

**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: 12  
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The Secretary  
Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait  
Islander Land Fund  
Parliament House  
CANBERRA ACT 2600

<<BY FACSIMILE>>

Dear Sir/Madam

### **INQUIRY INTO INDIGENOUS LAND USE AGREEMENTS**

These submissions directly concern the resources that are necessary to successfully negotiate and register agreements as ILUAs. The submissions are made by the Central Queensland Land Council in reference to our experience with ILUA processes. The submissions are preliminary submissions only and the Central Queensland Land Council requests the opportunity to make more detailed submission in due course.

### **INTRODUCTION**

1. Indigenous Land Use Agreements fall within three categories, body corporate agreements<sup>1</sup>, area agreements as considered below and alternate procedure agreements<sup>2</sup>. Most of the agreements being negotiated with a view to them ultimately becoming ILUAs are area agreements. For this reason the submission focus' on the provisions that apply to area agreements. The most significant difficulty with ILUA's is the resources and thus ability of representative bodies and their constituents to deal with them.

### **EFFECT AND AUTHORISATION OF ILUAs**

2. The purpose of the provisions relating to ILUAs is to bind people who native title. Any future act consented under an agreement and carried out while the agreement is included on the Register of Indigenous Land Use Agreements

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<sup>1</sup> See section 24BA of the *Native Title Act (1993) Cth.*

<sup>2</sup> See section 24DA of the *Native Title Act (1993) Cth.*

will be valid<sup>3</sup>. The provisions and mechanism by which all people who hold native title are bound being the major evolution from the preceding provisions under *sections 21 and 31(1)(b)* of the original Act<sup>4</sup>. Consultation is inevitable if it is sought to bind all people who hold native title.

3. Given the Central Queensland Land Council's understanding of the composition and nature of groups within our area we cannot foresee a situation where the number of people that would be sought to be bound would be less than 250 people.
4. A failure to consult effectively with people who may hold native title can result in a challenge to the authority of the persons that sign the ILUA or an objection to the inclusion of the agreement on the register of ILUAs. Decisions to date involving a challenge to authorisation have been limited to the authority to bring claims<sup>5</sup> although similar issues can potentially arise in relation to agreements that are proposed to be included on the register of Indigenous Land Use Agreements.
5. If the authorisation of ILUAs is not addressed in an open and transparent way it is possible for there to be an adverse impact on claims processes. In particular it may result in the fragmentation of claims or the lodgment of multiple claims in areas where people who may hold native title perceive that their interests are not represented.
6. In Queensland significant numbers of ILUAs have or are currently being negotiated with all levels of industry and government. In the Central Queensland Land Councils gazetted area ILUA negotiations have taken place or are currently occurring with commonwealth, state and local government.
7. The Love Rasheed report suggested that representative bodies are not sufficiently resourced to perform their statutory obligations under the *Native*

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<sup>3</sup> *Section 24EB(1) & (2)*.

<sup>4</sup> No 110 of 1993

*Title Act.* The Love Rasheed report occurred at a time when the statutory obligations placed upon representative bodies were more circumscribed than they are today<sup>6</sup>. At the very least representative bodies have been and are likely to continue to be pressed to meet their requirements under the *Native Title Act*.

8. ILUA negotiations while they may be desirable to all parties concerned, entry into indigenous land use agreements is not compulsory. The capacity of representative bodies and their constituents to engage in ILUA negotiations has and is likely to continue to limit the speed at which ILUA negotiations can take place.
9. In many instances the project proponent will have both the capacity and the willingness to pay. Aside from any altruistic motives it is often likely that it will be economically desirable to the proponent for the negotiations to occur a rate that is faster than the representative body and or its constituents can reasonably respond.
10. In ILUAs that have been negotiated within the Central Queensland Land Council's gazetted area non indigenous parties seeking to negotiate agreements have assisted the CQLC with the costs of holding meetings that will enable effective consultation with people who may hold native title.

#### **AUTHORISATION AND CERTIFICATION**

11. Non indigenous parties that have negotiated ILUAs within Central Queensland Land Council's gazetted area have sought the representative bodies' certification. While it is possible for agreements to be registered on the register of ILUAs without the representative bodies certification most parties

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<sup>5</sup> See *Moran v Minister for Land & Water Conservation for the State of New South Wales* [1999] FCA 1637 (25 November 1999)

<sup>6</sup>The statutory functions of representative bodies under the *Native Title Act (1993) Cth.* as in force at 1 July 2000 (see *section 203B*) include, facilitation and assistance functions, certification functions, dispute resolution functions, notification functions, agreement making functions and internal review functions as well as the functions under *section 203BJ*. By comparison as at the date of the Love Rasheed report the statutory functions were effectively facilitation and assistance and dispute resolution.

seeking to have ILUAs show a strong preference towards the perceived certainty that the representative bodies certification can provide.

12. Certainty will not be provided by the certification itself but by a thorough and inclusive authorisation process that ought to precede any consideration of certification. As suggested above to have an authorisation process that provides certainty it is necessary that the authorisation process be both transparent and inclusive. The policy of the Central Queensland Land Council is for there to be a publicly advertised meeting open to all people who assert to have a native title interest in the area covered by the ILUA prior to a decision on whether or not to certify the agreement.
13. Accepting that the Central Queensland Land Council has limited resources in which to perform its statutory functions meetings of the type referred to in paragraph 11 generally occur less than once a year. At meetings of this type it is possible to deal with more than one project although when considering complex matters there are limits to the amount of subject matter that can realistically be covered.
14. Parties seeking to progress matters in cooperation with the representative body outside the timelines that the representative bodies finances will permit need to contribute to the costs associated with the consultation and certification.
15. In recognition of this the Central Queensland Land Council is developing a User Pays model. The model is not one in which the Central Queensland Land Council receives money for providing services.

#### **ADVANTAGES OF ILUAs OVER OTHER PROCESSES UNDER THE NATIVE TITLE ACT OR ALTERNATE STATE SCHEMES**

16. ILUAs have the possibility of providing economies of scale to non indigenous parties. This is particularly the case where in the case of various types of mining permits and licences. These licences under the right to negotiate

process or in Queensland under the Mineral Resources Act need to be dealt with on a case by case basis. ILUAs can with support from the non indigenous party be dealt with, more promptly and with economies of scale.

### **MINOR DIFFICULTIES WITH CONSTRUCTION**

17. An Indigenous Land Use Agreement (Area Agreement) is an agreement that meets the requirements of *sections 24CB to 24CE* of the *Native Title Act*<sup>7</sup>. *Sections 24CB to 24CE* set out as follows: -

- *Section 24CB* provides the subject matter that area agreements can cover.
- *Section 24CC* provides that an agreement can only be an area agreement if there is no body corporate for all of the area.
- *Section 24CD* describes the people who are required to or may become parties to area agreements.
- *Section 24CE* provides that the agreement may be given for any consideration.

18. *Section 24EA(1)* provides that the effect of an agreement while on the register of indigenous land use agreements is that it will bind all people who hold native title. *Section 24EA(2)* confirms that an area agreement without registration is not binding upon people who are not parties to it. The combined effect of *sections 24EB(1)(a) & (b)* and *24EB(2)* is that a future act will be valid if when it is done, there is an Indigenous Land Use Agreement on the register that includes a statement to the effect that the parties consent to the act or class of acts. By contrast *section 24AA(3)* provides that:

*“[a] future act will be valid if the parties to certain agreements (called indigenous land use agreements – see Subdivisions B, C, and D) consent to the act being done.”*

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<sup>7</sup> *Section 24CA* of the *Native Title Act*.

19. As illustrated above for an agreement to be described as an Indigenous Land Use (Area Agreement) the provisions of *sections 24CB to 24CE* are the only requirements. These provisions do not address inclusion on the register of indigenous land use agreements. If *section 24AA(3)* were to be read in conjunction with *sections 24CB to 24CE* it would suggest on the face of it that for an act to be valid if it meets the limited criteria for it being described as an ILUA. While standard principles of interpretation mean that general terms such as *section 24AA(3)* do not derogate from specific terms such as those found within *section 24EB(2)* it would be preferable that there be an amendment to *section 24AA(3)*.

The Central Queensland Land Council is available to appear before the inquiry should such attendance be requested.

**YOURS FAITHFULLY**

**MATTHEW MOHARICH  
LEGAL OFFICER**