

Queensland Government Native Title Work Procedures

Module Q: Using Indigenous Land Use Agreements to achieve consent for your future act

Commonwealth Native Title Act 1993: s.24BA - s.24EC

August 2017

Version history

Version	Comments	Date published
1		August 2017

This publication has been compiled by Aboriginal and Torres Strait Islander Land Services, Department of Natural resources and Mines.

© State of Queensland, 2017

The Queensland Government supports and encourages the dissemination and exchange of its information. The copyright in this publication is licensed under a Creative Commons Attribution 4.0 International (CC BY 4.0) licence.

Under this licence you are free, without having to seek our permission, to use this publication in accordance with the licence terms.



You must keep intact the copyright notice and attribute the State of Queensland as the source of the publication.

Note: Some content in this publication may have different licence terms as indicated.

For more information on this licence, visit <https://creativecommons.org/licenses/by/4.0/>.

The information contained herein is subject to change without notice. The Queensland Government shall not be liable for technical or other errors or omissions contained herein. The reader/user accepts all risks and responsibility for losses, damages, costs and other consequences resulting directly or indirectly from using this information.

Table of contents

Version history	
Introduction	1
What is an ILUA?	1
Types of ILUAs.....	1
What can an ILUA be about?	1
After the ILUA has been negotiated	2
This Module is divided into the following four divisions -	2
Preliminary considerations	2
A checklist to consider	2
Who has responsibility for negotiating an ILUA?	3
Advising an applicant that a registered ILUA is required	4

Introduction

You have reached this Module because no Module applies to your proposed dealing.¹ Unless **Module R** also applies, an Indigenous land use agreement (ILUA) is the only way in which you can validly proceed in relation to native title.

This Module provides a brief explanation about -

- (a) ILUAs
- (b) advising the applicant that a registered ILUA is required
- (c) steps your department/agency must take before negotiating an ILUA.

What is an ILUA?

An ILUA is a voluntary agreement about the use and management of an area of land or waters, made with one or more native title groups.

Types of ILUAs

There are three types of ILUAs -

- an **area** agreement² - an agreement in relation to a particular area of land or waters. This is the agreement type most commonly used
- a **body corporate** agreement³ - used where there is a determination of native title over all the land or waters dealt with by the ILUA and a registered native title body corporate has been established
- an **alternative procedure** agreement⁴ - used to provide alternative procedural rights to those afforded under the future act regime of the *Native Title Act 1993* (NTA).

What can an ILUA be about?

An ILUA can cover, for example -

- the doing of particular future acts
- the doing of classes of future acts
- alternative procedures
- the validation of future acts (other than intermediate period acts) that are invalid in relation to native title
- the surrender of native title.

¹ Even if a Module in the Procedures applies to your proposed dealing, an ILUA can still be used.

² Sections 24BA - 24BI, NTA

³ Sections 24CA - 24CL, NTA

⁴ Sections 24DA - 24DM, NTA

In the case of a proposed dealing (a future act), an ILUA may evidence the consent for a dealing in two ways -

- the proposed dealing is specifically described in the ILUA, eg. the grant of an exploration permit under the *Mineral Resources Act 1989* to the ABC Mining Company
- the proposed dealing is within a class of acts described in the ILUA, eg. the grant of exploration permits under the *Mineral Resources Act 1989* within the area covered by the ILUA over the next 5 years to various applicants.

The NTA provides that a dealing is valid where the native title parties have consented in an ILUA to the dealing. The non-extinguishment principle⁵ will apply to the dealing (unless otherwise specified in the ILUA).⁶

After the ILUA has been negotiated

Once an ILUA has been negotiated and signed by all the parties, the ILUA is forwarded to the National Native Title Tribunal (NNTT), which applies a registration procedure involving a notification period. Objections may be made to the registration of the ILUA. If after the notification period the NNTT decides to register the ILUA, it is entered on the Register of Indigenous Land Use Agreements. The registered ILUA is then binding on **all** native title holders for that area.⁷

This Module is divided into the following four divisions -

- A. Preliminary considerations
- B. Advising an applicant that an ILUA is required
- C. Requirements for departments and agencies
- D. Effect on native title, compensation and decision-making.

Preliminary considerations

A checklist to consider

You have carried out your native title assessment in accordance with these Procedures and you have decided that the only way⁸ in which the proposed dealing can proceed is through a registered ILUA.

This means that you must be able to tick each of the following checkboxes in the checklist below. If you cannot tick all of the checkboxes, **do not proceed** until you have done so.

⁵ This means that native title rights and interests affected by the doing of the future act continue to exist and are not extinguished. However, while the future act exists, those native title rights and interests have no effect on the future act.

⁶ Section 24EB, NTA

⁷ National Native Title Tribunal. 2000. "List of Terms". *Native Title Facts*. Commonwealth of Australia.

⁸ You may also have assessed that a non-claimant application is a possibility under Module R, in which case there are two possible options. Please refer to Module R.

CHECKLIST

- the proposed dealing cannot proceed under
Module AB
- there is no existing registered ILUA that covers
your proposed dealing - **Module AC**
- there is no determination that native title does
NOT exist over the proposed dealing area -
Module AD
- a full tenure and usage history has been done -
Modules BA, BB, CA and CB
- a future act provision does not apply - **Modules F**

If you found a PEPA under **Module BA** but cannot rely upon it due to **Module BB**, seek advice from Aboriginal and Torres Strait Islander Land Services (ATSILS) through your NTCO, before proceeding any further.

Due to the significant amount of time, money and effort that can go into ILUA negotiations, it is very important that you satisfy this checklist. If you are not confident that a registered ILUA is actually required, provide your native title assessment and evidence to show that the checklist is satisfied to ATSILS, through your NTCO.

Who has responsibility for negotiating an ILUA?

Where, in relation to native title, a registered ILUA is required to validly proceed with the proposed dealing, this does not mean that the State must take on the responsibility of negotiating the ILUA. The requirement for a registered ILUA can be met by the applicant or proponent, ie. the person seeking the proposed dealing.

It is unlikely that the State would take on the negotiation of an ILUA for a specific dealing unless it was, for example -

- (a) of State significance
- (b) part of an broader ILUA covering many dealings
- (c) associated with the settlement of a native title claim

(d) the State was the applicant.

Further, just because the NTA requires that the State must be a party to the ILUA⁹, does not mean that the State must be involved in the negotiation of the ILUA.

Advising an applicant that a registered ILUA is required

You now need to advise the applicant. Depending upon the legislation, you may be able to give 'in-principle approval' but require that it is subject to native title being addressed. In any event, you will not be able to do the proposed dealing until the applicant can bring you evidence of a registered ILUA¹⁰ - see **Module AC**.

There are ten key points that must be included in a letter to the applicant -

1. For the State to validly proceed in relation to native title a registered ILUA is required.

If a non-claimant application is a possibility you will also need to include this as another option in your letter. Refer to **Module R**.

2. An ILUA is a voluntary agreement between the relevant native title parties for the ILUA area and other parties such as the applicant and/or the State.

It is a matter for the native title parties if they are willing to agree to the ILUA. If an ILUA is the only option, ie. a non-claimant application is not an option, and there is no agreement, the proposed dealing cannot proceed.

3. The ILUA must consent to the proposed dealing.

To ensure that the consent is correct, include a description of the proposed dealing in the letter, e.g. the grant of fee simple under the *Land Act 1994*. It should also be noted that if the applicant requires other approvals, it may be wise to include them into the ILUA as well.

4. Whether surrender of native title is required?

Surrender of native title is required where the proposed dealing is the grant of fee simple (a freehold estate). The grant of other tenures may also require the surrender of native title. Otherwise the non-extinguishment principle, i.e. suppression of native title, applies.

⁹ The State must be a party where there is surrender of native title, validation of invalid future acts or the ILUA type is an alternative procedures ILUA.

¹⁰ Where a non-claimant application is an alternative option (see Module R), the applicant will need to bring you evidence of a non-claimant application being filed and then you will need to satisfy the requirements of Module F to see if section 24FA protection has arisen.

5. Whether the State must be a party.

The State must be a party where surrender of native title is required.

6. That independent legal advice about the option/s is recommended.

This is very important as both options are complex involving a number of legal requirements and the State cannot provide legal advice to the applicant.

7. Until it has been registered by the NNTT, the State can not rely upon an ILUA to do the proposed dealing.

It is not until the ILUA is registered that it is binding against all native title parties for a particular area.

If a non-claimant application is a possibility, you will need to include in the letter that it not until requirements under Subdivision F, Division 3, Part 2 of the NTA are satisfied that the proposed dealing can proceed.

8. The ILUA only provides the authority for native title and not any State legislative requirements.

The ILUA only ensures that if the State proceeds to the dealing it will be valid in relation to native title. The department or agency must still comply with any requirements under the relevant State legislation and the applicant still must comply with any conditions the State imposes.

9. It is highly recommended that before the ILUA is signed by all the parties, it is submitted to your department/agency to ensure the future act/s consented to adequately describes the proposed dealing.

This will hopefully ensure that when you are presented with the registered ILUA, the registered ILUA can actually be relied upon to do the proposed dealing in relation to native title.

10. Assistance regarding the ILUA process can be sought from the NNTT (Free call 1800 640 501, <http://www.nntt.gov.au>).

Whilst great assistance can be found through the NNTT and the Guidelines, it is still important that independent legal advice is recommended.