

Making a Body Corporate Agreement and applying for registration

Fact sheet 2: 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 a Body Corporate Agreement?

A Body Corporate Agreement is an agreement about native title matters (and can include non native title matters) between the Registered Native Title Body Corporate(s) (RNTBC(s)) for the agreement area and other parties.

A Body Corporate Agreement can only be made where a determination of native title has been made over the entire agreement area.

What is a RNTBC?

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. A RNTBC comes into existence after a determination of native title is made.

What are the requirements for an agreement to be a Body Corporate Agreement?

The Native Title Act (the Act) sets out requirements for Body Corporate Agreements relating to the:

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

A Body Corporate Agreement can usually only be made if there is one or more RNTBC(s) over the whole of the proposed agreement area. We can help you identify whether a Body Corporate Agreement is the correct type of agreement for your circumstances.

What do you need to think about before making a Body Corporate Agreement?

Some considerations before beginning the process of making a Body Corporate Agreement are:

- What area is to be covered by the agreement?
- Is a Body Corporate Agreement the correct type of agreement to make over the proposed agreement area?
- Does the Commonwealth, State or Territory government (relevant government) have to be a party to the agreement?
- Who is the representative body for the agreement area? Can they provide you with assistance?
- 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 consulted with and considered the views of a representative body for the agreement area?
- Has the RNTBC informed the representative body for the area of the intention to enter into the agreement?
- Has the RNTBC prepared a document certifying that the affected common law holders have been consulted and have consented to the native title decision?

Did you know?

The National Native Title Tribunal (NNTT) can assist you in negotiating an ILUA. See our website for more information on negotiation assistance or call the NNTT office in your region.

What must a Body Corporate Agreement be about?

A Body Corporate Agreement must be about at least one of the matters provided for under the Act. Generally, Body Corporate Agreements are about one or more of the following:

- future acts that are to be done;
- future acts already done;
- the surrender of native title rights and interests;
- 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 a Body Corporate Agreement?

The following must be a party to a Body Corporate Agreement:

- all RNTBCs for the area; and
- where the agreement provides for the extinguishment of native title rights and interests by surrender or is to have the effect of validating future acts already done invalidly, the relevant government must be a party.

Who may be a party to a Body Corporate agreement?

In addition to the above mandatory parties, the following may be a party to a Body Corporate Agreement:

- the representative body for the agreement area;
- the State, Territory or Commonwealth government; or
- any other person.

What if a determination of native title has been made over all of the agreement area but there is no RNTBC for all of that area?

In certain limited circumstances it may be possible to make a Body Corporate Agreement even though there is no RNTBC for the entire area.

This may include where a determination of native title has been made over the whole of the agreement area, but for some parts of the agreement area the Federal Court has determined that native title does not exist as a result of an extinguishing act.

In most circumstances, however, a Body Corporate Agreement cannot be made unless there are RNTBCs over the entire agreement area. You should seek legal advice in deciding whether a Body Corporate Agreement is appropriate for your circumstances.

How is a registration application for a Body Corporate Agreement made?

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

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

Who can make a registration application for a Body Corporate 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 consent of the RNTBC(s).

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 agreement of the RNTBC(s). Further, the relevant government must be a party to the agreement for the validation of the future acts to be effective.

Is the agreement about the surrender of native title?

If the agreement provides for the surrender of native title, the agreement must include a statement to the effect that the surrender is intended to extinguish native title rights and interests. The relevant government to which native title is surrendered must be a party to the agreement.



What documents/information must accompany the registration application?

A registration application must be accompanied by a copy of the Body Corporate Agreement and a:

Signed statement from the parties

The registration application for a Body Corporate 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

All registration applications for Body Corporate Agreements are to be accompanied by a copy of at least one determination of native title over the agreement area. That is because at least one RNTBC is always a party to a Body Corporate Agreement.



Is there a 'surrender area'?

When the agreement provides for the surrender of native title rights and interests that is intended to extinguish native title, a complete description of that area (the surrender area) must be provided.

A complete description of the surrender area is one that includes a written description that enables the identification of the boundaries of the surrender area and a map of the surrender area that contains geographic coordinates.



Does a representative body have to be informed of the RNTBC's intention to enter into the agreement?

Where a representative body is not a party to the agreement, yes. The RNTBC must inform at least one representative body for the agreement area of its intention to enter into the agreement. This must be done before entering into the agreement.

A registration application must be accompanied by a statement from at least one RNTBC that they have informed the representative body.

The statement can be contained in the agreement or provided in a separate document.

When is a document certifying to consultation and consent needed?

When there is a representative body for the area but they are not a party to the agreement or when there is no representative body for the area a document certifying to consultation and consent must accompany the registration application. This is because at least one RNTBC is always a party to a Body Corporate 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 Body Corporate Agreement. It must be signed in accordance with the relevant regulations. A template of this document is included in the application form for Body Corporate 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

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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).*