

**Parliamentary Joint Committee on
Native Title and the Aboriginal and
Torres Strait Islander Land Fund**

OPERATION OF THE NATIVE TITLE ACT

**Inquiry Into Indigenous Land Use
Agreements**

Submission No: 4

Cr John Ross

President

Australian Local Government

Association

8 Geils Court

DEAKIN ACT 2600

☎ 02 6281 1211 📄 02 6282 2110

E-mail: alga@alga.com.au



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Inquiry into Indigenous Land Use Agreements (ILUAs) October 2000

Background

Local Government's concern with native title arises from two perspectives. Firstly, from the fact that native title exists or may exist on land in its care control or custody. Local Councils throughout Australia (with the exception of the Northern Territory) administer or manage Crown land or other public lands where native title exists or may exist. Secondly, from its responsibilities to represent the interests of all its citizens, which includes varying responsibilities under State/Territory legislation for the zoning of land and control of land uses and other regulatory powers.

By late 1996/early 1997 the Australian Local Government Association realised that local Councils throughout Australia were in need of factual information and practical guidance on how to work with native title. In March 1997 the National Executive of ALGA resolved to undertake an information project on native title for Local Government. The project comprised two elements:

- the conduct of information seminars; and
- the production of information kits specifically for Local Government.

With assistance provided by the Aboriginal and Torres Strait Islander Commission (ATSIC), ALGA undertook over 60 information seminars throughout Australia (except Tasmania). These information seminars provided considerable information about Local Government's information and training needs.

With assistance provided by ATSIC and the National Native Title Tribunal (NNTT), ALGA also undertook the production of two information resources:

- *Working with Native Title: A Practical Guide for Local Government*; launched by the Attorney-General, the Hon Daryl Williams AO, QC, MP in October 1999; and
- *Working out Agreements: A Practical Guide to Agreements between Local Government and Indigenous Australians*, launched by the Hon Peter Baume, AO, Professor of Community Medicine UNSW and Chancellor of the ANU in June 1998.

The *Working with Native Title* Guide provides Councils with a 6-step Action Plan for incorporating native title matters into Council's day-to-day operations, as well as all the background information necessary to have a better understanding of the facts relating to the common law recognition of native title.

The *Working out Agreements* Guide provides information about how to develop an agreement, how to develop the content of an agreement, what is involved in implementing the commitments entered into in an agreement, and how to review an agreement, as well as additional information on case studies and other resources.

Both the guides have been well received by Local Government throughout Australia. The *Working out Agreements* Guide was launched prior to the guide to *Working with Native Title* because of the protracted debate around the amendments to the *Native Title Act 1993* at the time and because there was general agreement amongst the various stakeholders about the need for agreements.

The approach that ALGA took was to ask:

- What does a local Council need to know about native title so that it can continue to carry out its responsibilities and continue making decisions about land use and management in accordance with the law?
- What are the appropriate processes for recognising and accommodating everyone's legal rights and interests at least cost?

Of course, the 1998 amendments to the *Native Title Act 1993* made this much clearer with the insertion of new provisions relating to agreements.

Following the launch of the *Working with Native Title* Guide, and with assistance from ATSIC, the NNTT and the Legal Aid Branch of the Federal Attorney-General's Department, ALGA undertook the development of a training program to assist Councils in the use and application of the two guides.

In the twelve months since October 1999, ALGA in conjunction with the NNTT and the respective State Local Government Associations, and with the continued support of ATSIC and the Legal Aid Branch of the Federal Attorney-General's Department, has conducted 35 training workshops in all the mainland States, as follows:

- Queensland – 9
- Western Australia – 13
- Victoria – 4
- South Australia – 4
- New South Wales – 5.

The purpose of the training workshops was to enable practitioners to understand the basic facts about native title, their responsibilities arising from the *Native Title*

Act 1993 (Cth) and complementary State/Territory legislation, and how to adopt a precautionary approach to native title matters by following a six-step action plan.

The workshop comprises four modules as follows:

- Module 1. Exploring the concepts and basic facts of native title;
- Module 2. Unpacking the Guides;
- Module 3. Putting the Action Plan into practice;
- Module 4. Mapping the next steps.

All participants of the workshops receive a copy of the two resource guides, a workbook and a copy of all the overheads used during the workshop.

Participants generally included:

- elected representatives (Councillors) in Local Government;
- Chief Executive officers, senior managers and practitioners in Local Government;
- solicitors and consultants;
- representatives of Native Title Representative Bodies and individual claimants;
- ATSIC staff or Regional Councillors;
- State Government officials from a range of State Government agencies;
- Officials from Federal Government Departments or agencies (i.e. CSIRO);
- Academics;
- infrastructure agencies;
- pastoralists and other local community representatives.

At the completion of each workshop the participants are invited to complete an evaluation. The feedback is predominantly very positive. Most participants commented that they would prefer the workshop to have been conducted over two days to allow more time for discussion about local case studies and practical application of local examples of future acts and for training in agreement making.

Terms of Reference

The remainder of this submission is based on our experiences in conducting the workshops and feedback from the participants.

a) The usefulness and scope of the ILUA provisions in the *Native Title Act 1993 (Cth)*

The 1998 amendments to the *Native Title Act 1993* inserted new provisions dealing with Indigenous Land Use Agreements (ILUAs). The aim of these provisions is to encourage and facilitate negotiated outcomes to native title matters, including in relation to future acts, resulting in formally binding agreements when registered by the Native Title Registrar.

ALGA welcomes the insertion of these provisions as they increase the range of options available to local Councils for resolving native title matters. ALGA believes the provisions relating to agreements have indeed been strengthened by the 1998 amendments to the *Native Title Act 1993* (Cth). The fact that they can be used to ensure the validity of acts affecting native title is a positive feature. The negotiation of agreements will be easier than following the future act processes in the *Native Title Act 1993* (Cth) or complementary State/Territory legislation.

Even when the Federal or High Court makes a determination that native title exists, there is still a need for agreements about how the native title rights and interests are going to be exercised on the ground. The *Native Title Act 1993* (Cth) is silent on vital questions about the practical ways in which the relationship between native title rights and interests, public laws and private rights and interests can be exercised and enjoyed together. These matters can only be dealt with to the satisfaction of all the parties through consultation and negotiation of an agreement.

At this stage the number of registered ILUAs involving local Councils is only small. There are several reasons for this, including for example:

- The provisions relating to ILUAs have only been in the *Native Title Act 1993* (Cth) for two years. It is still very early days;
- The level of knowledge and understanding in Local Government about the provisions relating to ILUAs is limited. This has been addressed to some degree through the training workshops, but training in the scope and application of ILUAs and the processes of negotiating agreements remains a high priority.
- Some State Governments are not actively promoting agreements (see term of reference (d) below).
- Local Government, in some instances, is being poorly advised about agreements as an alternative to the future act processes lower down in s24 of the *Act*. ALGA is aware that some Councils are not being given the benefit of the full range of options available for validity for future acts, especially in relation to agreements.
- Some of the Native Title Representative Bodies are not in a position to promote agreements or to deal effectively with future acts issues because they have been pre-occupied with their own re-registration, the re-registration of native title determination applications and the progress of contested applications in the Federal Court. This is beginning to improve as some of the NTRBs have been re-appointed and are able to turn their attention to matters relating to future acts and the negotiation of agreements.
- Councils may not be ready to negotiate an agreement because a high level of misunderstanding about the facts of native title persists within the local community. In these circumstances, some Councils are not able or willing to take the lead.

- In some locations there is a level of intra-indigenous conflict which may impact adversely on an agreement in a particular matter in the time required.

ALGA understands that as at the end of August 2000, five (5) applications have been lodged for the registration of ILUAs that involve local Councils, and that a further twelve (12) ILUAs are currently under negotiation involving local Councils.

b) Local Government's experience of the process of negotiating ILUAs

To date only three ILUAs involving local Councils have been registered. Two of these involve Mackay City Council and the other involves Cairns City Council. In both cases, the Councils were seeking validity for future acts in areas subject to native title determination applications. ALGA understands that the Councils did not encounter any particular difficulties in finalising these agreements. That is not to say though, that there are no issues involved in the process of negotiating agreements.

The *Working out Agreements* Guide canvasses several issues of a general nature that will arise in the course of negotiating agreements. Feedback from Councils that have used the guide in this and other contexts indicates that the Guide has been useful in resolving many of the general issues.

Participants in the training workshops have identified a range of issues based on their observations or experiences, including:

- the preparedness of the local community to accept that an agreement is an appropriate course of action;
- the preparedness and ability of a local Council to enter into negotiations and to close the negotiations to everyone's satisfaction;
- the ability of native title claim groups to enter into negotiations and to close the negotiations satisfactorily;
- the extent to which an ILUA will be binding and effective in securing certainty of the outcomes that have been negotiated; and
- the extent to which the State Government may need to be involved and is also willing to consider an agreement as a suitable or appropriate means of resolving a particular matter.

c) The ILUA registration requirements and process

To date local Councils have not encountered any particular difficulties with the registration requirements and processes. Local Councils are generally pleased to be included in the parties to be notified in the course of ILUAs being registered. This provides Councils with an opportunity to become a party if they need to or at least to be aware of the existence of an ILUA in their area at the time of its registration.

One of the concerns raised by a number of participants in the training workshops was whether a registered ILUA can be undone or overturned in some way by another potential holder of native title for the area covered by an agreement, if they came forward after the ILUA was registered. The registration process is intended to ensure that all the likely native title holders are consulted. In addition, the fact that the relevant NTRB is required to certify the agreement should reduce the chances of this ever having to occur. To date, the agreements involving Local Government have not encountered any difficulties in relation to the registration requirements and processes for registration.

Another concern raised by a participant at one of the training workshops was whether a future act can proceed before the registration of an ILUA is finalised. The *Native Title Act 1993* (Cth) is silent on this matter and it is presumed that the common law relating to contracts would apply. This may require some clarification by way of an amendment to the *Act* at a later date.

d) The role Local/State/Federal Governments should play in the negotiations

All spheres of Government have an information and education role to play in promoting and facilitating agreements as the most practical way of resolving native title matters at least cost to the community. ALGA has played its role by developing the two resource guides and by providing training in their use and application. ALGA believes there is scope for the Federal and some State Governments to play a greater role in developing an awareness of the role and scope for agreements in the native title context, as well as in relation to their facilitation.

In relation to future acts, the Federal and some State Governments could do more in promoting and facilitating the development of agreements between native title holders, registered applicants, and/or Native Title Representative Bodies and other stakeholders. The training workshops revealed a high level of ignorance about the provisions relating to agreements taking precedence over other processes in the *Act*, as well as some hesitation due mainly to lack of familiarity with the processes involved.

In particular, the workshops have revealed that some State Government policies on how Councils should respond to native title matters is having a strong influence on responses by Local Government, especially where the State is intricately involved in relation to the transfer of tenure to the Council. For example, in NSW and WA local Councils are not able to carry out any activities on Crown land not in their custody or control without acquiring the Crown land and the native title rights and interests. In some situations the States are requiring Councils to follow the future act processes when the claimants or the relevant NTRB may be willing to negotiate agreements. ALGA is concerned that agreements are not being canvassed as one of the options and as an alternative

approach to the complex processes in the *Native Title Act's* future act provisions in s24.

To some extent the role of different spheres of government in negotiating ILUAs will depend largely on the reasons for an ILUA. For example, a local Council may want to have an ILUA about some of its land management activities in an area where native title exists or may exist. State and Federal Governments may not need to be parties to the agreement, especially if the agreement does not involve extinguishment. However, State Governments in particular can and do exercise a considerable degree of influence over a local Council's willingness to develop an ILUA. State Governments can also assist the process by providing a range of resources, including financial assistance and negotiating skills.

As State Governments are primarily responsible for land management, we believe the States also have a responsibility for delivering on the outcomes. In some situations the State has offered to provide assistance or given a commitment to do certain things either in the process of negotiations or afterwards, and some State Governments have failed to deliver on its commitments. This tends to discourage the development of agreements.

e) The factors influencing Local Government's decision to enter into ILUA negotiations rather than using other procedures under the *Native Title Act 1993 (Cth)*, in particular the future act regime

One of the crucial factors influencing local Councils is public opinion. Local Councils, like other spheres of government, are accountable to their local communities. Being close to their communities they are very responsive to public opinion. The workshops have highlighted the fact that there continues to be a high level of misinformation and misunderstanding in the wider community about native title. In these circumstances it can be extremely difficult for a local Council to 'sell' the idea of an agreement.

Other factors that will influence Councils include:

- Knowledge of the options available and the source of their advice;
- Costs involved;
- The procedures and outcomes;
- The level of skills and experience in negotiating agreements;
- The nature of existing relationships with the native title holders and/or the local Indigenous community; and
- The extent to which a local community will accept an agreement as compared to other processes.

f) The advantages/disadvantages of ILUAs compared with agreements outside the framework of the *Native Title Act 1993 (Cth)*

Prior to the 1998 amendments to the *Native Title Act 1993 (Cth)* there were not many opportunities for agreements as a way of resolving native title matters with the same degree of certainty that is now possible under the ILUA provisions.

However, some Councils such as Redland Shire in Qld and Broome Shire in WA entered into agreements about native title matters with the claimants in order to progress matters pertaining to planning and land management in their respective shires. Their experiences have varied.

In the case of the agreement between Redland Shire and the Quandamooka Aboriginal Corporation, the parties have continued to work together to jointly develop a planning and management strategy for North Stradbroke Island (Minjerrabah). A draft of the strategy is currently on display for public comment. The Queensland Government initially condemned the agreement, but since just prior to the last change in Government, the State Government has generally supported the process the parties embarked on and now realises that it also needs to be a party to the next stage of the planning and development process. The planning and land management strategy will provide a basis for ILUAs about future acts on the Island.

In the case of the agreement between the Shire of Broome and the Rubibi Working Group (representing the various native title claimants in Broome), the agreement has not been quite as successful as the parties initially anticipated. This is due to a variety of factors including resourcing, commitment, and expectations of the parties. The agreement enabled the State and Broome Shire to proceed with the preparation of a longer term strategy plan for the future development of Broome. A final strategy plan for the former Waterbank pastoral lease immediately to the north of Broome was released last month, but by comparison with the process on Stradbroke Island, neither the local Council nor the local native title claimants played a key role in the process. Other elements in the agreement remain to be implemented due to a lack of appropriate resources and commitment.

g) The resources (technical/financial) that are necessary to successfully negotiate agreements.

Local Councils often do not have the appropriate resources, technical or financial, to develop binding agreements. Local Councils generally have fixed budgets with little freedom to allocate resources to negotiating agreements. Many Councils are increasingly turning to the Federal Attorney-General's Department for assistance in these matters. ALGA understands that the number of applications to the Federal Attorney-General's Department from Local

Government for assistance under the 'Provisions for Financial Assistance by the Attorney-General in Native Title Cases' are increasing.

The training workshops on the use and application of the Guides have revealed a high level of need for training in negotiating skills and agreement making throughout Australia, as well as training on the provisions relating to agreements in the *Native Title Act 1993* (Cth).

Conclusion

Dealing with native title matters is now another part of Local Government's responsibilities as administrators, managers or developers of land where native title exists or may exist, just the same as heritage and environmental matters have become over the last two decades.

ALGA has taken a lead in developing appropriate resource materials (the *Working with Native Title* Guide and the *Working out Agreements* Guide) and in providing training in their use and application. However, there remains a high level of ignorance and misunderstanding in the community about native title matters generally. All spheres of government could do more to overcome the myths and misinformation in the wider community, especially about the provisions in the *Native Title Act 1993* (Cth) relating to agreements.