

Guideline

Application of the native title infrastructure facility process to mining leases for ancillary mining activities

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Introduction

Purpose of this guideline

This guideline sets out how NSW Resources (NSWR), within the Department of Primary Industries and Regional Development, applies the infrastructure facility process under the *Native Title Act 1993* (Cth) (NTA).

This guideline is introductory and complements other NSWR guidance. This guideline includes links to other NSWR guidance.

This guideline:

- will help you comply with the NTA
- is designed to assist each of the key stakeholders to participate in the infrastructure facility process with the objective of maximising the likelihood of a favourable outcome for each participant, and
- contains resources and information to assist you.

In this guideline, we refer to the processes detailed in section 24MD(6B)(c)-(g) of the NTA as the ‘infrastructure facility process.’

What this guideline covers

This guideline covers circumstances when the infrastructure facility process applies to the grant, renewal or variation of a mining lease.

What this guideline does not cover

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

This guideline does not cover future acts to which other provisions of the NTA, such as the Right to Negotiate (RTN) apply.

It also does not cover an ‘off title Ancillary Mining Activity (AMA)’ that is regulated by a condition under section 6(2) of the *Mining Act 1992*.

Where the Minister administering the Mining Act is satisfied that native title is extinguished over the entire area of a mining lease application, it is not necessary to follow the infrastructure facility process (or the RTN). Therefore, this guideline is not applicable in those circumstances.

This guideline does not provide guidance about the amount of compensation that might be payable for a future act, or the benefits that may be negotiated between miners and native title parties.

Additional information

For an introduction to native title and a general overview of how NSWR applies the NTA in administering the Mining Act, see the guideline [An overview of native title and the Mining Act – minerals and coal](#).

For information about the Right to Negotiate process and the various steps required, see the [Right to Negotiate guideline](#).

For information about native title extinguishment and NSW's requirements if you are asserting that native title is extinguished, see the [Guideline: The preparation of native title assessment reports in support of applications for authorities granted under the *Mining Act 1992* and the *Petroleum \(Onshore\) Act 1991*](#).

The National Native Title Tribunal (NNTT) [website](#) contains information about the operation of the NTA and native title, including an online register of claims and determinations that can be used to search for native title parties.

In NSW, Aboriginal cultural heritage is protected by other legislation including the *National Parks and Wildlife Act 1974 (NSW)* (NP&W Act). Compliance with the infrastructure facility process does not relieve you from the need to comply with your obligations under other laws.

Glossary

Term or acronym	Definition
AMA	Ancillary Mining Activity
EP&A Act	<i>Environment Planning and Assessment Act 1979</i>
Infrastructure Facility Process	The process within s24MD(6B)(b)-(g) of the <i>Native Title Act 1993</i> (Commonwealth)
NSWR	Mining, Exploration and Geoscience in the Department of Regional NSW
Mining Act	<i>Mining Act 1992</i> (NSW)
ML	Mining Lease
Native title party	A registered native title claimant, or registered native title body corporate, with an interest in land or waters subject to a mining lease application
NCAT	NSW Civil Administrative Tribunal
NNTT	National Native Title Tribunal
NP&W Act	<i>National Parks and Wildlife Act 1974</i> (NSW)
NSWR	New South Wales Resources
NTA	<i>Native Title Act 1993</i> (Commonwealth)
NTSCORP Limited	The NSW representative Aboriginal/Torres Strait Islander body
RNTCs	Registered native title claimants
RNTBCs	Registered native title body corporates
RTN	the right to negotiate process required by Part 2, Division 3, Subdivision P of the <i>Native Title Act</i>

Introduction to the infrastructure facility process in the NTA

In a mining context, the infrastructure facility provisions may apply to the grant, renewal or variation of certain mining leases instead of the RTN.

The infrastructure facility provisions apply to the creation (grant) of a right to mine for the sole purpose of the construction of an infrastructure facility associated with mining (in accordance with section 24MD(6B)(b) of the NTA).

In NSW, the infrastructure facility provisions will apply to the grant of mining leases for AMAs under the Mining Act, where these align with the description of infrastructure facilities within the NTA (or the ordinary meaning of infrastructure facilities), and are for the sole purpose of the construction of such a facility.

Put another way, the infrastructure facility process applies to the grant of a mining lease for the sole purpose of the construction of AMAs. This may depend on whether the AMA is an infrastructure facility applying an ordinary meaning, which must be assessed by NSW on a case-by-case basis.

NSW or an applicant don't get to choose whether the infrastructure facility process or the RTN applies to a particular mining lease – if the mining lease meets the infrastructure facility criteria, then the RTN cannot apply.

Conversely, if the infrastructure facility criteria are not met, then the infrastructure facility process cannot be applied. In this circumstance, the proposed act will need to be otherwise validated, and in a mining context this will usually be via the RTN process.

The infrastructure facility process allows for objections from registered native title claimants and registered native title body corporates, which require the applicant to consult with the objector. If an objection hasn't been resolved or withdrawn 8 months from notification, then NSW must refer the objection to a hearing by an independent body. This 8 month period is longer than the 6 month period under the RTN before a negotiation can be referred to the NNTT for a determination. Unlike the RTN process, an objection must be referred to NCAT after 8 months and there is no opportunity to extend negotiations. Applicants should be aware of these timeframes and requirements and ensure that these are accounted for in project planning.

Any application must also meet the general requirements for an AMA application under the Mining Act, such as the AMA being conducted in the vicinity of and directly facilitating a mining lease in respect of minerals.

Applicability to renewals and variations of a mining lease

If the infrastructure facility process applied to the grant of a mining lease, it will likely apply to the subsequent renewal of that same mining lease. Where the infrastructure facility process applies to a renewal, the same process outlined in this guideline for the grant of a mining lease will apply, including the notification, objection and consultation requirements.

Depending on the specifics of the application, the infrastructure facility process may also apply to a variation of a mining lease, for example where an additional infrastructure facility/AMA is added to an existing mining lease or an existing infrastructure facility/AMA is expanded or modified. Again, the process must be followed in full.

Note that NSWGR will assess the applicability of the infrastructure facility process at the time of the renewal or variation application.

For ease of reading, this guideline will focus on how the infrastructure facility process applies to the grant of a mining lease. Please contact NSWGR if you are considering whether the infrastructure facility process will apply to a mining lease renewal or variation.

What is an infrastructure facility under the NTA?

‘Infrastructure facility’ has its ordinary meaning and examples are included in the NTA as follows:

Infrastructure facility 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 [there have been no determinations under this clause].

In addition to the above list, the High Court of Australia in its judgement for the ‘Harvey case’¹, concluded that the definition of an infrastructure facility is expanded to include the ‘ordinary meaning’ of infrastructure facility. The High Court referred to the following ‘ordinary meaning’ from the Explanatory Memorandum of the *Native Title Amendment Bill 1997 (Cth)*:

"Within its ordinary meaning, an infrastructure facility is a facility (generally a fixture) necessary for the provision of services or to support the development and operation of major developments. The infrastructure can be provided either by a government or the private sector."

When considering whether the infrastructure facility process applies to a mining lease application, NSWGR will consider both the list of infrastructure facilities in the NTA and this ordinary meaning.

¹ Harvey v Minister for Primary Industry and Resources [2024] HCA 1

Infrastructure facilities and AMAs

The infrastructure facility provisions of the NTA and the AMA provisions of the Mining Act are for differing, but related, purposes. The infrastructure facility provisions provide an exemption from the RTN process for the grant of mining leases that are for the sole purpose of the construction of infrastructure facilities associated with mining. The AMA provisions of the Mining Act allow the grant of titles for certain mining purposes relevant to mining operations in NSW, and the regulation of such activities.

NSWR will assess each application on its merits, and because of the differing purposes between the infrastructure facility provisions under the NTA and AMAs under the Mining Act they may not align in all circumstances.

Overview of the infrastructure facility process

When does the infrastructure facility process apply?

The infrastructure facility process has a strict set of criteria that must be met for the process to apply.

NSWR will consider whether the infrastructure facility process applies in relation to each proposed lease application. The criteria that will be considered are:

1. whether the AMAs are an infrastructure facility within the examples listed in the NTA or by applying the ordinary meaning of infrastructure facility
2. whether the lease is only for the construction of an infrastructure facility or facilities and nothing else, and
3. whether the AMAs are associated with mining.

Some examples include:

Table 1 Examples of AMAs that may or may not meet the infrastructure facility definition

Lease purpose	24MD(6B)*?	Reason
Construction of a road that will be used both for access to a mine and as a public road	Yes	
Construction of a railway solely to transport ore from a mine site to a processing facility	Yes	
Construction of a tailings dam	Yes	
Construction of a solar farm and associated equipment to provide only the mine site with electricity	Yes	
Mining (i.e. the right to extract minerals), and the construction of an electricity generator and transmission infrastructure	No	Not for the sole purpose of the infrastructure facility (because extraction is also included).

Lease purpose	24MD(6B)*?	Reason
Construction of a tailings dam and other mine related water management works	Yes	
Construction of an earth bund and drain to deflect surface water from a mine dam	Yes	
Construction of a facility for the removal, stockpiling and depositing of ore	Yes	
Construction of a facility for the removal, stockpiling and depositing of overburden associated with closure and final rehabilitation.	Yes	
Construction of a plant nursery to support mine rehabilitation only	Yes	
Environmental management, protection and rehabilitation of land on which an ancillary mining activity <i>has been</i> carried out	No	As the AMA relates to <i>land</i> and there is no <i>facility</i>

*Note that the examples provided in this table are for illustration purposes only. Each application must be assessed on a case-by-case basis, noting the particulars of the matter.

What does the infrastructure facility process involve?

The process involves giving notice to registered native title claimants (RNTCs) and registered native title body corporates (RNTBCs) (together referred to here as the “native title parties”), NTSCORP, and the Native Title Registrar, for the mining lease application area. Native title parties have a statutory right to object to the grant of the mining lease and to have that objection heard by the NSW Civil Administrative Tribunal (NCAT) if, after consultation with the applicant for the mining lease (applicant), their objection still stands.

Consultation between the applicant and any native title parties who object to granting the mining lease is required. That consultation is to address:

- ways of minimising the act’s impact on native title rights and interests (including heritage) in relation to the land or waters concerned,
- access to the land or waters concerned (if relevant), or
- the way in which any thing authorised by the mining lease might be done (if relevant).

If the objection is not withdrawn 8 months after the notification, NSWGR must ensure that NCAT hears the objection.

If NCAT upholds the objection or imposes conditions, NSWGR must comply with that determination unless the Minister responsible for administering the Mining Act consults with the Minister for Aboriginal Affairs, takes that consultation into account and then determines that it is in the interests of the Commonwealth or the State not to comply with NCAT’s determination.

Where it applies, the infrastructure facility process must be completed before the Minister can grant a mining lease.

Overview of NSW Resources' approach to the infrastructure facility process stages

NSWR's approach to the infrastructure facility process is separated into the following stages:

Commencement: Where the applicant applies for the grant of a mining lease for the sole purpose of constructing one or more AMAs, NSW will assess whether the infrastructure facility process applies. Whether the infrastructure facility process applies will be fact specific. It may depend on the proposed activity and how it relates to mining operations and other infrastructure, amongst other factors. Where the applicant requests that NSW apply the infrastructure facility process, the applicant must provide an AMA submission with the application.

Notification: NSW issues the relevant notice to any native title parties in respect of the land and waters concerned, along with NTSCORP Limited (the NSW representative Aboriginal/Torres Strait Islander body) and the Native Title Registrar. The notice will include a copy of the applicant's AMA submission.

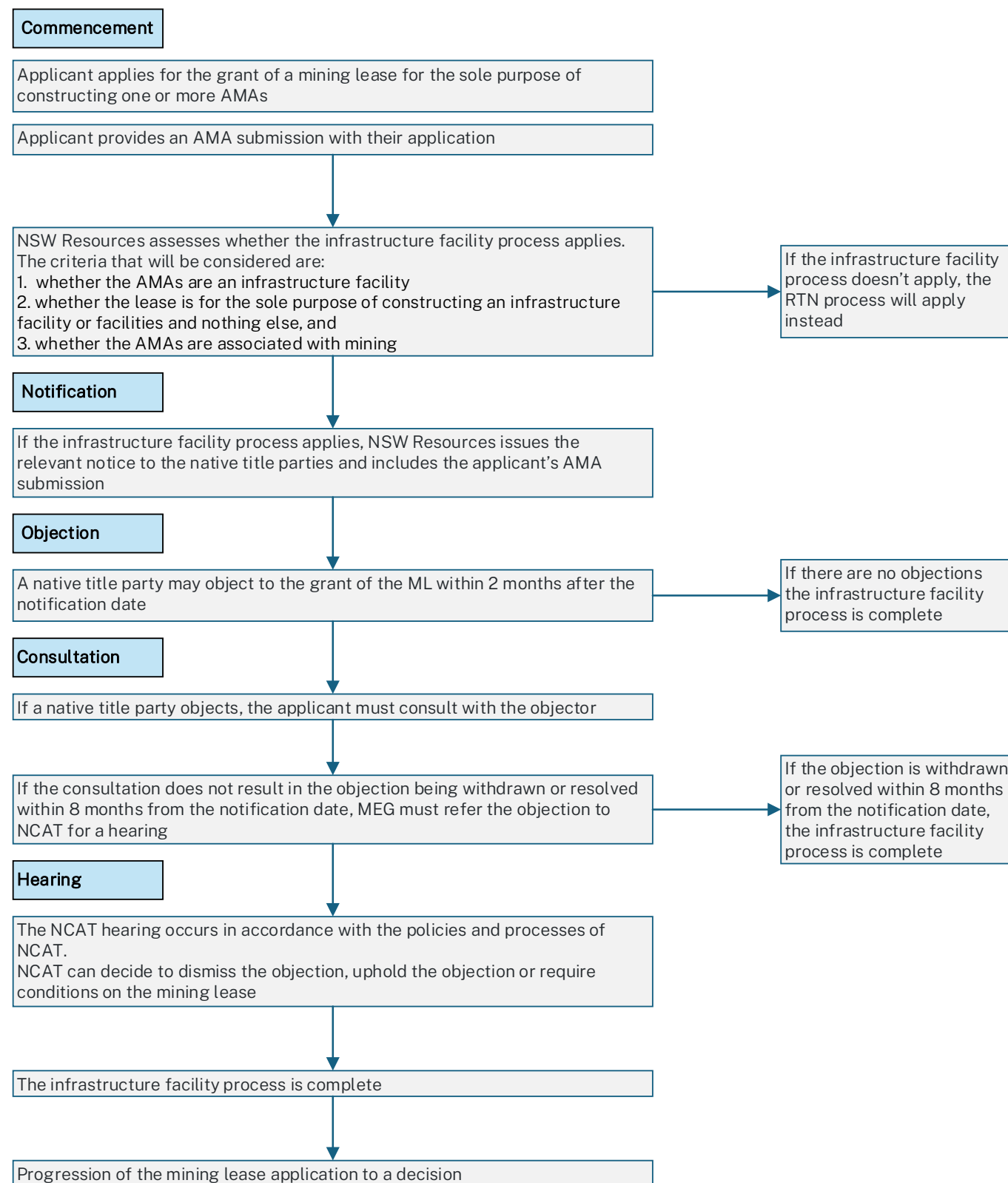
Objection: A native title party may object to the grant of the mining lease within 2 months of notification.

Consultation: The applicant must consult any native title party that makes an objection. The consultation must be about the ways of minimising their proposed activity's impact on registered native title rights and interests in relation to the land or waters, and, if relevant, any access to the land or waters or the way in which anything authorised by the mining lease might be done.

Hearing: If 8 months have elapsed since the notification and an objection has been made that has not been withdrawn, NSW must refer the objection to NCAT for hearing.

These stages are outlined in the flow chart over the page.

Flow chart of the infrastructure facility process stages



Commencement of the infrastructure facility process

Applications for mining leases for the sole purpose of one or more AMAs will be assessed by NSW to determine whether the infrastructure facility process will be applied.

Where NSW determines that the infrastructure facility process applies, NSW will prepare a draft notification and diagram for the application. NSW will provide it to the applicant for review and confirmation that all details are correct.

The applicant must also submit an AMA submission at this early stage.

If NSW determines the infrastructure facility process doesn't apply, then the applicant will need to follow an alternative native title process, such as the RTN process. Additional information on alternative processes can be found in the guideline [An overview of native title and the Mining Act – minerals and coal](#).

The applicant's AMA submission

The purpose of the applicant's AMA submission is to share important information at the start of the infrastructure facility process with any affected native title parties and to allow them to decide whether they will object to the grant of the mining lease.

The applicant's AMA submission must include:

- background on the applicant, such as general information about their mining activities
- information about the proposed activities as they may affect native title rights and interests. This should include maps and plans. The applicant should take into consideration that native title parties have a right to object and any information on how the proposed activities could affect native title rights and interests, and potential mitigative actions, may determine whether an objection is lodged, or not.
- whether a development consent under the *Environment Planning and Assessment Act 1979* (EP&A Act) is required for the grant of the mining lease. If so, provide a copy of the development consent or application under the EP&A Act.
- as much information as possible about the potential impacts of the proposed activities on the land and the natural and cultural environments. For example, an environmental impact statement or other planning document that has been prepared for development consent or approval.
- information, including maps and cultural heritage reports for example, about any known heritage issues including affected Aboriginal objects and/or Aboriginal places protected under the NP&W Act that might be impacted by the proposed activities, and
- copies of any Aboriginal archaeological information obtained for the land in any surveys conducted by or on the applicant's behalf.

Web links to the above information/documents are acceptable.

Notification stage

Notification of the infrastructure facility to the relevant parties is NSW's responsibility.

NSWR will only commence the notification stage where:

- the applicant holds an appropriate development consent under the EP&A Act for the mining lease application, or
- the applicant has made an application for an appropriate development consent under the EP&A Act for the mining lease application.

This is to ensure enough detail is known, with reasonably certainty, about the proposed activity.

NSWR will discuss notification timing with the applicant if development consent isn't required, or hasn't yet been applied for. It is expected that notification would commence after the nature and content of the application is sufficiently progressed to a point similar to where a development consent would be applied for.

Starting the notification stage

NSWR will endeavour to start the notification stage within 4 weeks of receiving a complying application.

Section 24MD(6B)(c) notice

NSWR must give notice of the creation or variation of the right to mine in accordance with section 24MD(6B)(c) of the NTA. This will involve providing notice to:

- all RNTCs for the area
- all RNTBCs for the area
- NTSCORP Limited, and
- the Registrar of the NNTT.

A copy of the notice will also be provided to the applicant.

The notice will set out how the native title parties can make an objection.

The notice will include the applicant's AMA submission but will not include a copy of the application form.

Objection date

The notice will provide that any native title party that receives the notice may object, within 2 months after the notification, to the grant of the mining lease so far as it may affect their native title rights and interests.

Objection stage

Making an objection

Where a native title party receives a notice, they may object to the granting of the mining lease so far as it may affect their native rights and interests.

Any objection made in response to a notice must be provided in writing to NSWRR by the date objections are due. The contact for making objections is as follows:

titles@regional.nsw.gov.au

NSWR recommends that native title parties seek their own legal advice in relation to the making of objections.

Native title parties may also seek assistance from the NNTT.

An objection automatically leads to consultation

Where an objection has been received by NSW by the due date, it will be forwarded as soon as possible to the applicant for their consideration and the consultation stage will start. See section 8 below for information on the next step regarding consultation.

Where no objection is made

Where no objection is made to NSW by a native title party by the date objections are due, the infrastructure facility process under the NTA is complete. There is no appeal process.

Consultation stage

Starting consultation

Where an objection has been made, NSW will forward the objection to the applicant for their consideration and to facilitate consultation with the native title parties that made the objection.

The applicant is required under section 24MD(6B)(e) of the NTA to consult with the native title parties in relation to their objection.

Matters subject to consultation

The consultation must address the following:

- The ways of minimising the impact on registered native title rights and interests in relation to the land or waters the subject of the application.
- If relevant, any access to the land or waters the subject of the application.
- The way in which any thing authorised by the mining lease might be done.

Consulting with objectors

The NTA does not prescribe how the consultation should occur.

While the obligation to consult under the NTA is placed upon the applicant, NSW encourages the parties to work together in good faith to decide how best to approach the consultation process. What will work best will depend on several factors including the nature of the application, the available information, the content of the objection and the location of the parties.

Parties will need to consider factors such as whether it would be appropriate to meet in person or by video conference or phone call, to best facilitate the process.

NSWR's participation in the consultation

NSWR is not required to participate in the consultation process.

The nature and extent of any involvement of NSW in the consultation process will be guided by the parties and resolved on a case-by-case basis.

Withdrawing an objection after consultation is complete

Where a native title party has made an objection but is satisfied that its objections have been dealt with after consultation with the applicant, it must formally notify NSW and the applicant in writing that the objection is withdrawn. The withdrawing party must be the same as the party that made the objection.

The infrastructure facility process would then be complete.

Hearing by NSW Civil Administrative Tribunal (NCAT)

Where an objection is not withdrawn

If 8 months have elapsed from notification (see above), NSW must refer the objection for hearing to NCAT (the relevant independent person or body for the purposes of the NTA for NSW).

Before referral of the objection to NCAT, NSW will write to the applicant and the native title parties who have made the objection advising them of the intention to refer the objection to NCAT.

The NCAT process

NCAT is a separate and independent body to NSW.

The hearing of the objection will occur in accordance with the policies and process of NCAT.

Further information can be obtained [here](#).

NCAT determination

In making a determination, NCAT is to consider:

- the likely impact of the mining lease on the objector's native title rights and interests
- the measures proposed to be taken to minimise that impact, and
- the social, economic or other public benefits likely to result from the doing of the proposed act (including in the relevant region or locality of the state).

If NCAT decides to uphold the objection or requires conditions be placed on the mining lease, the determination (including any conditions) must be complied with by the Minister when granting the mining lease, unless it is in the interests of the state not to comply. In that case, a special process must be followed to disregard the NCAT's determination (see section 24MD(6B)(g) of the NTA).

Compensation to native title holders relating to the infrastructure facility provisions

Please note that this guideline does not address possible compensation payable by applicants to the native title party. You should seek your own independent legal advice.

Frequently asked questions

What happens where an objection is not withdrawn or resolved?

Where the objection has not been withdrawn or resolved 8 months after the notification date, NSWGR must refer the objection to NCAT.

Can referral to NCAT by the Minister be delayed?

No. Under the NTA NSWGR must refer the matter to NCAT if an objection has not been withdrawn 8 months after the notification. See section 24MD(6B)(f) of the NTA.

What if the AMAs are not an infrastructure facility?

If the AMAs do not fit within the definition of an infrastructure facility under the NTA, NSWGR will advise which NTA process applies. It is likely the RTN process will apply instead.

For information on the RTN process see the [Right to Negotiate guideline](#) on NSWGR's website.

Does the development consent process need to be complete before notice is given under the infrastructure facility process?

No, the development consent process does not need to be complete so long as an application has been made. Where the infrastructure facility process applies to the grant of a mining lease application, NSWGR will only commence the notification stage after a development consent application has been made (if development consent is necessary).

This is because we must know with sufficient detail the types of activities proposed and where they will occur.

Can the applicant discontinue the infrastructure facility process?

Yes. If the applicant elects not to proceed with the infrastructure facility process at any stage of the process, NSWGR requires the applicant to promptly notify NSWGR and any native title party who made an objection in writing, if any objections have been made.

Discontinuing the infrastructure facility process may have implications for the mining lease application. NSWGR recommends you obtain legal advice on this issue.

Can the infrastructure facility process be commenced and then put on hold?

We recommend speaking to NSWGR in these circumstances.

Where an objection is made, NSWGR must refer the matter to NCAT if the objection has not been withdrawn 8 months after the objection date.

You should also seek your own legal advice on this issue.

Can the application that triggered the infrastructure facility process be transferred to another person during the process?

We recommend speaking to NSWGR in these circumstances.

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

Does the protection of Aboriginal cultural heritage form part of the consultation process?

In NSW, Aboriginal cultural heritage is protected by the NP&W Act.

While Aboriginal cultural heritage matters will often form part of the consultation process, the applicant must continue to comply with their obligations under the NP&W Act.

Does this guideline apply to subsurface mining leases?

Yes. Native title is presumed to exist where there is no determination that native title is extinguished or does not exist, and there is no clear evidence that it has been extinguished, including at depth.

I hold a subsurface mining lease and want to construct infrastructure facilities on the surface, do I need to comply with the infrastructure facility process?

Not for some limited types of surface activities.

Certain prescribed surface activities are permitted in relation to subsurface leases under s81 of the Mining Act with the consent of the landholder and the holder of any authority or mineral claim in force over the surface of the land. Prescribed surface activities are detailed in [Clause 27 of the Mining Regulation 2016](#). If activities are of a type listed in clause 27 and the preconditions of s81 of the Mining Act are met, it is not necessary to complete a native title process for the surface activities.

If the surface activities differ to those within clause 27 and are for the construction of infrastructure facilities (as defined under the NTA), then the infrastructure facility process may apply. Please contact us to discuss if this scenario might apply.

Where does native title exist in NSW?

Native title exists in areas where the Federal Court has made a determination that native title exists.

NSWR also takes the view that native title is presumed to exist where native title has not been determined or there is no clear evidence that it has been extinguished.

What can I do if the consultation process has stalled?

At any stage of the consultation process a party may approach the [NNTT](#) for assistance.

What is the application fee?

The standard mining lease application fee will apply. Fees in relation to the Mining Act can be found [here](#).