

Making an Alternative Procedure Agreement and applying for registration

Fact sheet 4: A guide to the Native Title Act and regulations



This factsheet is provided for general information only and on the understanding that neither the Native Title Registrar nor the Commonwealth of Australia is providing legal or any other professional advice. Appropriate professional advice relevant to your circumstances should be sought.

What is an Alternative Procedure Agreement?

An Alternative Procedure Agreement is an agreement about native title matters (and can include non native title matters) between the native title group for the agreement area, the relevant government for the agreement area, and other parties.

An Alternative Procedure Agreement can be made where there is no registered native title claimant for the agreement area, or where no determination of native title has been made over the whole area.

There must, however, be at least one Registered Native Title Body Corporate (RNTBC), or one representative body for the agreement area.

Who comprises the native title group?

The native title group for an Alternative Procedure Agreement consists of all RNTBCs and all representative bodies for the agreement area.

A RNTBC is a body that holds native title on trust, or acts as agent for the persons who the Court decides are the common law holders of that native title.

What are the requirements for an agreement to be an Alternative Procedure Agreement?

The Native Title Act (the Act) sets out requirements for Alternative Procedure Agreements relating to the:

- subject matter;
- area covered;
- parties; and
- legal consideration and conditions.

What do you need to think about before making an Alternative Procedure Agreement?

Some considerations before beginning the process of making an Alternative Procedure Agreement are:

- What area is to be covered by the agreement?
- Is there a RNTBC for the agreement area?
- Is an Alternative Procedure Agreement the correct type of agreement to make over the proposed agreement area?
- Who is the relevant government that must be a party to the agreement?
- Who is the representative body for the agreement area that must be a party?
- How will you negotiate the agreement? Who may assist you?
- Has the RNTBC consulted with and gained the consent of the affected common law holders?
- Has the RNTBC prepared a document certifying that the affected common law holders have been consulted and have consented to the native title decision?

What must an Alternative Procedure Agreement be about?

An Alternative Procedure Agreement must be about at least one of the matters provided for under the Act. Generally, Alternative Procedure Agreements are about one or more of the following:

- future acts that are to be done;
- future acts already done;
- the manner of exercise of native title rights and interests or other rights and interests;
- the relationship between native title rights and interests and other rights and interests;
- compensation; or
- any other native title matters.

Who must be a party to an Alternative Procedure Agreement?

The following must be a party to an Alternative Procedure Agreement:

- all RNTBCs for the area;
- all representative bodies for the area; and
- every relevant government.

Did you know?

An Alternative Procedure Agreement cannot be made if there is a RNTBC for the entire area. There must be at least one RNTBC or one representative body for the agreement area.

Who is a relevant government for an Alternative Procedure Agreement?

A relevant government is a government (Commonwealth or State/Territory) for which the agreement area is within their jurisdiction.

If the area covered by the agreement includes areas owned by both the Commonwealth and the State/Territory governments, both governments must be parties to the agreement.

Who may be a party to an Alternative Procedure Agreement?

In addition to the above mandatory parties, the following may be a party to an Alternative Procedure Agreement:

- any registered native title claimant for the area;
- any person who claims to hold native title in the area; or
- any other person.

An Alternative Procedure Agreement cannot provide for the extinguishment of any native title rights or interests.

How is a registration application for an Alternative Procedure Agreement made?

A registration application must be in writing to the Native Title Registrar (Registrar) at the National Native Title Tribunal (NNTT).

A template registration application form for Alternative Procedure Agreements can be downloaded from the NNTT's website.

Who can make a registration application for an Alternative Procedure Agreement?

Any of the parties to the agreement, with the consent of all the other parties.

Is the agreement about future acts to be done?

If the agreement is about future acts to be done, the terms of the agreement should include the parties' consent to those acts, not just the native title group's consent.

If the future acts consented to would be subject to the right to negotiate, the agreement must also include a statement that the right to negotiate provisions are not intended to apply.

Is the agreement about future acts already done?

If the agreement provides for the validating of future acts that have been done invalidly, the terms of the agreement should include the parties' agreement to those acts, not just the native title group's.

What documents/information must accompany the registration application?

A registration application must be accompanied by a copy of the Alternative Procedure Agreement and a:

Signed statement from the parties

The registration application for an Alternative Procedure Agreement must always be accompanied by a statement from the parties that they agree to the registration application being made. The statement must be signed by or for each of the parties to the agreement. It can be included in the agreement or can be provided as a separate statement.

Complete description of the agreement area

A complete description of the agreement area is one that includes a:

- written description that enables identification of the boundaries of the area covered and any areas within the boundaries that are not covered; and
- map of the agreement area that contains geographic coordinates.

The description and map can be included in the agreement or in a separate document.

Copy of the determination(s) of native title over the agreement area

When a RNTBC is a party to the agreement, the registration application will need to be accompanied by a copy of the determination of native title made over the agreement area.



When is a document certifying to consultation and consent needed?

When there is no representative body for the area. This is because at least one RNTBC is always a party to an Alternative Procedure Agreement.

This document is referred to as a Regulation 9 Certificate. It must contain a statement that the common law holders have been consulted about, and have consented to, the proposed decision to make the Alternative Procedure Agreement. It must be signed in accordance with the relevant regulations. A template of this document is included in the application form for Alternative Procedure Agreements, which can be downloaded from the NNTT's website.

The common law holders are the persons who have had a determination of native title made in their favour, that recognises them as the native title holders for the area covered by a determination.

Why is consultation and consent necessary?

The law says that for a decision to enter into an ILUA the RNTBC(s) for the agreement area must consult with, and obtain the consent of the common law holders.

How must the RNTBC consult with the common law holders?

The consultation process requires the relevant RNTBC(s) to ensure that the common law holders understand the purpose and the nature of the proposed decision to enter into the ILUA. This is to be done by consulting and considering the views of a representative body for the area, and if the RNTBC considers it appropriate and practical – giving notice of those views to the common law holders.

How is consent given?

The consent of the common law holders must be given either:

- by using a decision-making process under the traditional laws and customs of the common law holders where there is such a process that must be used; or
- if there is no such traditional decision-making process, by using a decision-making process agreed to and adopted by the common law holders.

What does the Registrar consider?

The Registrar or the delegate will only consider whether the registration application is accompanied by a document certifying to these matters and signed in accordance with the regulations. The Regulation 9 Certificate is taken to be evidence of the consultation and consent.

You can contact the NNTT 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 NNTT has offices in Brisbane, Cairns, Melbourne, Perth and Sydney.

Freecall 1800 640 501.

Information also available at www.nntt.gov.au

*Published by the National Native Title Tribunal
Copyright Commonwealth of Australia 2014.*

*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).*