



Chapter 11

Study: Central Queensland ILUA template

Indigenous land use agreements

While the native title system is able to deliver social and cultural outcomes through determinations of native title, Indigenous land use agreements (ILUAs) are one of the only ways in which native title holders can pursue economic development.

According to Professor Ciaran O’Faircheallaigh (Griffith University), outcomes for Indigenous groups could be better negotiated through organised approaches that identify traditional owner aspirations.¹ The case study on the central Queensland ILUA template (the CQ ILUA template), later in this chapter, is one such approach.

As pointed out by the President of the National Native Title Tribunal, there is considerable scope for making agreements in the form of ILUAs. For example:

- as part of the package of documents that formalise native title applications to areas of land and waters; or
- as ‘stand alone’ agreements that deal with native title issues independently of the native title determination process.²

Central Queensland’s local government ILUA template is the result of three years of negotiation. The Gurang Land Council Aboriginal Corporation (GLC), worked with three native title claim groups from central Queensland, the Local Government Association of Queensland (LGAQ) and 16 local governments, represented by MacDonnells Law, to develop a template for future ILUA negotiations.

In this chapter we will talk about ILUAs and their interaction with local government, then the greater part of the chapter will look at a case study of the central Queensland ILUA template.

What is an ILUA?

Indigenous land use agreements are voluntary agreements between native title groups, and others, about the use and management of land and waters. Once finalised an ILUA is entered on the Register of ILUAs and is legally binding on all parties to the agreement.

ILUAs are a tool of the native title system.³ The Native Title Act provides for them. They allow native title groups to negotiate flexible, pragmatic, legally binding agreements that meet their particular needs and aspirations. While they can be developed as part of a native title determination process, ILUAs can also be made separately from the formal native title application process.⁴ Thus Indigenous people do not need to have a native title application to enter into an ILUA.



Where there is no native title application or determination, the onus is on industry, government, or the representative body to establish who the right people are to be involved.⁵

Clarifying terminology

The terms 'native title claimant', and 'native title holders' are sometimes used loosely. Indigenous people often refer to themselves as 'native title holders' when asserting their native title interests.

- For the purposes of Indigenous land use agreements, Indigenous parties are referred to as native title holders (because the agreements are negotiated on the basis that the Indigenous party may hold native title to the area concerned).
- For the purposes of a native title claim process, a native title holder is one who has been determined by the Federal Court to have native title rights and interests (after determination). A native title claimant has a current registered native title claim.

Who uses ILUAs?

ILUAs can be negotiated across a number of topics including development, access, extinguishment, compliance procedures, cultural heritage and compensation. They may prescribe the relationship between native title rights and interests and the rights and interests of other people. That can make them an important tool in the resolution of native title issues. They don't have to deal with native title matters.

For example, an ILUA between a native title claim group and a local government⁶ may stipulate how the rights, interests and responsibilities of the local government can coexist with those of the native title holders. At the same time they ensure that the local government continues to perform its functions, and native title holders are able to exercise their recognised native title rights and interests in accordance with the law.

An appendix to this report gives examples of the range of rights and interests often sought by native title groups, and the categories of rights, interests and responsibilities often either held or exercised by local government. The relationship between such interests is considered in native title negotiations.

An ILUA allows developments on land to happen before or after determination of native title.⁷

What does an ILUA deal with?

An ILUA may be a stepping stone on the way to a native title determination, be part of the determination process, or it may suit the parties better than a determination. The advantage of an ILUA is its flexibility – it can be tailored to suit the needs of the people involved and their particular land use issues.⁸



The Federal Court of Australia determines native title. A determination deals only with:

- the identity of the people who hold the native title; and
- the nature of the native title rights and interests held by those people; and
- the area over which the rights are held; and
- the nature of other interests in the area; and
- the relationship between the native title and other rights (for example, whether the other rights prevail over native title); and
- whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.⁹

A determination order does not deal with the 'on the ground' issues such as future acts compliance, cultural heritage matters, or compensation for the extinguishment of native title. It is increasingly common practice for such issues to be addressed through an ILUA either before or concurrently with a consent determination order.

Creation and types of ILUAs

ILUAs are created under the *Native Title Act 1993* (Cth) (the Native Title Act). There are three types of ILUA:

- body corporate agreements
- area agreements
- alternative procedure agreements.¹⁰

Mining ILUAs

In many areas of Australia, particularly the desert regions, opportunities are limited for traditional owners to gain economically through ILUAs.¹¹

Mining ILUAs have to date appeared to produce the most substantial economic benefits. This is because large long-term mining projects can give royalty payments to native title parties, as well as other benefits including economic and employment opportunities, compensation, recognition of their native title, and cultural heritage. These ILUAs often relate to specific projects and do not necessarily address the resolution of the native title claim between the parties involved.

ILUAs and local government

Where there are no mineral riches and no plans for future development, the economic opportunities for ILUA agreements can be more limited.

Local government ILUAs

To date, local government authorities have been involved in 30 ILUAs, either as an applicant or a party. Of these, 25 have been registered and the remaining five are either in notification or have recently come out of notification.¹²



Several local government ILUAs are providing innovative models for how parties can contribute to the resolution of native title claims by agreement. Recently, agreements between local government and native title parties have also provided an opportunity for:

- traditional owners to discuss with local government how their social and cultural aspirations can be achieved locally;
- the development of more effective communication;
- local government to support scrutiny into a range of areas that may improve the economic capacity of traditional owner groups, particularly in training and employment; and
- local government to advocate for and support local projects identified during native title negotiations.

There is an overview of ILUAs where a local government authority is an applicant or a party in an appendix at the end of this report.

ILUA templates

ILUAs can be established for various purposes. In this chapter we are discussing templates for local government Indigenous land use agreements. We have chosen to call such a template by the shortened name 'ILUA template'.

A number of ILUAs have been negotiated for individual situations. However, templates have been developed recently, and they provide a time and cost effective way of assisting parties to negotiate – without 'reinventing the wheel' every time. A generic template can be adapted to provide tailored outcomes.

Templates may include standard clauses, terms and conditions that can then be applied to individual agreements to suit each particular situation.¹³

Parties have discretion in the issues dealt with in an agreement; there is flexibility and freedom to identify important issues. They can negotiate outcomes learning from experiences of those that have gone before.

Framework agreements can also be developed to provide a uniform process for all future acts of similar kinds or setting out a process for negotiating more substantive outcomes.

A Process or Framework agreement is an agreement between a native title party and other interested parties, binding them to a particular process rather than substantive issues. For example, a framework or process agreement may set out the process agreed to between the parties for the negotiation of an ILUA.¹⁴

(The use of the word 'framework' is used in the same sense as the word 'template' or 'model'.)

The National Native Title Tribunal encourages the use of templates when negotiating ILUAs, in particular, regional template agreements.



... while not everyone will want to use template or framework agreements, it is important that tools like these are available so that negotiations can proceed more effectively.¹⁵

ILUA templates also have limitations. The use of them has the potential to influence or limit the scope of negotiations and outcomes. A template may be based on previous inappropriate examples. It is easy to adopt ideas without careful scrutiny. It is important that templates are seen as models to be adapted to the specific needs and aspirations of the parties using them.



The South Australia Local Government ILUA template is an example of a template agreement developed from a particular ILUA, the Narungga Local Government ILUA. The Tagalaka ILUA developed in Northern Queensland is an example of another template agreement.

Example 1: South Australia Local Government ILUA template

The South Australia ILUA template was developed after consultations between the Aboriginal Legal Rights Movement, the local government association and the state government as part of the South Australia state-wide ILUA negotiations.¹⁶

The template originated from the Narungga Local Government ILUA.¹⁷ It was negotiated between the Narungga people of South Australia, the Yorke Peninsula Region of Councils (YPRC) (comprising of the District Councils of Yorke Peninsula, Copper Coast and Barunga West, the Wakefield Regional Council), and the State of South Australia. The agreement was signed in December 2004.

The agreement set out a process for planning infrastructure development, and protocols for the protection of Aboriginal heritage. It reflects negotiated native title outcomes that are specific to the participating local governments.

The template agreement is based on key provisions of the Narungga Local Government ILUA. The template will also take into account the differences between the particular circumstances of the Yorke Peninsula, and other Councils.¹⁸



Example 2: Tagalaka ILUA

The Tagalaka ILUA¹⁹ in North Queensland was developed using a template developed by Andrew Kerr of MacDonnells Law. The parties to this agreement include the Tagalaka native title party, the State of Queensland, and Croydon Shire Council.

The agreement is made up of two separate agreements:

- a relationship agreement between the native title party and the council (which establishes how the parties will work together in the future);
- a technical agreement which includes the state. The technical agreement requires state involvement in matters like the regularisation of roads and tenure for community infrastructure.

The ILUA considered the issues of the Tagalaka People who were keen to find ways to move back to country. Croydon Shire Council was able to address native title issues in township areas, such as the provision of public infrastructure, release of additional freehold land for township expansion, and development in the town.

The ILUA between the Tagalaka, the council and the state included a process for tenure resolution in Croydon, allowing all unallocated state land (USL) to be reallocated under the terms of a Queensland Land Act policy, the *Exchange of state land for native title interests*. This policy deals with an exchange of tenure grants in unallocated state land, in return for the surrender of native title. Under the terms of this policy, the Tagalaka have been granted freehold land, the state has gained freehold land, and a number of reserves have been created for community purposes.

There is an ancillary agreement which addresses:²⁰

- the validation of various acts;
- the process by which approval for future works and cultural heritage clearances will be managed;
- employment and training opportunities;
- other relationship matters including the purchase of a number of freehold blocks from the Tagalaka by the council for development, and a guaranteed period of rates-remission for those freehold blocks retained by Tagalaka.



Advantages of templates

The National Native Title Tribunal has identified advantages to using ILUA templates or frameworks. They are also conscious that each agreement needs to be tailored to suit each situation.

Key advantages of template agreements are:²¹

- they provide a time and cost effective way of assisting parties to negotiate. As a consequence, there is a financial benefit because fewer resources are required for each agreement;
- flexibility.

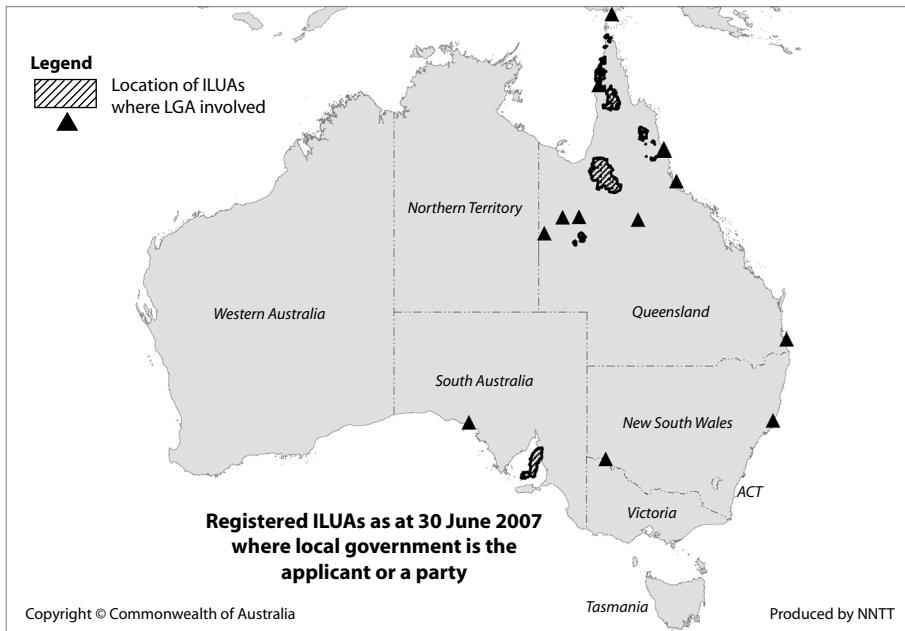
The tribunal warns that standardised agreements may make ILUAs less flexible. They may limit the issues that parties will bring to the table for negotiation, and the development of more creative outcomes. Consequently, it can be argued that ILUA templates could restrict negotiations, preventing parties from identifying issues which are unique to their particular circumstances, particularly where one party is more experienced in the ILUA process. In the past, for example:²²

Large mining companies have come to the negotiation table with a template ILUA, which native title groups have seen as a 'poor deal'. This has had the propensity to get relationships off to a bad start and effect subsequent negotiations.

However, ILUA templates are being used more, particularly in:

- South Australia where the state government has strongly advocated the use of ILUA templates to facilitate future ILUA negotiations;
- Queensland where legal firms have developed template agreements for local government and public utilities such as electricity providers and Telstra;
- Victoria where ILUA templates have been used in granting mining and exploration holdings.²³

The following map gives an idea of the extent of registered ILUAs where a local government authority is an applicant or a party.



Registered Indigenous land use agreements where a local government authority is an applicant or a party

The central Queensland project

This case study profiles a project to develop a template Indigenous land use agreement that may be used for future ILUA negotiations. Native title parties and local governments in central Queensland were involved. Of particular interest, are the processes of mediation and negotiation used to develop the template.

Summary of the project

Central Queensland's local government ILUA template (the CQ ILUA template) is the result of three years of negotiation. The Gurang Land Council Aboriginal Corporation (GLC), worked with three native title claim groups from central Queensland, the Local Government Association of Queensland (LGAQ) and 16 local governments, represented by MacDonnells Law, to develop a template for future ILUA negotiations.

The combined area of the three native title claims covers approximately 45,259 hectares.

This CQ ILUA template has been adopted for use by many native title and local government parties in the Gurang Land Council region.

The template is a useful framework for others entering into native title mediation. Particularly, it can narrow broad common issues, and provide flexibility to consider specific claim outcomes.

The CQ ILUA template cannot, however, be registered because it is incomplete, and designed only to be used as the framework for substantive negotiations between the parties. The intent is that substantive negotiations would focus on completing the ILUA, taking into account individual and local circumstance. Alterations, adapt-



ations and other departures from the template may also be agreed to ensure flexibility and enable creative variations.

Once claim groups have used the template to negotiate a substantive agreement, the native title party would authorise the ILUA, and apply to have it registered as a legally binding agreement on the National Register of Indigenous Land Use Agreements.

The key elements of the ILUA template include provisions for:

- claims resolution;
- future acts;
- cultural heritage; and
- other outcomes and initiatives.

Background to the central Queensland project

In 2004 a regional group representative model was introduced at the instigation of the Commonwealth Attorney-General's Department.²⁴ It was for Queensland local government native title negotiations. The Local Government Association of Queensland (LGAQ) supported the initiative and agreed to act as a group representative for all of the Queensland local government groups.²⁵

Negotiations were conducted with one claim group represented by Gurang Land Council, and two local government regional groups. Two separate negotiations were conducted. After discussion between the group and legal representatives, about how such negotiations could be streamlined, the idea of developing a template emerged for the Gurang Land Council region.

Broadly, the objective of the project was to:

- develop a framework agreement that would expedite the mediation and resolution of native title between native title claim groups and local governments;
- reduce the associated negotiation costs; and
- provide the opportunity to develop simplified compliance processes.

The scope of the project broadened during the negotiations.

In order to prepare this case study, all parties have authorised the Human Rights and Equal Opportunity Commission to access documents and other materials, released with the consent of respective representatives and which provide background to the agreed frameworks and outcomes of the process.²⁶



Aim of the project

The aim of the project was to develop an ILUA template that:

- could be recommended by Gurang Land Council, MacDonnells Law and LGAQ as the starting point for negotiations between native title parties and local government groups throughout the Gurang region; and
- in the longer term, could be introduced throughout Queensland with the support of other native title representative bodies.



Preparations

The parties wanted to draw on the range of difference in the Gurang Land Council region, and yet ensure the negotiations were of a manageable size.

■ It was agreed that the Gurang Land Council would identify three native title claim groups for involvement in the project. This was to ensure a workable group. The factors taken into account to select the participating groups included:

- the relative stability of the claim group and it's representatives;
- the stage of any research being conducted to support the claim;
- the differing range of issues that each group may bring to the negotiation table;
- the availability and capacity of claim group representatives to attend regular meetings;
- the willingness of the claim group to work constructively with other claim groups for the period of the project; and
- the extent of overlapping claim issues.

Finally, representatives from the following three native title claimant groups participated in the project: QUD6005/01 Port Curtis Coral Coast, QUD6144/98 Gangalu, and QUD6162/98 Iman People Number 2.

■ After the groups were selected, the Local Government Association of Queensland (LGAQ) invited each affected local government area (in part or in whole) to participate in the project. MacDonnells Law was instructed to represent local government throughout the project.

In all, sixteen local governments agreed to participate in the project. They were:

Banana Shire Council; Bauhinia Shire Council; Biggenden Shire Council; Bundaberg City Council; Burnett Shire Council; Calliope Shire Council; Chinchilla Shire Council; Daringa Shire Council, Fitzroy Shire Council; Gayndah Shire Council; Kolan Shire Council, Miriam Vale Shire Council; Monto Shire Council; Mount Morgan Shire Council; Perry Shire Council; and Taroom Shire Council.

■ In May 2006 representatives of the claim group and local governments were invited to a workshop organised and facilitated by Gurang Land Council, MacDonnells Law and LGAQ. Prior to the workshop, the organisers jointly developed a proposed negotiation framework for consideration at the workshop.

This workshop represented the initial joint briefing about the project and provided an opportunity for people to raise questions and also discuss the negotiation framework proposed. The project was endorsed at the workshop and it was also decided to formalise the agreed negotiation framework in a memorandum of understanding (MoU).

■ The parties also agreed at the workshop to invite the National Native Title Tribunal to facilitate the ILUA template negotiations as a formal mediation under the Native Title Act, and there was discussion between the relevant tribunal members and the representatives before the MoU was signed.



Process used in the project

The project negotiations were to consist of two stages. To mediate:

- development of the ILUA template; and
- specific localised ILUAs between the local governments and the native title parties using the ILUA template as the starting point.²⁷

The negotiation framework outlined in the MoU entailed the formation of the following two groups.

General working group	Legal working group
<ul style="list-style-type: none"> ▪ up to two from each council ▪ up to two from each claim group (it was subsequently agreed to increase this to three) ▪ MacDonnells Law ▪ LGAQ ▪ Gurang Land Council ▪ an independent facilitator.²⁸ 	<ul style="list-style-type: none"> ▪ MacDonnells Law ▪ LGAQ ▪ Gurang Land Council.

Memorandum of understanding

The framework for the negotiations adopted by the parties was recorded in three memorandums of understanding (MoU). Identical terms were used between each separate claim group and the respective local governments. The MoUs were executed at a signing ceremony held on 19 October 2006.

Memorandums of understanding, or accords, are documents that demonstrate political will but are not legally binding. They can be used to create a framework for further action, clarifying roles and responsibilities of the parties. MoUs can be based on community consultations and negotiations rather than on a legal framework involving lawyers. The aim is to reach an amicable and workable arrangement for the long-term benefit of the community.²⁹

Aim of the MoU

- engender good faith at the start;
- separately address some of the legal complexities, which could potentially delay the negotiations;
- resolve any underlying adversarial aspect of mediation, and move towards a collective resolution of issues and development of options; and
- narrow the issues to assist in structuring proposed mediation.³⁰



This process of understanding each others' responsibilities, aspirations and priorities set the foundation for positive relationships and inclusive participation for everyone.

Outline

The memorandum of understanding outlined:

- acknowledgements made by each party;
- the aims of the template ILUA project;
- the negotiation framework that would be adopted;
- broad discussion points identified at the May 2006 workshop; and
- confidentiality provisions.

Discussion points

The broad points for discussion included:

- recognition of rights of native title claim groups, as the native title claim group for the area under claim;
- cultural and other aspirations and priorities of native title parties, such as the protections and rights of decision-making in respect of cultural heritage;
- social and economic benefits, opportunities and development for members of the native title parties;
- involvement of the native title parties in decisions which may impact upon the council's Indigenous issues;
- the council's responsibilities to provide services and facilities in its local government area for the public benefit;
- the relationship between native title and local government planning processes and outcomes;
- the inclusion of, and participation by, the native title parties in community events and festivities; and
- working cooperatively to source community funding.

Settings used

In addition to recording aspirations and a framework in the MoU, the legal representatives and the group representative also organised a number of events in the early stages of the negotiation to encourage the parties to interact on an informal basis. In particular:

- A formal lunch (including speeches and traditional ceremonies) was held to mark the signing of the MoU.
- An informal bar-b-que dinner for all the Working Group representatives was held at the conclusion of the first day of mediation which included a traditional dance performance.
- Group exercises which encouraged the Working Group representatives to interact with each other were organised just prior to commencement of the formal mediation.



- A half day interactive workshop that provided insight into Aboriginal culture, law and history, conducted by an independent facilitator, was attended by all the Working Group representatives.³¹

These activities set the scene for positive engagement in the formal mediation process.

Mediation

The working group agreed to meet for two consecutive days, every six to eight weeks until the template was completed. The template was broadly agreed at the fifth meeting (10 days of negotiation in total), then settled by the legal working group.

The parties involved were briefed separately. Each local government formally resolved to adopt the template and move into stage two of the negotiations.

The first mediation meeting identified categories of specific issues (drawing on the MoU). Subsequent meetings addressed each identified category. Most meetings were held in Bundaberg.

The two-day mediation meetings were usually conducted in the following phases:

- The native title claim group representatives met separately with their legal representative during the morning of the first day (and usually also met for the full day before).
- The local government representatives met separately with their legal representative during the morning of the first day. (A separate full day meeting with the local government representatives was also held once during the mediation.)
- The afternoon of the first day, when the formal mediation started, the working group reviewed changes made to the draft template by the legal working group since the last meeting. This review also enabled discussion of any other issues arising from the draft (or previous meetings).
- The second day focused on the next category of issues identified at the first mediation meeting, aiming at consensus on how to address the related issues in the next draft of the ILUA template.

Some of the features identified by the legal representatives, and the group representative, that assisted in the progress of these negotiations included:

- an emphasis on developing relationships between the working group representatives;
- a history within some of the local areas of local government assisted to address local Indigenous issues;
- the decision to discuss most of the legal and drafting issues at a separate meeting of the legal working group (there were usually two or three meetings of the legal working group between each mediation meeting), allowing the mediation to focus on the broad issues of interest to the representatives;



- the time spent preparing for the mediation during the morning of the first day (and in the case of the native title representatives, also the previous day); and
- the enthusiasm amongst the working group representatives to look positively towards the future and produce an outcome that would work 'on the ground'.

Contents of the central Queensland ILUA template

The template that arose from the process outlined above will form the basis of individual ILUAs between local governments and native title groups. Two ILUA templates have been drafted for:

- a single government party; and
- multiple local government parties.

It is intended that a final ILUA will be settled before the associated native title claim is finalised, and probably before the conclusion of negotiations between the native title group and other respondent parties.

The CQ ILUA template provides for options on how native title and cultural heritage issues may be resolved in the claims resolution process and also provides for an innovative approach to future mediation through the introduction of 'other outcomes'.³²

The template is divided into five distinct parts.

- Part 1 – Preliminary
- Part 2 – Resolving the native title claim
- Part 3 – Native title compliance
- Part 4 – Aboriginal cultural heritage compliance
- Part 5 – Other outcomes

Part 1 – Preliminary

This part of the CQ ILUA template covers a number of technical issues. However it also contains the following important features:

- recognition of traditional ownership (regardless of the native title claim outcome);
- an expectation that the claim group may ultimately be represented by a corporate entity (regardless of the native title claim outcome);³³
- review of the ILUA (within 5 years of execution);
- a comprehensive dispute resolution process; and
- termination provisions with a high degree of flexibility. They anticipate how the native title claim may be finalised, and how the final outcome of the native title claim will impact on each individual Part of the ILUA. (Each possibility is detailed in Part 2 of the template.)



Part 2 – Resolving the native title claim

This part of the CQ ILUA template deals exclusively with the resolution of the native title claim. It recognises that there are four possible ways that a claim may be finalised, assuming the ILUA is concluded in the relatively early stages of negotiation (as is anticipated). Once the native title claim is finalised, this part of the ILUA automatically terminates as the issue is resolved.

The template deals with what the parties agree will occur in the event of any of the following four possibilities summarised in the table below.³⁴

Possible outcomes for the native title proceedings	
Scenario	Meaning
1. Consent determination	Determination orders are made with the consent of all parties to the native title claim required for a determination recognising the existence of native title. ³⁵ The local government and native title group agree to work towards resolving the native title claim under this possibility.
2. Contested final hearing	There is no consent determination and the native title claim proceeds in such a way (for example by way of a final hearing before the Federal Court), that there could ultimately be either an order made that native title does or does not exist.
3. Native title is surrendered	The native title party agrees to surrender any native title in the ILUA area to the State of Queensland.
4. Native title claim discontinued, struck out or dismissed	The native title claim is discontinued by the native title party, or struck out or dismissed by order of the Federal Court.

In summary, the template indicates that the local governments will support a consent determination subject to the satisfaction of a number of conditions.

In anticipation of a consent determination the template includes acknowledgment of:

- respective interests in the area (that is, the asserted native title rights and interests and the categories of local government interests listed in an Appendix to this report);
- certain community interests, the particulars of which would be included in the final ILUA.

The template records the co-existing relationship between these respective interests and the extent of native title extinguishment in the area.

In the event of a contested final hearing of the native title claim in the Federal Court, the template states:



- that the ILUA may be tendered as evidence and that parties will cooperate to minimise the time and cost involved in any such hearing.

The template also provides that local governments agree to participate and assist (when relevant and appropriate), in any negotiations between the native title group and other respondent parties about non-native title outcomes.

As observed by Gilkerson (from MacDonnells Law):³⁶

The structure and content of the template ILUA ensures that real value is added to the basic claim resolution provisions and that both native title parties and local governments will gain enduring benefits from the final ILUAs however claims are resolved.

Part 3 – Native title compliance

This part of the central Queensland ILUA template details a process that is alternative to the ‘future act’ regime in the Native Title Act. (It was developed and agreed to by the working group.)

Basically, a future act involves a proposed activity or development on land and/or waters that affects native title rights and interests. Generally, rights to be informed and consulted about a future act are given to native title claimants.³⁷

The working group was keen to develop a simple and streamlined procedure that addressed:

- most local government obligations under the Native Title Act;
- local governments’ statutory duty of care obligations under the *Aboriginal Cultural Heritage Act 2003* (Qld) (the Aboriginal Cultural Heritage Act).³⁸

The ILUA template records how both the native title compliance arrangements (in Part 3) and the Aboriginal cultural heritage compliance arrangements (in Part 4) are coordinated. This has been achieved through two simple steps:

- A range of local government activities are rated as having either a ‘high impact’ or ‘low impact’ – to the extent that they may affect native title and to the extent that they may impact on Aboriginal cultural heritage.
- The ILUA template provides that a notice must be given to the native title claim group of any high impact activity proposed (the same notice can be used for both native title and Aboriginal cultural heritage high impact activities).

The template broadly allows low impact activities to proceed, whilst high impact activities can only proceed with agreed compliance procedures.



Native title impact activities in the ILUA template³⁹	
Low native title impact activity - procedures	High native title impact activity - compliance procedure
<ul style="list-style-type: none"> ▪ Maintenance ▪ Low impact infrastructure ▪ Statutory approvals ▪ Low impact tenure grants ▪ Invalid past acts ▪ Pest control ▪ Access and site investigation ▪ Contractual interests ▪ Operational activities ▪ Emergencies ▪ Contractual interests with third parties ▪ Works/infrastructure otherwise agreed at a capital works forum 	<ul style="list-style-type: none"> ▪ High impact infrastructure ▪ High impact tenure grants ▪ Activities preventing the exercise of native title ▪ High impact works/infrastructure otherwise agreed at a capital works forum

A high impact native title activity cannot proceed unless consultation occurs. The consultation process is to be negotiated during the second stage of negotiations.

Consensus alternative

As an alternative to the notice and consultation compliance procedure, a consensus decision on the impact of an activity may be made at a capital works forum. Whilst this innovative mechanism is recorded in Part 4 of the central Queensland ILUA template, an explanation of the capital works forum process follows.

The template contains specific compliance procedures including notification and participation in the decision-making processes for high impact future acts, that may affect Aboriginal cultural heritage, or that fit both the other categories.

The capital works forum combines the consideration of the native title future act, and cultural heritage into one practical process that provides the parties with more flexibility to work outside the specific compliance procedures if they choose.

The native title parties will regularly meet with the capital works forum to review the local government's proposed capital works, their possible impacts on native title and cultural heritage, and any additional compliance action necessary. The working group discussed this concept at length, and details of how the forum will operate are included in the template.

Part 5 of the ILUA template provides for the establishment of a broader communication mechanism.



Importantly, the non-extinguishment principle applies to any future acts carried out in accordance with the ILUA template. Consequently, the template does not address the acquisition of native title. Native title acquisition must still be undertaken in accordance with a separate agreement, to which the State of Queensland is a party, and which is registered as an ILUA.

Part 4 – Aboriginal cultural heritage compliance

Part 4 of the ILUA template records procedures to ensure Aboriginal cultural heritage is not harmed or damaged.

Aboriginal cultural heritage is protected under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and, specific to the current case study, the *Aboriginal Cultural Heritage Act 2003* (Qld).

The inclusion of ILUAs as a compliance option under the Aboriginal Cultural Heritage Act means that:

- the parties to an ILUA can include in the agreement their own procedures to ensure that activities avoid, or otherwise reasonably minimise, harm to Aboriginal cultural heritage;
- an activity can also proceed lawfully if it is covered by an ILUA (or by certain other provisions in the Aboriginal Cultural Heritage Act).⁴⁰

As the memorandum of understanding between the parties indicated:⁴¹

Completed ILUAs based on the ILUA template will constitute 'native title agreements' for the purposes of the *Aboriginal Cultural Heritage Act 2003*. [Consequently], the Councils will be complying with their cultural heritage obligations if they proceed in accordance with completed agreements.

Unless the native title group is no longer recognised under the Aboriginal Cultural Heritage Act as the 'Aboriginal party'⁴² this part of the ILUA may continue indefinitely, regardless of the outcome of the native title claim. However the parties are not prevented from making other agreements affecting Aboriginal cultural heritage.

The recognition of ILUAs under both the Native Title Act and the Aboriginal Cultural Heritage Act enables and encourages parties to address the legally distinct issues of native title and Aboriginal cultural heritage in the same ILUA which adds value to the agreement reached. A table of the cultural heritage impact activities in the CQ ILUA template follows.⁴³



Cultural heritage impact activities	
Low cultural heritage impact – procedures	High cultural heritage impact – compliance procedure
<ul style="list-style-type: none"> ▪ Maintenance ▪ Pest control ▪ Access and site investigation ▪ Works/infrastructure on a disturbed area ▪ Emergency ▪ Works/infrastructure otherwise agreed at a capital works forum 	<ul style="list-style-type: none"> ▪ Works/infrastructure on an established cultural heritage area ▪ Works/infrastructure where a cultural heritage find is made ▪ Works/infrastructure on an undisturbed area ▪ High impact works/infrastructure otherwise agreed at a capital works forum

A high impact cultural heritage activity cannot proceed unless prior notice is given (as discussed in Part 3, the same notice covers both native title and cultural heritage) and a clearance procedure is completed. The details of the clearance procedure including remuneration will be negotiated during the second stage of negotiations.

An alternative to a notice and clearance procedure, as mentioned earlier, is a consensus decision reached at a capital works forum, about the impact of activities and the appropriate action (if any) required.

Part 5 – Other outcomes

Part 5 of the ILUA template has two broad areas.

■ The template records the practical outcomes agreed between local governments and the native title group that are unrelated to the outcome of the native title claim. This may include a range of social, cultural, economic and community matters.

The parties believe that by working together, they can achieve additional, practical outcomes on issues which affect the lives and values of the native title parties and other Indigenous people in the local community.⁴⁴

Particulars to be included in this Part of the ILUA would be negotiated during the second stage of negotiations. Examples identified by the working group include:⁴⁵

- arts and cultural programs;
- community recognition;
- employment and training initiatives;
- Indigenous business development initiatives;
- involvement in environmental protection and land management;
- opportunities to secure Commonwealth and state funding for identified activities;
- partnership programs;
- reconciliation statements;
- social and equal access programs;
- traditional owner recognition; and
- tenure resolution approved by the State government.



The ILUA template anticipates that the agreed outcomes may fall into two areas:

- those that local government can commit to; and
- those policies and programs that require further discussion and consideration for a variety of reasons including future budget allocation uncertainties, the need for the support of third parties, and the general capacity of a local government and the native title claim group to undertake projects.

■ The template provides for the establishment of a consultative committee as a forum for regular communication. It is an addition to the technically focused capital works forum discussed earlier.

The purpose, structure and functions of the consultative committee would be determined in the second stage of negotiations to ensure that individual ILUAs meet the local needs and aspirations of the parties involved. The committee would meet on a regular basis to discuss the implementation of the ILUA and other local issues.⁴⁶

This Part of the ILUA provides parties with a tangible opportunity to establish a framework for a long-term relationship aimed at building a stronger and enduring local community that ensures effective communication between the native title party and local government.

The template recognises that mistakes may be made along the way. Accordingly, the template provides two separate communication forums where new ideas and proposals for mutual consideration can be put forward and concerns may be addressed. This ensures that a permanent relationship between the parties at the local level is maintained.

Implementing the central Queensland ILUA template

Implementation of the local government ILUA template will involve the development of individual final ILUAs between native title claim groups and the councils specific to their claim areas. The final ILUAs will use and adopt the template to ensure tailored and locally-focussed results.

The template is a progressive tool that provides a model, and detailed guidance for mediation and negotiation. It assists parties to identify issues of importance, develop solutions to problems, and achieve outcomes.

On completion of the negotiations for substantive agreements, native title parties will authorise the ILUA in accordance with Section 24CG of the Native Title Act. An application would be made to have the ILUA registered as a legally binding agreement on the National Register of Indigenous Land Use Agreements.

The amalgamation of many Queensland local governments in March 2008 was announced during the ILUA template negotiations. The parties recognised that this structural change could delay the commencement of Stage 2 negotiations.

When adopting the ILUA template, the councils involved in the negotiations ensured the newly amalgamated local governments would move into the second stage of these negotiations by mid 2008. Consequently, the local government amalgamations should not have a significant effect on the second stage of negotiations towards final ILUAs.



Parallel to the template negotiation process, two of the participating groups have begun developing their corporate governance structures, taking into consideration how they manage and implement their responsibilities under a final ILUA.

Strategic planning workshops have been held or are due to be held, to develop governance structures and rules for claim groups. Those involved would be Gurang Land Council, claim groups working with independent legal advisers, and claim anthropologists. These governance structures will reflect law and custom elements such as claim group membership, representation and distribution of benefits. These governance structures are provided for under *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the CATSI Act).⁴⁷

It is contemplated that the structures will be:

- multi-dimensional, anticipating representative and decision-making structures, asset holding structures, business development operations, and cultural heritage operations;
- developed to operate as social, cultural and business entities; and
- in the event of a determination, possibly nominated as regional cultural heritage bodies and as prescribed bodies corporate (PBC).⁴⁸ (A detailed analysis of changes to PBCs is provided in another chapter of this report.)

The legacy of the central Queensland ILUA template

As this report was being written, the ILUA template was being adopted for mediation purposes with up to four claim groups in the Gurang Land Council region, and was being forwarded to Queensland South Native Title Services (QSNTS) for its consideration.

As observed by the previous Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Native Title Report 2003*, native title parties are often only afforded 'a right to be consulted on ways to minimise the impact of the development on native title rights and interests'. He highlighted the lack of Indigenous participation in benefits from development.⁴⁹

The ILUA process that the native title parties and local governments have embarked upon contributes significantly to the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples. Daes argues that the exercise of these rights is preconditioned on consultation with Indigenous peoples.⁵⁰

An agreement process such as described in this chapter provides for native title parties to decide their own priorities for the process of social, cultural and economic development.⁵¹ In particular it takes steps to ensure the progressive realisation of Indigenous peoples' right to development that encourages participation in decisions directly affecting their lives, beliefs, institutions and their lands.⁵²

This process seeks to provide a level of recognition of Indigenous people, without argument. To some degree, it is almost akin to local government adopting the Declaration on the Rights of Indigenous Peoples and incorporating elements of governance and care for country in their protocols.⁵³



- 1 Corbett T. and O'Faircheallaigh C., *Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTAs, Arbitration Provisions*, Department of Politics and Public Policy, Griffith University, Brisbane, 2006.
- 2 Neate, G., *Indigenous Land Use Agreements: Some legal issues*, Paper presented by the President of National Native Title Tribunal at the Native Title Forum, Brisbane, 1-3 August 2001. Available online at: http://www.nntt.gov.au/metacard/files/Negot_neate1/ILUAs_some_legal_issues.pdf, accessed 13 September 2007.
- 3 See Division 3, Subdivisions B, C, D & E of the *Native Title Act 1993* (Cth) for more information about ILUAs and their registration.
- 4 National Native Title Tribunal, *Indigenous Land Use Agreements*, Fact Sheet, Commonwealth of Australia, 2006. Available online at: <http://www.nntt.gov.au/ilua/index.html>, accessed 13 September 2007.
- 5 National Native Title Tribunal, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, Telephone Interview, 19 December 2007.
- 6 For the purposes of this report 'local government' will be the term used to describe Local Councils as a general term. We acknowledge that different states will have different terms (Shire, District, etc) that they would usually use to describe their local authorities.
- 7 National Native Title Tribunal, *What is an indigenous land use agreement (ILUA)?*, available online at: http://www.nntt.gov.au/publications/1021435535_10212.html, accessed 13 September 2007.
- 8 National Native Title Tribunal, *What is an indigenous land use agreement (ILUA)?*, available online at: http://www.nntt.gov.au/publications/1021435535_10212.html, accessed 13 September 2007.
- 9 Finlayson Lawyers, *Native Title Briefing Paper for Local Councils*, December 2004, prepared for the Local Government Association, December 2004, p4. See also s225 of the *Native Title Act – Determination of Native Title*.
- 10 For more information on the types of ILUAs see the National Native Title Tribunal website available online at: http://www.nntt.gov.au/metacard/files/Mediation_guide/102mid.html, accessed 11 October 2007.
- 11 Identified in the *Native Title Report 2006*.
- 12 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 13 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 14 National Native Title Tribunal, *Local Government Agreements: Content Ideas*, Raine Quinn, Research Unit, August 2005, Commonwealth of Australia, 2005, p11.
- 15 Neate, G., (President, National Native Title Tribunal), *Mining template agreements help people to focus on the big picture*, Media Release, 21 April 2004, p1. Available online at: http://www.nntt.gov.au/media/1082597924_744.html, accessed 13 September 2007.
- 16 For further information about the South Australia State-wide ILUA Negotiations see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, HREOC, Sydney, 2006, pp113-123.
- 17 This agreement is also known as the Yorke Peninsula Indigenous Land Use Agreement.
- 18 Finlayson Lawyers, *Native Title Briefing Paper for Local Councils*, December 2004, prepared for the Local Government Association, December 2004, p4.
- 19 Elston, K., Wade, R., Carse, K., Pickering, C., Kerr, A., *The Tagalaka ILUA*, Abstract of Presentation at the Native Title Conference 2007, Cairns, 6-8 June 2007, available online at www.ntru.aiatsis.gov.au/conf2007/speakers.html, accessed, 13 September 2007.
- 20 Elston, K., Wade, R., Carse, K., Pickering, C., Kerr, A., *The Tagalaka ILUA*, Abstract of Presentation at the Native Title Conference 2007, Cairns, 6-8 June 2007, available online at www.ntru.aiatsis.gov.au/conf2007/speakers.html, accessed, 13 September 2007.
- 21 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 22 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 23 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 24 The Commonwealth Attorney-General's Department administers the financial assistance scheme for native title respondents.
- 25 The group representative is the initial and primary contact point for Qld local government about native title and the representative works in partnership with the legal representative selected by each group. Amongst a range of responsibilities, the group representative is tasked with ensuring each local government group's processes have to the greatest extent possible an overall commonality of approach.
- 26 This material was authorised for release and use and all privilege waived subject to the release being made with the consent of all representatives (Gurang Land Council, MacDonnells Law and LGAQ). At a mediation meeting in Bundaberg on 29 June 2007, the questions was asked of the Working Group if they were happy for the template ILUA to be the subject of a HREOC case study and they all agreed unanimously by show of hands.



- 27 Clause 4.1 of the Memorandum of Understanding between Port Curtis Coral Coast People and local government dated 19 October 2007, p6.
- 28 Clause 4.2 of the Memorandum of Understanding between Port Curtis Coral Coast People and local government dated 19 October 2007, p6.
- 29 National Native Title Tribunal, *Local Government Agreements: Content Ideas*, Raine Quinn, Research Unit, August 2005, Commonwealth of Australia, 2005, p11.
- 30 Gurang Land Council, *Model Indigenous Land Use Agreement between Native Title Parties and Local Governments*, Discussion Paper, 30 July 2007, p2.
- 31 Support for this workshop was firstly obtained through the National Native Title Tribunal.
- 32 Gurang Land Council, *Model Indigenous Land Use Agreement between Native Title Parties and Local Governments*, Discussion Paper, 30 July 2007, p3.
- 33 Two of the participating groups have begun developing their corporate governance structures that will reflect the law and custom with respect to elements such as claim group membership, representation and distribution of benefits.
- 34 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007, pp15-16.
- 35 The reference to 'all parties' means the respondent parties to the native title claim application, ie. the State of Queensland, pastoralists, other industry parties. Section 87A of the Native Title Act sets out the respondent parties that are required to give notice of their consent to any proposed determination orders.
- 36 Gilkerson, O., *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 28 September 2007, p14.
- 37 National Native Title Tribunal, *Glossary*, Commonwealth of Australia, 2006, available online at <http://www.nntt.gov.au/about/glossary.html>, accessed 25 September 2007.
- 38 s23(1) of the *Aboriginal Cultural Heritage Act (Qld) 2003* states – A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the cultural heritage duty of care). Maximum penalty – (a) for an individual – 1000 penalty units; (b) for a corporation – 10,000 penalty units.
- 39 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 40 The *Aboriginal Cultural Heritage Act 2003* (Qld) provides that: (a) The parties to an ILUA can include in the agreement their own procedures to ensure that activities avoid, or otherwise reasonably minimise, harm to Aboriginal cultural heritage: and (b) That an activity can also proceed lawfully if it is covered by certain provisions in the Aboriginal Cultural Heritage Act. See Sections 23(3), 24(2), 25(2), and 26(2) of the Act.
- 41 Clause 4.5 of the Memorandum of Understanding between Port Curtis Coral Coast People and local government dated 19 October 2007, p8.
- 42 s35 of the *Aboriginal Cultural Heritage Act 1993* (Qld) defines an "Aboriginal Party".
- 43 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 44 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 45 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 46 Gilkerson, O., MacDonnells Law, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, email 24 September 2007.
- 47 A detailed analysis of the *CATSJ Act* which commenced on 1 July 2007 is provided in this Report.
- 48 A detailed analysis of the native title reforms relevant to Prescribed Bodies Corporate is provided in this Report.
- 49 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p13, available online at: http://www.humanrights.gov.au/social_justice/nt_report/ntreport03/index.htm, accessed 27 September 2007.
- 50 Daes, E., *Indigenous Peoples Permanent Sovereignty over Natural Resources*, 2004, National Native Title Conference, Adelaide, 3 June 2004, p6, available online at www.hreoc.gov.au/about/media/speeches/social_justice/natural_resources.html, accessed 26 September 2007.
- 51 *International Labour Organisation Convention Concerning Indigenous and Tribal Peoples, 1989 (No.169)*, Article 7(1).
- 52 *Declaration on the Right to Development (1986)*, Article 8(2).
- 53 Escartin, M. (Gurang Land Council), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 27 September 2007.