

QUEENSLAND GOVERNMENT

SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON NATIVE TITLE AND THE ABORIGINAL AND TORRES STRAIT ISLANDER LAND FUND

INDIGENOUS LAND USE AGREEMENTS

Background

1. The Queensland Government is committed to the process of negotiating outcomes to native title issues across the State. The Premier has publicly stated his Government's support for the use of the indigenous land use agreement (ILUA) provisions of the *Native Title Act 1993* (the NTA) as a means of negotiating difficult native title issues.
2. The State is currently involved in a number of negotiations for indigenous land use agreements (ILUAs). These involve a number of projects varying in size and complexity. Thus far the State has only been a party to three agreements that have proceeded to registration, although registration is pending for a number more.

The usefulness and scope of the ILUA provisions of the *Native Title Act 1993*

3. The State finds the ILUA provisions of the NTA generally workable. The State is willing to engage with indigenous people in ILUA negotiations and has also assisted third parties to reach agreements with native title parties.
4. The introduction of the legislative provisions in Part 2 Division 3 of the NTA has corrected the previous problems regarding the legislative capacity to enter agreements regarding matters that affect native title. This legislative framework is essentially sound, although there continues to be problems ensuring that negotiations are concluded and agreements registered within reasonable timeframes.
5. Given the broad range of matters which may be dealt with and the certainty they provide, ILUAs are a useful tool in resolving native title issues. The protracted nature of the ILUA negotiation and registration process is evidenced by the small number of agreements registered thus far by the NNTT. The State's experience is that agreements are difficult to finalise, however this does not necessarily reflect on the workability of the legislative provisions. This is an inherent difficulty in any voluntary negotiation process that is not limited by legislative time limits or restrictions. The process of identifying interested parties, negotiating the content of an agreement, finalising drafting and obtaining relevant authorisation and signing is lengthy and difficult. The notification and registration process, while adding to the length of time involved, has not, of itself, prevented agreements being reached.

6. It is likely that the ILUA process will become easier once more native title determinations are finalised. This will simplify the task of identifying native title parties and will allow all parties to operate on the basis of a clear understanding of their respective legal rights.
7. It is also likely that the processes will become more streamlined as more agreements are reached and relevant parties learn more about approaches to agreements and the requirements for registration.
8. The State is therefore of the view that the existing legislative provisions do not require any substantial amendment.

The ILUA registration requirements and process

9. The registration process for ILUAs is protracted and causes some practical difficulties.
10. The registration of area agreements in particular has proved difficult, due in part to the more onerous requirements for the identification of and approval by native title parties. The impact of these requirements have been two-fold:-
 - it has proved difficult to reach agreement with all native title parties;
 - the funding required to conduct negotiations, provide independent legal advice to parties and obtain authorisation can make the whole process financially non-viable. This is particularly the case for smaller projects.
11. One of the mechanisms in the NTA designed to assist this process is the provision allowing certification by native title representative bodies. In practice this mechanism has not assisted the process. Furthermore, this mechanism does not change any of the fundamental problems associated with the process and cost of obtaining authorisation. It merely casts a greater burden on the representative body to be satisfied about the agreement rather than the registrar.
12. There are often circumstances where the recognition of native title through a consent determination will be accompanied by an ILUA that makes provision for the doing of future acts in the determination area. Under the existing legislation there are two separate processes for making the determination and the registration of the ILUA. This adds time and expense to the process. It may be appropriate to consider some alternative arrangements that may streamline this process.

The role of local, State and Federal Governments in ILUA negotiations

13. There are clearly many circumstances where the State will be required to be a party to an ILUA. The NTA prescribes that the State must be a party to an agreement that provides for the extinguishment of native title. Section 24EBA of the NTA also requires the State to be a party to an agreement which validates future acts that have already been done invalidly.
14. However other than where an agreement provides for extinguishment of native title or validation of acts, it is not necessary for the State to be a party. Where a proposed ILUA relates to a future act or acts to be performed by the State, it is important to contact the State about the proposed future act, however the State does not take the view that it should automatically be a party to such an agreement.
15. There are potential problems with the State being party to agreements that purport to bind it to particular administrative decisions. It is important to ensure that agreements take account of relevant legislative provisions and administrative law requirements and that they do not effectively fetter the discretion of the decision maker under State legislation.
16. In this case the role of the State depends very much on the nature of the activity to be authorised and its relationship with any other State activity. For example, where the agreement is dependent on an administrative decision by the State (such as the issue of a permit or authority), it is obviously important for the State to be kept informed of the progress of negotiations. The State may also assist the negotiations by providing information about the progress of relevant administrative decisions, and in particular any conditions likely to be imposed. The State will also have an interest in ensuring that the particular future act covered by an agreement is sufficiently described so that the State is able to rely on the provisions of the ILUA in managing its compliance with the provisions of the NTA. It is important to coordinate the ILUA process with the decision making process of the State, so that the ILUA can accurately reflect any conditions imposed on the State's approval. Engaging the State in the ILUA process from the beginning also avoids agreements being reached over matters which are unlikely to receive administrative approval.
17. Where the State is not required to be a party to an agreement it may nevertheless assist in the negotiation process. The State is often willing to provide assistance in an educational or administrative manner, for parties seeking to come to agreement about native title matters. The State may take a more proactive role in the negotiation of ILUAs of disputes regarding projects of major State significance. In many instances these types of projects would require the State's involvement in any event.

The factors influencing the State's decision to enter into ILUA negotiations rather than use other procedures under the NTA, in particular the future act regime

18. For many administrative acts the State will use other parts of the future act regime rather than a formal ILUA process. Generally the resources required to complete an ILUA make the process less favourable than the future act provisions. As mentioned previously it is often not worth the risk of devoting funds to an ILUA process that has no guarantee of success and can be stopped at any stage by an unsatisfied party, when a more certain and expedient process is available.
19. The State is conscious of the need to maintain the goodwill of indigenous people, and will look to use the ILUA process for more significant projects. In particular the State will consider the use of an ILUA process where:-
- the alternative options available are compulsory acquisition or a right to negotiate process;
 - there are a number of complex issues to be considered and multiple processes required;
 - there is no alternative option available (for example for an acquisition for the purpose of conferring rights and interests on a third party)
20. A disincentive to the use of the ILUA process is that the right to negotiate and compulsory acquisition processes have set timeframes for completion which are often shorter than would be required to complete an ILUA. The major disadvantage of the ILUA process as compared with the right to negotiate process or the process under Queensland's Alternative State Provisions is that ILUAs are open ended. Significant resources can be committed in attempting to reach agreement without success.
21. The factors which will influence the State's ultimate decision on how to proceed will obviously vary according to individual circumstances. However they may include:-
- The nature, impact and extent of the proposed act or acts that require authorisation;
 - The potential benefits of the project, particularly in terms of employment and social impacts;
 - The urgency of the request for authorisation and the timeframes required;
 - The resources required to negotiate an ILUA and the resources available to conduct the negotiations;
 - Any prior consultation and in particular the involvement of native title parties in the process, and whether proposal has the support of the native title parties.

The advantages and disadvantages of ILUAs compared with agreements outside the framework of the NTA

22. A major disadvantage of the ILUA process is the expense. The process can be protracted and expensive and, particularly in relation to minor projects, is often perhaps not an efficient way to proceed. By way of example a resumption of land in a rural or remote area would require an extensive process of negotiation and proof in order to reach registration

under the ILUA process. In most circumstances the value of such land would not justify the expense.

23. The advantage of the ILUA process is that, upon registration, there is certainty for all parties. A contractual arrangement with a native title holder, reached outside the ILUA process, will only provide certainty as between the parties to the agreement. Its success is therefore dependent upon the identification of appropriate native title parties.
24. The State is also conscious of the need to ensure that interested native title parties are not excluded from any agreement. The ILUA process provides a framework for identifying all relevant parties and the State will generally prefer this approach to an agreement outside the NTA which may exclude interested parties.

The resources necessary to successfully negotiate agreements

25. It is difficult to give an assessment of the resources necessary to negotiate agreements. There is no “typical” agreement on which this could be based. The resources required depends entirely on the complexity of the negotiations including the nature of the proposed agreement, the number of parties and the likely impact on the native title rights and interests.
26. The ILUA process is of most use for major projects and infrastructure where the cost involved in the process is justified by the ultimate return. However for many smaller projects the potential benefits might not justify the resources and effort required to obtain a registered agreement. For example the issue of a freehold title over a small parcel of land for a community purpose in a rural community could require extensive time and resources to negotiate and register the ILUA. In most circumstances this will far outweigh the commercial value of the land, which may be negligible.