



Authorisation of Area Agreements

Fact sheet 11: A guide to authorisation of Area Agreements



What is authorisation?

The parties to an Area Agreement need the authority of the persons who hold or may hold native title in the area to make the agreement.

Authorisation involves a decision about whether the agreement can be made. There are two decision-making processes that may be used to authorise the making of an ILUA. Both processes are set out in the Act and will be discussed later in this factsheet.

Does the making of an Area Agreement always have to be authorised?

Yes. Even where the representative body for the area certifies the agreement, the making of an Area Agreement has to be authorised. A representative body cannot certify the application for registration of the agreement unless it is of the opinion that all the persons identified as persons who hold or may hold native title in the agreement area (see below) have authorised the making of the agreement.

What must occur before an Area Agreement can be made?

All reasonable efforts must be made to ensure that all persons who hold or may hold native title in the agreement area have been identified.

What is reasonable depends on the circumstances of the agreement. However, when an application is not certified, all reasonable efforts must include consulting all representative bodies for the agreement area.

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Who is responsible?

Any of the parties or persons assisting the parties can take responsibility for making all reasonable efforts to ensure that all persons who hold or may hold native title in the agreement area have been identified.

Where the application for registration is to be certified, it is likely that the representative body will undertake to make all reasonable efforts.

Timing

All reasonable efforts to identify all persons who hold or may hold native title in the agreement area must be made before authorising the making of the agreement.

Is it enough to only consult all representative bodies?

No. Making all reasonable efforts to ensure that all persons who hold or may hold native title in the agreement area have been identified typically includes other efforts. Examples of the kinds of other efforts are described later in this factsheet.

Consulting all representative bodies for the area — what might that look like?

The following are examples of what could be done to consult all representative bodies:

- asking each representative body for the agreement area to provide their advice or opinions about the persons who hold or may hold native title in the agreement area;
- asking each representative body for the agreement area to provide any research or information they may have about the persons who hold or may hold native title in the agreement area;
- asking each representative body for the agreement area to conduct research into the persons who hold or may hold native title in the agreement area; and
- taking that advice/opinions/research into account when making all reasonable efforts.



What else could you do to ensure that all persons who hold or may hold native title are identified?

In making all reasonable efforts to ensure that all persons who hold or may hold native title in the agreement area have been identified, you could:

- contact us to help with searches of the registers and schedule of native title determination applications to find out what native title interests exist in the agreement area;
- inform people about the proposed agreement using different forms of media or public forums such as newspaper advertisements, radio announcements and notices placed on community notice boards. These kinds of notices should include details of the proposed agreement and who to contact for more information;
- invite persons who hold native title in the area to attend information sessions and consultations about the proposed agreement;
- consult with the known native title group party or parties about other persons who hold or may hold native title in the agreement area;
- send persons who you think may hold native title in the proposed agreement area personal notice of the proposed agreement and invite them to contact you.

Who could be persons who hold or may hold native title in the agreement area?

- persons determined by the Federal Court to be the native title holders for the agreement area;
- members of a native title claim group for a current or previous native title claim over the agreement area (registered or unregistered); and/or
- other persons who say that they hold native title over the agreement area but have not filed a native title claim.

Will the native title group comprise all the persons who hold or may hold native title in the agreement area?

The native title group does not have to be made up of all the persons who hold or may hold native title in the agreement area. It is generally a more limited group of persons.

Depending on the area covered, the native title group may include a registered native title claimant, a registered native title body corporate and/or persons who claim to hold native title over the agreement area and/or any representative body for the agreement area.

Do you actually have to identify all persons?

No. The law only requires that all reasonable efforts are made to ensure that all persons who hold or may hold native title in the agreement area are identified.

What may be relevant when the Native Title Registrar (Registrar) considers whether all reasonable efforts have been made?

The following *may* be relevant:

- the outcome of consulting all representative bodies for the area, including to what extent any advice/opinions/research given by the representative body were taken into account;
- the nature and extent of the efforts made to identify persons;
- who was identified as a result of such efforts as persons who hold or may hold native title in the agreement area and why; and
- actions taken and decisions made in the identification process.

Who authorises the making of an Area Agreement?

This depends on the circumstances of the agreement.

When the term *authorise* is used here it refers to a term defined in the Act. The Act says that the making of an agreement is to be authorised by the persons who hold or may hold the common or group rights comprising the native title by using one of two described decision-making processes.

The persons who hold or may hold the common or group rights comprising the native title will depend on the agreement area and the circumstances that exist in the area. In some circumstances where the agreement area is entirely covered by a registered native title claim the law says that only the members of the registered native title claim group must authorise the making of the agreement. There may, however, be exceptions to this.

Typically, where the area is not entirely covered by a registered native title claim, all persons who have been identified must authorise the making of the agreement, even if they are not named as a party to the agreement.

This does not necessarily mean that all persons have to participate in authorising the making of the agreement. The law says that it may be sufficient if all the persons were given a reasonable opportunity to participate in authorising the making of the agreement.

Is there a required forum for authorising the making of the agreement?

No. Generally, however, authorisation occurs at a meeting that is held for persons to authorise the making of the agreement.

What are the two decision-making processes described in the Act? These

are:

- a process of decision-making that under the traditional laws and customs of the persons must be complied with when authorising things of this kind (a traditional decision-making process); or
- if there is no such traditional decision-making process, the persons may authorise by using a process of decision-making that is agreed to and adopted by the persons.

If a group has a traditional decision-making process that their laws and customs say must be followed when authorising ILUAs, this is the only process that they can use to authorise the agreement.

It is only when there is no traditional decision-making process that the persons may agree to and adopt a decision-making process of their choosing.

What could an agreed to and adopted decision-making process involve?

There is no particular process that must be agreed to and adopted for authorising the making of an agreement. The decision-making process chosen might be one where:

- a decision is made by consensus, where everyone must agree to the making of the agreement; or
- a decision is made by majority, where a majority of persons who are present at the meeting must agree to the making of the agreement; or
- a decision is made by all family or tribal groups, where each of these groups must agree to the making of the agreement or where a majority of these groups must agree to the making of the agreement.

What may the Registrar consider when assessing whether all the persons have authorised the making of the agreement?

The following *may* be considered:

- the way in which authorisation occurred and whether the process used was appropriate in the circumstances;
- whether persons were given sufficient notice of the intended authorisation and how notice was given;
- whether persons were given a reasonable opportunity to participate in the decision to authorise the making of the agreement;
- if authorisation occurred at a meeting, what the material says and reveals about the conduct of persons at the meeting; and
- the decision-making process that was used to authorise the making of the agreement and whether it meets the requirements of the Act.

When is authorisation relevant to the conditions of registration?

For an Area Agreement that is not certified, the second condition of registration requires the Registrar or the delegate to consider that all reasonable efforts have been made and all the persons have authorised the making of the agreement. That is why a registration application for an Area Agreement that is not-certified must be accompanied by a statement that contains information about identification and authorisation. If you do not provide this statement, the Area Agreement cannot be registered.

When an agreement is certified, the Registrar or the delegate will only consider these requirements when a valid objection is made to the registration application. However, your registration application for an Area Agreement that is certified must be accompanied by a copy of the certification. The certification must contain the statements required by the Act.

For more information see our **Fact sheet No 12** *The conditions for registration of Area Agreements*



You can contact the Tribunal office in your region for any further information about the matters discussed in this factsheet:

National Native Title Tribunal,
GPO Box 9973 in your region. The National Native Title Tribunal has offices in Brisbane, Cairns, Melbourne, Perth and Sydney.

Freecall 1800 640 501.

Information also available at www.nntt.gov.au

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*All references to the Act are to the Native Title Act 1993 (Cth).
References to the regulations are to either the Native Title (Indigenous Land Use Agreements) Regulations 1999 (Cth) or Native Title (Prescribed Body Corporate) Regulations 1999 (Cth).*