Area agreements: guidelines for registration

These guidelines for registration are specifically for area agreements. An area agreement can be considered if there is no registered native title body corporate (or bodies corporate) (RNTBC/s) for the whole of the agreement area.

These guidelines should be read in conjunction with the relevant sections of the Native Title Act 1993 (Cth) (NTA), the Native Title (Indigenous Land Use Agreement) Regulations 1999 (ILUA Regulations) and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations), which outline the requirements for registration. They are intended to assist applicants meet those requirements, and identify key issues that must be addressed in the agreement and the information that must be provided when making an application for registration.

The Native Title Registrar (Registrar) is responsible for ensuring that an ILUA lodged for registration meets the formal requirements of the NTA and the Regulations. The Registrar can assist parties by providing comments on draft ILUAs and draft applications for registration.

Registration

The registration of an area agreement can be divided into two stages:

1. The Registrar checks the agreement, the application for registration and accompanying documents and information to make sure that they comply with the formal requirements of the NTA and Regulations. If they do, public notification can proceed; and
2. The Registrar considers objections to the agreement and any other barriers to registration (if any) and decides whether the agreement can proceed to registration.

The Registrar cannot make a decision on registration before the end of the notification period and without considering any objections or other barriers (if any) to registration.
Further information

If you are considering negotiating an area agreement you should read the application information for area agreements, which includes an application form.

The list below will assist you in identifying the issues that need to be addressed in your agreement and application for registration, and will help you meet the legal requirements for registration of the area agreement.

1. Subject matter: what is the area agreement about?
2. Complete description of the area.
3. Parties: who can and must be party to the area agreement?
5. Certification by RNTBC.
6. Essential information and documentation.
7. Confidentiality.

These guidelines are intended to provide assistance to people interested in pursuing an area agreement to registration. They do not cover all instances or circumstances. They are general information only and should not be relied upon as legal advice. If you have further questions please contact the National Native Title Tribunal (Tribunal) for more information on freecall 1800 640 501.

Assistance

We can assist you with your application for registration of an area agreement by:

- Preparing a complete description of the agreement area;
- Preparing a complete description of any surrender area; and
- Providing pre-lodgement comments on your draft application and draft agreement.
1. Subject matter: what is the area agreement about?

An area agreement can be about almost anything related to native title rights and interests. It must be about at least one of the issues set out in the NTA, and it can be about other matters as well. The details of the agreement will depend entirely upon the needs and requirements of the parties involved.

For example, an area agreement may be about:
- allowing future acts to be done;
- extinguishment of native title by surrender to government;
- contracting out of the right to negotiate provisions of the NTA;
- validating previous acts;
- the relationship between native title rights and interests and other interests in the area;
- how native title rights and interests and other rights and interests will be exercised; and
- compensation for past, future or intermediate period acts.

If your area agreement is about allowing future acts to be done, extinguishment of native title, the right to negotiate or validating previous acts, then the following information must be provided in the agreement:

\text{\textit{Future acts}}

A future act is broadly defined as an act or class of acts that may affect native title rights and interests in land and waters. Future acts can be consented to by an area agreement. To do so, those future acts must be adequately and accurately described.

\text{\textit{Right to negotiate}}

If the area agreement is intended as a substitution for the right to negotiate, that must be clearly stated in the terms of the agreement.

\text{\textit{Extinguishment}}

Extinguishment of native title by surrender to government may be the entire subject, or part of the subject of an area agreement.

If native title is to be extinguished over any part of the agreement area it must be plainly stated in the agreement. The area of the extinguishment must be clearly identified by providing a detailed map and description of the area.
Validating previous acts

Certain kinds of previous acts that may be invalid may be subsequently validated by an area agreement if the relevant government is a party. These include some types of 'past acts' as defined in the NTA.

'Intermediate period acts' as defined in the NTA cannot be validated by an area agreement, although an area agreement may vary the effect on native title rights and interests of the validation of those acts.

Why are these requirements so important?

They are important because:

- they provide accurate and adequate information to the parties regarding what they have agreed can be done in that area;
- they provide that information to interested third parties, both in the notice period and afterwards for the life of the agreement; and
- they supply concise material for the notice of the agreement and for the registration of the agreement.

Key points and tips

- As some of the statements made in the agreement will be included in the notice and be entered on the Register, they should be described as concisely as possible;
- The content of the agreement may have implications about who must be parties. For example, extinguishment requires the relevant government(s) to be a party; and
- Contact the Registrar for further assistance if you are contemplating the validation of previous acts in an area agreement. In general, the procedural requirements outlined in these guidelines apply. However there may be more particular requirements depending on the nature of the previous act(s).
2. Complete description of the area.

Regs 5, 7(2)(d) and (e) of the ILUA Regulations

An application to register an area agreement must be accompanied by a complete description of the area that the agreement covers. The description must consist of two key components:

- a written description of the area which enables the external and internal boundaries to be clearly identified; and
- a map of the area, complete with geographic coordinates.

If the agreement also provides for extinguishment of native title, the application must be accompanied by a complete description of any areas over which native title is to be extinguished.

Why are the map and the written description so important?

They are important because they:

- make it possible to identify all the necessary parties, so they can be included as parties to the agreement. The map and written description also make it possible to identify any other potential parties or interest holders; and
- provide accurate information about the area covered by the agreement for notice and for the Register.

Written description

The written description may include any of the following:

- geographic coordinates and datum;
- tenure types and cadastral boundaries, where these correspond to the area agreement boundaries;
- local government or other gazetted boundaries;
- man-made features such as roads, especially where those features form boundaries; and
- lot plan numbers.

Map

The map provided must be legible and precise enough to identify the boundaries of the area agreement. Where possible, the map should also indicate which areas are excluded from the agreement. The map must also include geographic reference coordinates and datum (the datum form part of the coordinates).

Features of the landscape, such as rivers and roads, may help identify the location of the agreement area and can be included in the map, particularly when they are referred to in the written description.
3. Parties: who can and must be party to the area agreement?

Certain people and organisations must be parties to an area agreement. These are:

- all registered native title claimants in the area; and
- all RNTBCs in the area.

If any land and waters within the area are not covered by a registered native title claim, or have no RNTBC covering them, then at least one of the following must be a party:

- any person who holds or claims to hold native title (this could include unregistered native title claimants); or
- a Representative Aboriginal and Torres Strait Islander body (RATSIB) for that area.

If the agreement validates previous acts or changes the effect of validation of intermediate period acts on native title rights and interests, the relevant government(s) must be a party.

If the agreement extinguishes native title over any of the area, the relevant government(s) must be a party.

Any other person or organisation may also be a party to the agreement.

How to find native title parties

- Check with the Registrar regarding contact details for current registered native title claimants, unregistered claimants, determined native title holders and any RNTBCs in the area;
- Contact RATSIBs in the area or people already identified as native title parties to help find out if there are any other people who should be included in the agreement;
- If there is a negotiating team representing native title holders, this team may be able to help identify other potential native title parties; and
- Notices can be an effective way of seeking other potential native title parties. Notices should not be limited to newspapers. It may be worth contacting local and community radio stations, and placing posters and messages on local notice boards.

Key points and tips

- If none of the RATSIBs for the agreement area are party to the agreement then someone from the native title group must notify at least one of those RATSIBs that it intends to enter the agreement. This must be done before the agreement is signed;
- It may also be a good idea to keep a record of any notice given to a RATSIB of the intention to enter the agreement, if that notification was required;
• It may be necessary to include other native title claimants as parties if they successfully object to the registration of the agreement or become registered native title claimants before the agreement gets registered. Including unregistered native title claimants in the negotiations from the outset could avoid barriers or delays to registration. Check regularly for any new native title applications;
• Use only the most current register extracts. Prior to lodging the application for registration, check to make sure that all of the necessary parties are involved; and
• Remember that the content of the agreement has implications for whom must be party to the agreement. For instance, extinguishment of native title requires that the relevant governments must be party to the agreement.

s 24CG(3)
of the NTA

The native title group must authorise the making of an area agreement. There are two ways to demonstrate that authorisation has occurred. Either:

- the application for registration is certified by all the RATSIBs of the area; or
- the application for registration includes a statement that the application has been properly authorised.

Why is authorisation so important?

s 203BE(1)(b)
of the NTA

A registered area agreement binds everyone who holds native title in the area covered by the agreement, whether they are parties to the agreement or not. For this reason, it is essential that all reasonable efforts are made to identify all people with a native title interest in the area to ensure that they are part of the agreement-making process and authorise the agreement itself.

s 203BE(6)
of the NTA

Certified area agreements

If the application for registration is certified, then all of the RATSIBs in the area must be satisfied that authorisation has been properly given by the native title group. A RATSIB may assist the native title group to obtain authorisation. The onus is on the RATSIB to establish that the application has been properly authorised. For registration, the Registrar requires a certificate from the RATSIB stating:

- that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in the area have been identified;
- that all those people identified have authorised the making of the agreement; and
- the RATSIB’s reasons for believing that the agreement has been properly authorised.

The certificate must outline in some detail the basis of the RATSIB’s belief that the authorisation requirements have been adequately met.

Uncertified (i.e. authorised) area agreements

If the application is not certified, the Registrar must be satisfied that the authorisation has been properly given by the native title group. In order to be registered, the application for registration of the area agreement must contain statements to substantiate:

- that all reasonable efforts have been made to identify those who hold or may hold native title in the area;
- that all those identified have authorised the making of the agreement, and
- the grounds on which the Registrar should be satisfied that these requirements have been met.

The information provided should include details regarding the processes
which led to the authorisation of the agreement and may include things such as:

- statements from people involved in the process as confirmation of reasonable efforts to meet the requirement;
- copies of notices;
- meetings and the details of the discussions held;
- correspondence to and from interest holders;
- consultation with RATSIBs; and
- contact between negotiators and their respective claim groups.

Three steps in the authorisation process

1. Make reasonable efforts to identify all native title interest holders in the area (refer to 'How to find native title parties' on page 6).
2. Together decide on a process through which the agreement can be made. This may be either a traditional decision-making process or the native title groups may choose another process. Some area agreements will involve more than one native title party. If so, those parties do not have to authorise the making of the agreement by the same process. This process might be:
   - by vote;
   - by consensus;
   - by family group;
   - by setting up an internal decision-making body; or
   - by some other method.
3. Use the decision-making process to gain group endorsement of the area agreement.

Key points and tips

- Start identifying all potential native title parties early in the process;
- The native title group(s) should decide on a decision-making process as early as possible. This may help avoid conflicts in the future;
- It is not safe to assume that the decision-making process agreed to by the native title group will be by majority vote;
- Create a climate of informed negotiation. Allow enough time for consultation within, and between, native title groups and all other parties to the agreement making process; and
- Take time to make sure that everyone involved is properly informed about the content of the agreement and the consequences of registration. This may be time-consuming but it is crucial that everyone understands what they are agreeing to.
5. Certification by a RNTBC.

If there is a RNTBC in the agreement area important conditions apply.

If a RNTBC is a party to the agreement, and for any part of the agreement area there is either:

- no RATSIB, or
- a RATSIB that is not a party to the agreement.

then the application for registration of the agreement must include a document from the prescribed body corporate stating that all common law holders of native title have been consulted about, and consented to, the agreement.

6. Essential information and documentation.

The NTA and the Regulations require that an application for registration of an area agreement include a copy of the agreement and be accompanied by certain information and other documents.

The application must indicate where the following statements can be found in the agreement, if applicable:

- intention to extinguish native title by surrender to government;
- intention to contract out of the right to negotiate provisions of the NTA;
- consent to future acts yet to be done;
- validation of previous acts that may be invalid; and
- changing the effect on native title rights and interests of any intermediate period acts.

The application must also contain or be accompanied by the following, if applicable:

- names and addresses of all parties;
- statement/s that identifies any RATSIB that is party to the agreement;
- if no RATSIB is a party, a statement by a native title party that one RATSIB for the area was informed of the intention to enter the agreement;
- statement/s that any Commonwealth, State or Territory government is party to the agreement;
- complete description of the agreement area, including any area over which native title is to be extinguished (if applicable);
- a statement specifying the period during which the agreement will operate;
- a statement by each party that they agree to the making of the application; and
- a statement that the application has been properly authorised.

The following documents must accompany the application, if applicable:

- copies of each determination of native title (available from the Federal
7. Confidentiality.

Some of the details provided in the application and the agreement must appear in the notice and on the Register of Indigenous Land Use Agreements (Register). This information cannot be kept confidential. If parties would like any other information or documents to be kept confidential they should make this request when lodging the documents. The Registrar can, however, only keep the information confidential to the extent that the law allows. Please contact the Tribunal for further information about its confidentiality policy.