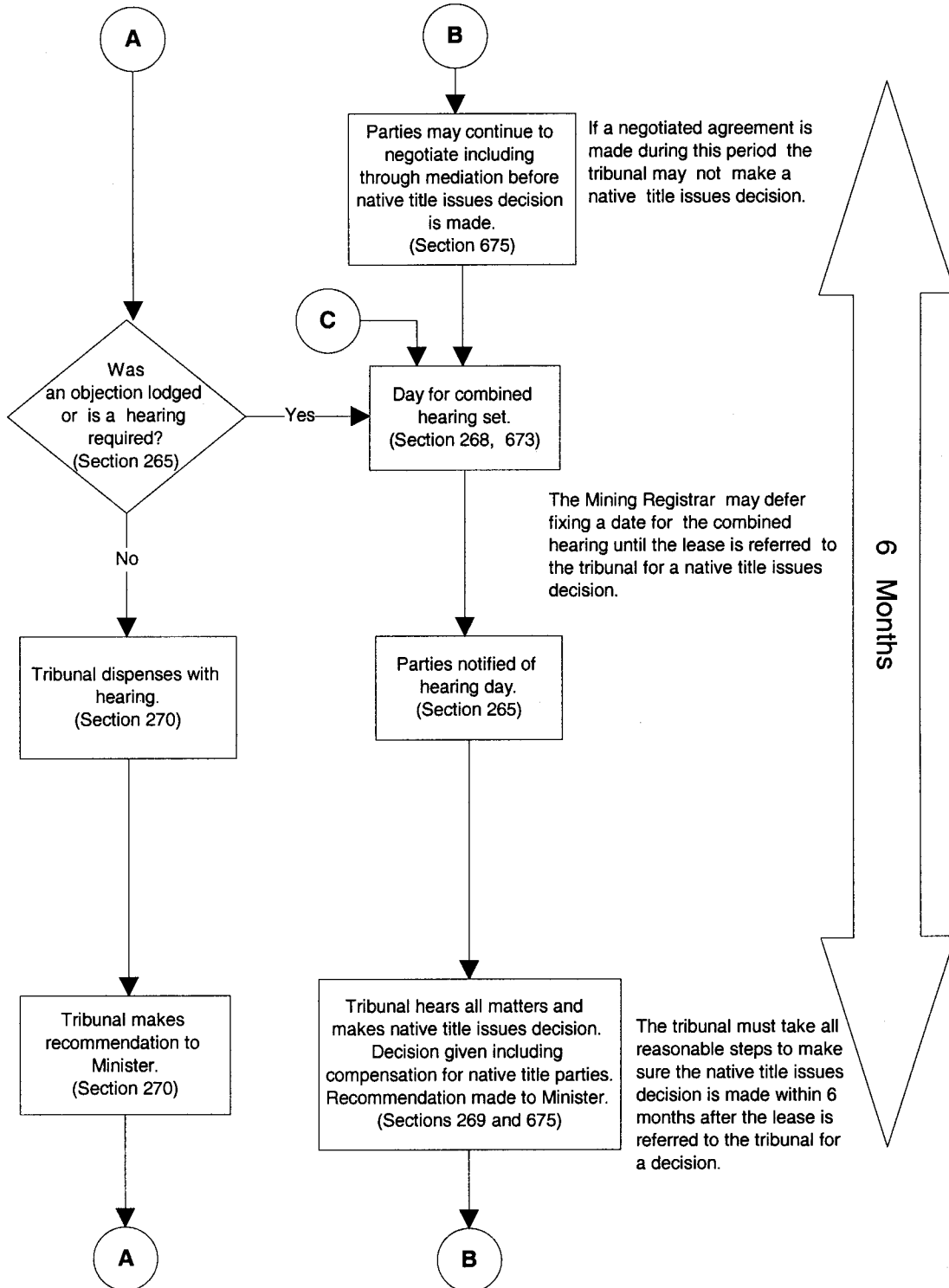
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Mining Lease Application
ML over non-exclusive land**



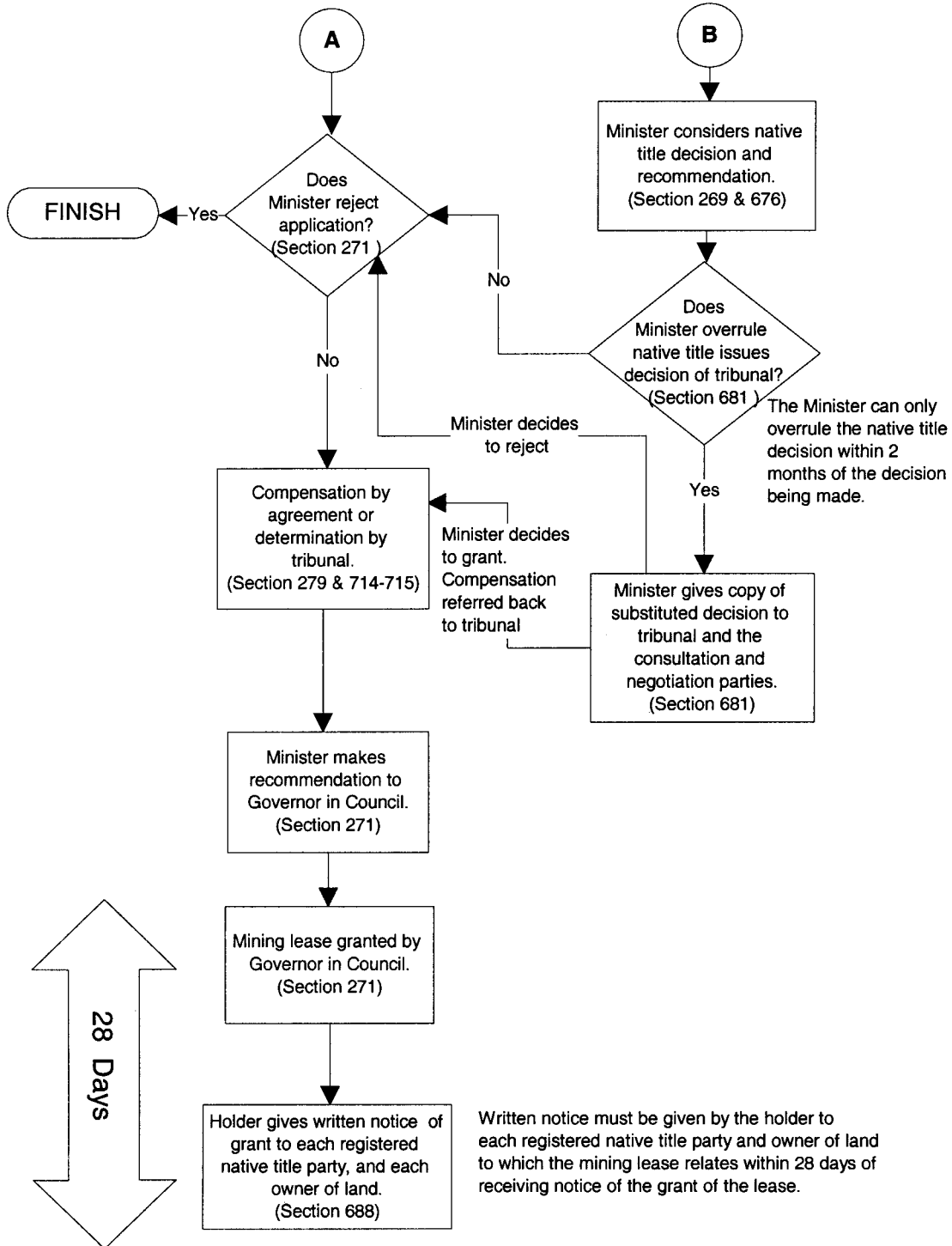
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Mining Lease Application
ML over non-exclusive land**



**FLOW CHART
Mining Lease Application
ML over non-exclusive land**



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Mining Lease Application
ML over non-exclusive land**



3. NATIVE TITLE PROCEDURES FOR RENEWALS OF MINING LEASES. Part 17 (Div5) of the Mineral Resources Act

Renewals of Mining Leases granted over non-exclusive land before 23 December 1996 can proceed without any native title procedures, provided the renewal is for a like term and does not authorise any additional activities.

NTA Section 26D(1)(b)(I)

Renewals contemplated in ILUAs and Right to Negotiate agreements under the NTA can also proceed under the conditions in those agreements.

Renewals of other Mining Leases granted over non-exclusive land since 1996 are subject to the procedures in chapters 1 or 2 above as if they were new grants.

Use of the native title procedures for renewals is necessary because the NTA does not permit State procedures to allow an agreement or determination for grant to include similar provisions for renewals.

Whilst the requirement can introduce delays, there are strategies to minimise these. It is possible to discuss renewal during the initial consultation and negotiation, before grant. If agreement on renewal can be reached at that stage, when the time comes for renewal, native title parties have the option of not objecting to the application after being notified of it, and quickly reaching a new Negotiated Agreement (preferably also dealing with compensation), which would then allow the application for renewal to proceed without further native title requirements.

However any advance understandings with the native title parties of this nature are not binding (unless incorporated into an ILUA).

If the Mining Lease is **solely for infrastructure facilities**, the procedures of chapter 1 must be followed as if the application for renewal was for the grant of a new lease.

For renewal of **other Mining Leases on non exclusive land** the procedures of chapter 2 with some necessary changes apply.

You must notify the native title parties and arrange for the public notices to be published between 3 months before lodging the application for the renewal with the Minister and 28 days after lodging it. There is a standard form for the notification of such a renewal application to the native title parties.

Section 652 modified by 695(2)

The pre-referral period during which you must consult and negotiate is a period of 6 months starting on the notification day, or a longer period agreed by the parties which has been advised to the Mining Registrar.

Section 669 modified by 695(3)

If a hearing in the Tribunal is required, it is not a combined hearing, but a hearing for a Native Title Issues Decision. The Mining Registrar will within 14 days of the end of the pre-referral period fix a day for the tribunal to hear the application for renewal.

Section 695(4)

In such a hearing the Tribunal must ask the Minister about the extent to which you are in compliance with the covenants and conditions of the Mining Lease and the MRA itself, and whether the Mining Lease still contains workable quantities of mineral or is required for other purposes for which it was granted (ie the matters in section 286(3) of the MRA). The Tribunal must take into account the information provided by the Minister. Sections 695(5) and (7)

The Tribunal will advise the Minister of its Native Title Issues Decision, and this must be complied with unless it is overruled by the Minister as described in chapter 4 above. The Minister cannot give an urgency notice to expedite the hearing of a renewal application. Section 676 modified by Section 695(6) and (8)

4. NATIVE TITLE PROCEDURES FOR SUBSIDIARY APPROVALS FOR MINING LEASES

Part 17 (Div.6) of the Mineral Resources Act

Adding additional Surface Area to a Mining Lease

If you wish to add additional Surface Area under section 275 of the MRA to a Mining Lease, the provisions of chapter 2 above must be complied with as if your application were an application for a new Mining Lease.

Approval to conduct drilling and other activities on land not included in the Surface Area of a Mining Lease

If you wish to apply under section 237 of the MRA to undertake such activities on non-exclusive land, the procedures of chapter 2 with some necessary changes apply.

You must notify the native title parties and arrange for the public notices to be published between 3 months before lodging the application for the approval with the Minister and 28 days after lodging it. Such applications should be lodged through the Mining Registrar. There is a standard form for the notification of such an approval application to the native title parties.

Section 652 modified by Section 705(2)

The pre-referral period during which you must consult and negotiate is a period of 6 months starting on the notification day, or a longer period agreed by the parties which has been advised to the Mining Registrar.

Section 669 modified by Section 705(3)

If a hearing in the Tribunal is required, it is not a combined hearing, but a hearing for a Native Title Issues Decision. The Mining Registrar will within 14 days of the end of the pre-referral period fix a day for the tribunal to hear the application for renewal.

Sections 705(4) and (5)

The Tribunal will advise the Minister of its Native Title Issues Decision, and this must be complied with unless it is overruled by the Minister as described in chapter 4 above. The Minister cannot give an urgency notice to expedite the hearing of an approval application of this type.

Sections 705(6), (7) and (9)

Note also that the Minister grants or rejects the approval application, not the Governor in Council as is the case with a grant of a new Mining Lease.

Section 705(10)

Adding minerals or an additional purpose to a Mining Lease on non-exclusive land.

If you wish to apply under section 298 of the MRA to mine specified (additional) minerals or to add another purpose to a Mining Lease, you must apply to the Minister. Such applications should be lodged through the Mining Registrar. There is a standard form for these types of applications.

Generally you must comply with the procedures in chapter 2 above, with any necessary changes, as if the application were for the grant of a new Mining Lease. The necessary changes are the same as set out above for approvals to conduct drilling etc.

However there may be some circumstances when the addition of a new mineral is not changing the right to mine and would not trigger the Commonwealth right to negotiate provisions, and hence the alternative State provisions will not then be necessary. If you think this may be the case you should contact the Department for advice.

5. COMPENSATION PROVISIONS FOR MINING LEASES

Part 18 of the Mineral Resources Act

Under the Commonwealth *Native Title Act 1993*, native title holders are entitled to compensation for the effect of any act on their native title rights and interests, including grants, renewals and other acts relating to exploration and mining tenements. This compensation is payable by the State making the grant or other approval, unless a law of the State provides for other parties to pay the compensation.

WHEN IS COMPENSATION REQUIRED?

There is an entitlement for compensation for the following acts:

- 1) The **grant** and **renewal** of, and **subsidiary approvals** for:
 - Mining Leases under the native title provisions of Part 17 of the MRA;
 - the above tenements on the seaward side of the mean high water mark (where the alternative State provisions of Part 17 of the MRA or Commonwealth 'right to negotiate' process do not apply);
 - the above tenements in approved opal or gem mining areas determined under section 26C of the Commonwealth NTA (where the alternative State provisions of Part 14 of the MRA or Commonwealth 'right to negotiate' process do not apply) (No such areas have been determined at the time of writing of this Manual).
 - Mining Leases solely for infrastructure facilities associated with mining which are mentioned in section 24MD(6B)(b) of the NTA.
 - the above tenements the subject of a registered Indigenous Land Use Agreement (ILUA) if the ILUA does not provide for compensation;
- 2) The **renewal** also of:

Mining Leases granted as a result of a 'right to negotiate' agreement or determination of the National Native Title Tribunal under the Commonwealth NTA and for which compensation on renewal has not been previously agreed.

Section 706

HOW AND WHEN IS COMPENSATION SETTLED?

Part 18 of the *Mineral Resources Act 1989* sets out how such compensation is to be settled in different circumstances. These provisions largely parallel the compensation entitlements of other land holders, but with modifications to cater for the fact that the actual native title holders may not have been determined and there are only claimants at present.

Compensation is payable by the applicant or the holder of the tenement, except in limited special circumstances where the State is liable. It is payable by agreement or after determination by the Tribunal (as with other land holders).

Agreements on compensation can be about any matter and are payable in money or non-monetary form. They must be in writing, signed by all parties, and lodged with the Mining Registrar to have force and effect. If an agreement is reached with a claimant but it later turns out that they were not the true native title holders, and the eventual registered native title body corporate requests the tribunal to determine compensation, the State will pay this second compensation.

If the Tribunal is required to make a determination on compensation where there is a registered native title body corporate, it makes a 'compensation decision' which takes effect immediately. This compensation must be in money, but the body corporate can ask the Tribunal to recommend that all or some of the compensation be paid in a non-monetary form. If there are only registered native title claimants the Tribunal makes a 'compensation trust decision' for money to be paid into trust until a determination of native title is made and a registered native title body corporate is established.

For **Mining Leases** compensation must be settled with any registered native title bodies corporate and registered native title claimants *before* the grant, renewal or other approval for the tenement.

If agreement on compensation is not possible, you or a registered native title body corporate or a registered native title claimant for the land can apply to the Tribunal for a determination on compensation. If the matter of grant, renewal or other approval of the tenement is already before the Tribunal for a Native Title Issues Decision because a negotiated agreement for the grant etc cannot be obtained, the Tribunal will determine the compensation at the same time.

If agreement for grant etc has been reached, but it does not contain agreement about compensation, and compensation has not been settled or referred to the Tribunal within 3 months of the agreement, the Mining Registrar will apply to the Tribunal for a determination.

Sections 714-715

If there are no registered native title bodies corporate or registered native title claimants at the time of grant, renewal or approval, but bodies corporate or claimants are registered later, they may approach you for an agreement on compensation or seek a determination in the Tribunal for a 'compensation decision' or 'compensation trust decision' as the case may be.

Section 716

6. SPECIAL PROVISIONS APPLYING TO APPLICATIONS FOR MINING LEASES OUTSTANDING AT THE TIME OF COMMENCEMENT OF THE NATIVE TITLE PROCEDURES

Part 19 of the Mineral Resources Act

Special transitional provisions are required for applications for tenements which are outstanding over non-exclusive land at the time of commencement of the native title procedures.

Regardless of the stage they have reached towards grant under Part 7 of the MRA, applicants for Mining Leases will have to comply with the native title procedures of Part 17 of the MRA before grant.

However, commencement of the notification, consultation and negotiation processes required by this Part in a random fashion by the large numbers of individual applicants involved would lead to chaos, as the native title claimants and representative Aboriginal/Torres Strait Islander bodies would not be in a position to respond.

The legislation provides that the Department of Natural Resources and Mines will determine when the initial notification process can start for each tenement (and hence also when subsequent consultation and negotiation can start).

One option to regulate the situation is for the Department to batch similar applications in similar geographical areas or over the same native title claim area, so that consultation or negotiation can be carried out on similar matters at the same time with the same people.

Under this option the Mining Registrar would notify you of a day after which you can notify the native title notification parties. You must then issue the relevant notifications under section 652 within 4 months of that day. Note that the Mining Registrar is only telling you that you are now free to notify the native title parties, and has not done that in your stead.

Sections 729, 730, 731, 732

Applicants in a batch may be well advised to try to co-ordinate their notices and consult and negotiate together, at least initially. The Department would assist in providing names and addresses of members of a batch.

