



National
Native Title
Tribunal



AUSTRALIAN
LOCAL
GOVERNMENT
ASSOCIATION

Developing indigenous land use agreements

A guide for local government

Facilitating timely and effective outcomes.

Disclaimer

This document is provided by the National Native Title Tribunal as general information only. It is made available on the understanding that neither the National Native Title Tribunal and its staff and officers nor the Commonwealth are rendering professional advice. In particular, they:

- accept no responsibility for the results of any actions taken on the basis of information contained in this paper, nor for the accuracy or completeness of any material it contains; and
- to the extent allowed by law, expressly disclaim all and any liability and responsibility to any person in respect of the consequences of anything done or omitted to be done by that person in reliance, either wholly or partially, upon the information contained herein.

It is strongly recommended that all readers exercise their own skill and care with respect to the use of the information contained in this document. Readers are requested to carefully consider its accuracy, currency, completeness and relevance to their purposes, and should obtain professional advice appropriate to their particular circumstances. This information does not indicate any commitment to any particular course of action by either the Tribunal or the Commonwealth.

© Commonwealth of Australia

This work is copyright. It may be reproduced in whole or in part for study or training purposes if an acknowledgment of the source is included. Such use must not be for the purposes of sale or commercial exploitation.

Subject to the Copyright Act, reproduction, storage in a retrieval system or transmission in any form by any means of any part of the work other than for the purposes above is not permitted without written permission.

Information about this report and requests and enquiries concerning reproduction should be addressed to:

National Native Title Tribunal
Communications Unit
GPO Box 9973, Perth WA 6848
Telephone: 1800 640 501
Email: enquiries@nntt.gov.au

Table of contents

Part 1 – Background information about ILUAs

| | | |
|----|---|----|
| 1. | Introduction | 6 |
| 2. | The role of ILUAs in resolving native title matters | 7 |
| 3. | Negotiating with the right Traditional Owners | 8 |
| 4. | Registering an ILUA | 9 |
| 5. | The effect of registration of an ILUA | 10 |
| 6. | Template ILUAs for Local Government | 10 |

Part 2 – Negotiating an ILUA

| | | |
|----|---|----|
| 1. | Preparing for negotiations | 13 |
| 2. | Setting the context | 18 |
| 3. | Resource requirements | 22 |
| 4. | Developing the Agreement | 26 |
| | Step 1 Identifying reasons | 27 |
| | Step 2 Developing a negotiating position and style | 30 |
| | Step 3 Developing a negotiating framework | 34 |
| | Step 4 Managing the negotiations and focusing on outcomes | 38 |
| | Step 5 Reaching agreement and settlement of final terms | 41 |
| 5. | Implementing the Agreement | 42 |
| 6. | Conclusion | 45 |

Part 3 – Technical issues

| | | |
|----|--|----|
| 1. | Three types of ILUAs and what they can and cannot be about | 48 |
| 2. | Parties to an ILUA | 49 |
| 3. | Important guidelines for ILUAs | 52 |
| 4. | Notification and registration requirements | 53 |

References

Part 1
Background
information
about ILUAs

1. Introduction

An indigenous land use agreement (ILUA) is a voluntary agreement made under the *Native Title Act 1993* (Cwlth) between people who hold, or claim to hold, native title in an area and other people who have, or wish to gain, an interest in that area. They are negotiated agreements, and when registered they are binding on all persons who hold or may hold native title for the area covered by the agreement.

An ILUA allows people to negotiate flexible, pragmatic agreements to suit their particular circumstances without having to resort to litigation or relying on the other processes for dealing with future acts within the *Native Title Act 1993* (Cwlth).

An ILUA can be negotiated over areas where native title has, or has yet, to be determined to exist. They can be part of a native title determination, or settled separately from a native title claim. ILUAs may be made about any native title matters the parties want to have an agreement about, as well as other associated issues. For example, ILUAs can be made on the following matters:

- native title holders agreeing to a future development
- how native title coexists with the rights of other people
- access to an area
- extinguishment of native title rights and interests
- compensation for the loss or impairment of native title rights and interests
- creating a protocol for dealing with Aboriginal or Torres Strait Islander cultural heritage matters (which is different from native title and is governed by separate state, territory and Commonwealth heritage protection legislation and not under the Native Title Act) and/or
- providing economic and social benefits for Aboriginal and Torres Strait Islander people and communities.

Before embarking on the development of an ILUA, first consider whether an ILUA is the best way of resolving a native title matter (in particular if it will only cover a particular future act¹). An ILUA must deal with native title matters. If the agreement is not going to deal with native title matters, then an ILUA is not appropriate.

The advantage of an ILUA is its flexibility—it can be tailored to meet the needs of the parties involved and their particular land use issues. By making agreements, Aboriginal and Torres Strait Islander people may gain benefits such as recognition of their native title rights and interests, employment opportunities and/or compensation. Other parties to the agreement may be able to proceed with new uses or development of their land for other purposes.

¹ Proposed activities or developments that may affect native title are classed as ‘future acts’ under the *Native Title Act 1993* (Cwlth). See page 56.

2. The role of ILUAs in resolving native title matters

Native title is subject to the laws of the Commonwealth and state or territory, including town planning schemes, health and building by-laws and environmental protection legislation, and is also subject to private rights validly granted under Commonwealth and state or territory laws.

The Native Title Act, however, is silent on vital questions about the practical ways in which native title rights can be exercised and enjoyed on the ground. Approved determinations under the Native Title Act set out the nature and extent of the native title rights and interests and the nature and extent of other rights and interests in the area. How both these sets of rights will be managed may be established through agreements setting out the principles and rules for managing the relationship between native title rights and interests, public laws and other private rights.

Therefore, negotiations between native title holders or registered native title claimants and local government (as well as, the relevant state or territory governments and other interest holders for example, lessees or licence holders) is necessary so everyone knows how native title rights and interests and private rights can be exercised on the ground.

The scheme for ILUAs has been inserted into the Native Title Act primarily as a problem-solving device. ILUAs can:

- reduce delays and costs
- combine separate future act negotiations to one process
- be used to develop harmony within a community
- be used as a way of resolving issues between groups of Aboriginal or Torres Strait Islander people
- incorporate joint management arrangements and access rights
- deal with the use of resources, the conduct of cultural matters, site management and other procedural matters, and
- deal with matters before or after a judicial determination of native title.

ILUAs allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances. An ILUA can be negotiated over areas where native title has, or has not yet, been determined to exist. They can be part of a native title determination, or settled separately from a native title claim. The Federal Court of Australia is not involved in the ILUA process—it is conducted entirely between the parties who wish to negotiate the agreement.

ILUAs can be made at any time. The Native Title Act does not set any time constraints on when an ILUA needs to be developed. They can be developed before or after a determination of native title by the Federal Court.

Although it is for each party to a native title claim to obtain its own legal advice about whether or not to commence ILUA negotiations, the Local Government Association of South Australia notes the following in its template ILUA:

- the discussions about an ILUA give control of the process and its outcomes to the parties
- costly and protracted litigation can be avoided
- if the matter goes to court, the court will not decide in detail how native title rights and interests are to be exercised on the ground. This creates uncertainty for all parties in the future, and means that, in practical terms parties will have to reach an agreement in any case
- litigation can divide parties which could otherwise work together for the period of negotiations and into the future
- the discussions in a voluntary ILUA can deal with other matters that affect the parties in addition to native title (LGASA 2006:3).

The best time is when the parties perceive there is a need for an ongoing relationship and that an agreement will be mutually beneficial.

Councils wanting to make an ILUA should first seek legal advice. If following receipt of that advice, you wish to proceed, the National Native Title Tribunal may be able to provide assistance if requested, to help negotiate an ILUA. The Native Title Registrar may also be able to provide feedback on whether proposed ILUAs and applications to register those ILUAs meet the requirements of the Native Title Act.

3. Negotiate with the right Traditional Owners

The National Native Title Tribunal can provide assistance with information about who must be party and who may be party to an ILUA. As circumstances with respect to registered native title claims and determinations of native title will change over time, it may be necessary to request register searches from the Tribunal at key stages throughout the process of negotiating an ILUA, to ensure that all mandatory parties are involved in the ILUA negotiations.

If a determination has been made by the Federal Court that native title exists in relation to a particular area, then details of the determination will be entered onto the National Native Title Register held by the Tribunal. The entry on the register will include contact details for the native title holders or their representative once a native title body corporate for the area has been determined.

The relevant Native Title Representative Body or Native Title Service Provider (these are bodies funded to represent native title claimants) may also be able to advise about the right traditional owners to approach about negotiations. To find the relevant Native Title Representative Body or Native Title Service provider for your area, check www.ntrb.net.

4. Registering an ILUA

Once an agreement is finalised, the parties can apply to the Native Title Registrar to have it registered. Following the relevant registration processes, an ILUA may be entered on the Register of Indigenous Land Use Agreements.

The Native Title Act provides for the registration of indigenous land use agreements. The effect of registering an ILUA is discussed in the next section. The National Native Title Tribunal has prepared guidelines for the registration of each of the different types of ILUAs (2008).

The Native Title Registrar maintains the Register of ILUAs and is responsible for checking whether an agreement lodged for registration meets the formal requirements of the Native Title Act and the Regulations.

The registration of ILUAs can be divided into two stages:

1. The Registrar checks the agreement, the application for registration and accompanying documents and information to make sure that they comply with the formal requirements of the Native Title Act and Regulations. The Native Title Registrar is required to notify the public and certain stakeholders (including any Council for the area covered by the agreement) that the parties have applied for registration of the ILUA.
2. The Registrar considers, where appropriate, objections to the agreement and any other barriers to registration (if any) and decides whether the agreement can proceed to registration.

The Tribunal advises that it generally takes about six months to register an Area Agreement, provided there are no objections lodged during the notification process. Body Corporate Agreements may be registered in a shorter time.

The ILUA will remain registered unless:

- there is a new determination of native title over the area and people determined to be the native title holders are not the people previously determined to hold native title in relation to an area
- there is a new determination of native title over the area and the native title holders who authorised the agreement are not the recognised native title holders in the determination
- the parties notify the Registrar that the ILUA has expired and the Registrar believes, on reasonable grounds, that this is the case
- the Federal Court orders that the ILUA be removed, or
- all the parties advise the Registrar that they wish to terminate the agreement (National Native Title Tribunal, 2008).

There are strict grounds upon which an ILUA can be removed from the Register.

5. The effect of registration of an ILUA

While registered, the ILUA has effect as a contract and all parties to the agreement are legally bound by the agreement. Native title holders for the area covered by the agreement (even if the native title holders are recognised after the ILUA is registered) are legally bound regardless of whether or not they are parties to the agreement.

Registration of an ILUA also ensures the validity under the Native Title Act of future acts that it authorises, if the relevant provisions are complied with. The non-extinguishment principle will apply to any future acts done under an ILUA, unless the parties agree to the extinguishment of native title by surrender.

6. Template ILUAs for Local Government

The Local Government Association of Queensland (LGAQ) has developed a template local government ILUA that covers all the issues outlined above, as well as cultural heritage compliance and related local issues. This template can be downloaded from www.lgaq.asn.au.

The Local Government Association of South Australia has developed a template local government ILUA that records an alternative native title and cultural heritage compliance process. This template can be downloaded from their website, www.lga.sa.gov.au.

These templates may be helpful in working out what needs to be included in an ILUA involving local government, noting that the templates will need to be adapted to meet the particular circumstances. The templates are not intended to limit the parties in their discussions with each other; they are provided as a guide only. The ability to adapt and expand a template to suit particular local or regional circumstances is in the hands of the parties negotiating the ILUA.

A range of information and publications are also available on the Tribunal's website at www.nntt.gov.au.

Part 2
Negotiating
an ILUA

ILUAs can be made at any time. The Native Title Act does not set any time constraints on when an ILUA may be developed. They can be developed before or after a determination of native title by the Federal Court. The best time is when the parties perceive there is a need for an on-going relationship and that an ILUA will be mutually beneficial and will deal with relevant native title matters.

The National Native Title Tribunal has a wide range of detailed information about ILUAs. This guide will be most useful if read in conjunction with other Tribunal publications, the full range of which can be found at www.nntt.gov.au .

Agreements may provide an important framework for the mutual recognition of rights and interests, and for ensuring that the parties can work together in ways that advance the interests of the whole community. They may assist in promoting harmonious community relations around native title matters. ILUAs can also lead to greater mutual acceptance of co-existence between native title holders/claimants and other title holders and land users.

However, ILUAs are primarily used by local governments to ensure that the decisions local governments make in relation to land use that affect native title (i.e. that are future acts) are valid under the Native Title Act.

1. Preparing for negotiations

A number of preliminary matters need to be considered before formal negotiations between the parties to an ILUA can commence.

With respect to native title matters in particular, these include:

Whether an ILUA is required. Decide whether an ILUA is the best way of resolving the issue(s) is an important decision because there may be other ways of resolving an issue to do with land or waters. An ILUA must deal with native title matters. If the agreement is not going to deal with native title matters, then an ILUA is not required.

Identifying the area to be covered by the ILUA. All ILUAs require an area description. This is a key element that needs to be included in any ILUA so that the parties understand what land and waters are covered by the agreement. It is also needed because the Native Title Registrar is required to give notice of the agreement, which includes a clear description of the area to which an ILUA will apply. The Tribunal has prepared guidelines for preparing maps and technical descriptions, and further details are available on the Tribunal's website. The Tribunal's Geospatial Services unit is able to provide further information if required.

Identifying the mandatory parties and persons. The Native Title Act states who must and who may be a party to each type of ILUA. Making sure that the right people and organisations are parties to the ILUA is essential for registering an ILUA. If the right people are not a party, then the agreement cannot be registered or there may be delays in the decision about registration.

Authorisation processes. Different authorisation processes apply to different types of agreements. Under the Native Title Act, while registered native title bodies corporate and registered native title claimants are mandatory parties to some agreements, they must be 'authorised' to enter into the agreements by the relevant persons. For example, for Area Agreements, the mandatory parties must be authorised by those persons identified by all reasonable efforts as persons who hold or may hold native title for the area to be covered by the agreement.

Registering an ILUA. It is important to note that an ILUA cannot be registered if it does not meet all the requirements for registration. Once an ILUA is finalised, the parties can apply to the Native Title Registrar to have it registered. The Native Title Registrar maintains the Register of ILUAs and is responsible for ensuring that the agreement lodged for registration meets the formal requirements of the Native Title Act and the Regulations. The Tribunal advises that it generally takes about six months to register an Area Agreement, provided there are no objections lodged during the notification process. Body Corporate Agreements that meet all the statutory requirements may be registered in a shorter period.

Understanding the effect of registering the ILUA. While registered, the ILUA has the effect of a contract and all parties to the agreement are legally bound by the agreement. All native title holders for the area covered by the agreement are also legally bound regardless of whether or not they are parties to the agreement.

The National Native Title Tribunal is able to provide assistance with most of these matters. The Tribunal can also appoint a Member or staff member to help with negotiations or the parties can engage the services of an independent mediator if the parties are unable to conduct the process by themselves. The Tribunal may not be involved in negotiations, but Councils should contact the Tribunal as early as possible in the process so it can help ensure the requirements for registration can be met. This will assist in avoiding undue delays later in the process.

Help the National Native Title Tribunal may give Councils can also include:

- technical information and support relating to ILUAs
- background research support
- helping non-Indigenous parties to identify the correct native title groups
- reviewing and providing maps of the ILUA area
- conducting register searches
- providing options for negotiations, and
- checking draft agreements and applications for registration for compliance with the statutory requirements and providing feedback.

A number of other matters also require consideration before entering into negotiations for an ILUA with native title holders and/or claimants. These include cultural differences, barriers of language and/or literacy, special protocols that may apply, and what sort of mandate is held by the negotiators.

Cultural differences. In developing agreements with native title holders/claimants, it is important to be aware of the cultural differences which may exist between native title holders/claimants and Council. Council may need to improve its knowledge and understanding of Indigenous culture and history of the area. It may be relevant to recognise that Aboriginal and Torres Strait Islander people continue to have connections to country, and therefore the authority to speak on issues affecting their country. It is also important to recognise that they may not have an understanding of the culture, role and functions of how Council operates and the way Council does its business. It may be necessary therefore at an appropriate stage in the process to provide the native title holders/claimants with assistance in understanding the role and functions of your Council.

Language and literacy. English may not be the first language for some native title holders/claimants and they may not have had equal access to education services resulting in different literacy levels. They may require assistance with interpreters or need other expertise in understanding how what is taking place will impact on their lives. Allowances will need to be made for such differences, including time and patience. Remember also that local government has its own institutional language which is not always understandable by other people, so keep jargon and acronyms to a minimum.

Developing indigenous land use agreements - *A guide for local government*

Special protocols. It is important to establish and observe protocols in any negotiating process, particularly across different cultural groups. There may be certain traditional laws and customs relating to negotiation and decision making that will need to be observed. Similarly, other parties will need to appreciate that Councils are obliged to follow pre-determined procedures and checks and balances in negotiating and decision making. In the interests of ensuring smooth negotiations, it may be necessary for the parties to learn about each other's practices and procedures. Protocols may cover such issues as where to meet, who welcomes participants, who speaks first on behalf of whom, who responds, what should be put in writing, who does the follow up, and respect for the sense of timing native title holders/claimants have for making and reporting on their decisions.

Mandate. Establishing the credentials and mandate for those representing the native title holders/claimants in the negotiations is essential. It is important to establish that whoever is going to undertake the negotiations on behalf of the native title holders/claimants is able to speak for, and make decisions on behalf of, the rest of their group. Similarly, Council will need to ensure it has a mandate for the development of the ILUA and who will conduct the negotiations (this is discussed in more detail in Part 3). This may require a resolution from Council or a Council committee, or it may require wider consultation with the community depending on the nature of the proposed ILUA and the level of commitment that Council is willing to enter into.

It is also important to understand the difference between process and content. The content of the ILUA is what the negotiations will be about. Of relevance will be an understanding of the subject matter and the desired outcomes. However, the process of getting to an agreement is often just as important. These matters are discussed later in this guide.

Preparing for negotiations

Things to think about (native title matters)

1. Is an ILUA required? Will the ILUA be dealing with native title matters? What native title matters or related matters need to be dealt with by an ILUA? Would an ILUA between Council and the native title holders/claimants be a useful way of resolving the native title matters? How will Council respond to a suggestion or an invitation from the native title holders/claimants to enter into an ILUA? (For example, the kinds of native title matters about which the Council may enter into an ILUA include the doing of future acts² and the settlement of claims).
2. What area will be covered by the ILUA? Can Council prepare the necessary maps and area description? In some cases, the ILUA area may be the full extent of the local government area covered by a particular claim; in others it may not and Council may decide to seek assistance from the National Native Title Tribunal's Geospatial Unit.
3. Who needs to be party to the ILUA? Who should be party to the ILUA? The relevant Native Title Representative Body or Native Title Service Provider will be able to assist with identifying who should be party in terms of native title holders or claimants or their representatives.
4. Depending on the type of ILUA, how will the ILUA need to be authorised? The relevant Native Title Representative Body or Native Title Service Provider will be able to provide some assistance with identifying the relevant people amongst the native title holders and/or claimants to discuss this with.
5. Is the ILUA to be registered? Is it necessary for the ILUA to be registered? Does Council understand the effect of registration, including for the Council? The Tribunal is able to assist with understanding the requirements for registration.

² See page 54.

Preparing for negotiations

Things to think about (non-native title matters)

1. Is Council aware of the cultural differences it will share with the native title holders/claimants? How well does Council know and understand the local history of Aboriginal or Torres Strait Islander people in the area? Would Council like to have an opportunity to get to know the native title holders/claimants before formal proceedings for negotiating the ILUA get underway? Will Council need to assist the native title holders/claimants in their understanding of Council's roles and functions of Council and how Council makes decisions and carries out its work? How will the native title holders respond to an invitation from Council to enter into an ILUA?
2. Does Council know whether the native title holders/claimants can speak fluent English? Will the native title holders/claimants need assistance with understanding how what is taking place will impact on their lives? Will Council need to assist the native title holders/claimants with understanding Council's jargon?
3. Are there special protocols that each party will need to follow? How will Council learn about the protocols of the native title holders/claimants? How will Council assist the native title holders/claimants in understanding Council's protocols?
4. How will Council establish its mandate to negotiate an ILUA with native title holders/claimants? How will Council establish that the native title holders'/claimants' representatives have established their mandate to negotiate an ILUA on behalf of the relevant native title holders/claimants?
5. How will Council establish its mandate? What is the level of commitment that Council requires to enter into and implement the ILUA? What are the issues Council wants resolved through an ILUA? What is motivating Council to want to negotiate an ILUA?

2. Setting the context

Leadership and public attitudes; willingness and commitment of the parties; timing and timeframes; communication; information and research; bargaining power; unity and representation of the parties; knowledge and assistance.

Often what can accompany the development of an ILUA is a longer term durable relationship built on understanding, mutual respect and trust. Hence, the context within which the ILUA is to be developed is just as important as the content of the ILUA. Several contextual matters can influence the outcomes, and these should also be considered before negotiations can commence.

Leadership and public attitudes. Public understanding and support for the development of an ILUA are important ingredients and can be considerable stimuli to its formulation and implementation. Council's leadership can set the tone of the community toward resolving native title matters through an amicable and workable ILUA.

Willingness and commitment. Negotiation requires commitment and compromise. Council must be willing and genuinely committed to reaching an agreement about how competing interests can be accommodated and managed in everyone's best interests. There must also be commitment to following through with implementation of matters agreed in the ILUA.

Timing and timeframes. Agreements take time to develop. The parties therefore need to be patient and adopt a long-term view. Timeframes need to be realistic for negotiations and adequate time should be allowed for consultation and decision making by each of the parties with members or constituents.

Communication. Effective communication between the parties is essential to successfully developing and implementing an ILUA, remembering that this is a two-way process between the parties. Effective communication therefore relies on good rapport built on mutual respect and understanding. It helps when the parties agree early in the proceedings on the means of communication, and the selection of methods for communication should match the circumstances. For example, each party could nominate an individual of equal status to act as a first point of contact between the parties. It may also be appropriate to ensure important communications are recorded in writing or some other agreed format.

Information and research. Agreements over the use of land or waters are likely to be achieved where there is good baseline information about the issues in contention. Environmental, social, economic and cultural studies can help to identify the major issues and allow parties to evaluate the merits of the various matters under negotiation. It is also helpful to remember that Council usually comes to the table better equipped in this regard than most native title holders/claimants.

Developing indigenous land use agreements - *A guide for local government*

Bargaining power. To ensure a fair settlement is reached, all negotiating parties must be able to speak from a position of equal status. It helps when parties are able to make decisions on behalf of their constituency and know when they need to go away and seek the relevant authorisation to continue and/or make a decision. To assist the process, it may also be appropriate to establish a negotiation committee with equal representation from each party. The purpose and composition of the committee could change when agreement has been reached, to focus on implementation of the agreement.

Unity and representation. The legitimacy and effectiveness of the parties to represent their native title holder/claimant group is a crucial factor in reaching agreement. Representation must always be legitimate, recognised and of equal standing. The ability of representatives to speak and to make decisions for their group is critical in reaching an effective and binding agreement. It is reasonable to be satisfied that there is unity and representation within the native title holder/claimant group with whom Council is seeking to develop an ILUA.

Knowledge. Knowledge of models, templates or precedents provides important demonstrations of what is possible. As mentioned elsewhere in this Guide, the Queensland and South Australian local government associations have produced templates for use by local Councils. These provide a useful starting point but need to be adapted to suit local circumstances. Respect for traditional knowledge and sensitivities associated with land and waters and connections to country must be given to native title holders/claimants. Respect should be accorded to any requests from native title holders/claimants that they do not wish particular information to become public knowledge.

Assistance. It may be helpful to realise that some native title holders/claimants may require assistance in obtaining expert advice and financial resources to enhance their capacity to negotiate fair settlements. While Council may be able to provide some assistance, often native title holders/claimants simply require assistance with accessing assistance from other appropriate sources.

All these factors are critical in developing workable and meaningful ILUAs. Adequate time must be allocated for developing an understanding of the context before embarking on the development of an ILUA. All parties need to take time to do so.

Some of the matters mentioned above which have resource implications are discussed in more detail in the next step.

Setting the context

Things to think about

1. It will be easier to work with developing an ILUA and gaining public acceptance if the wider community has a general understanding of the issues and that an ILUA is the best option for resolving particular matters between Council and the native title holders/claimants. What are the circumstances that need resolution? What is the wider community's understanding? How can Council show leadership in its community by working amicably with the native title holders/claimants? How can Council set the tone for a successful ILUA as far as Council's constituents/local community are concerned?
2. What is Council's level of commitment to a mutually acceptable outcome between Council and the native title holders/claimants? What is Council's level of commitment to following through with implementation of the commitments entered into in an ILUA?
3. Agreements take time to develop. Has any thought been given to timing and to timeframes? What factors will influence the timing? What factors may influence the timeframes for developing an ILUA? Has Council given some thought to how other parties may see the timing and timeframes? How patient is Council prepared to be?
4. Effective communication between the parties is a key to success. Has Council considered the means of communication or nominating an individual officer of Council as the primary point of contact between Council and the native title holders/claimants? Will the formation of a negotiation and implementation committee between the parties assist the process?
5. Good baseline information is important so the parties come from a position of common knowledge about the matters to be negotiated. What information does Council hold or access that it can make available to the native title holders/claimants? What additional information may be required? How can this information be obtained for the mutual benefit of Council and the native title holders/claimants?
6. Parties negotiating a binding agreement must be able to speak from a position of equal status. Has Council considered who will lead the negotiations on Council's behalf and how Council's representation may need to be adjusted to ensure Council's representative is able to speak from a position of equal status to those from the native title holders/claimants?

7. How will Council establish that the native title holders/claimants are informed and consent to the process? Will it assist the process if Council understands the native title holders'/claimants' processes for decision making around matters such as legitimacy and representation?
8. Knowledge of what the process is about is crucial to dismantling the fear, anxieties and apprehension around negotiating agreements. What knowledge about ILUAs and their purpose does Council bring to the negotiations? What additional knowledge may assist the parties? Does Council appreciate that there are sensitivities around traditional knowledge of country? Is Council able to extend respect for any request from native title holders/claimants not to publicly reveal or release certain information?
9. Is Council able to provide assistance to native title holders/claimants with obtaining expert advice and financial resources to enhance their capacity to negotiate fair settlements? If so, how?

3. Resource requirements

Time; personnel; expertise; consultation; administrative support; and budget.

The level of resources required for developing and the implementing of an ILUA will depend largely on the level of commitment that Council is willing to enter into. The greater the scope and nature of the ILUA, the greater the level of resources required to make and implement it. The time and effort required for a detailed and complex ILUA is clearly going to be more than will be necessary for a less complex ILUA.

Factors to consider include time; personnel; expertise; consultation; administrative support; and budget.

Time. The amount of time that may be required to develop an ILUA is difficult to predict in advance. However, it would be wise to endeavour to establish an agreed timeframe for discussions and negotiations, as well factor in time for any agreement reached to be assessed and registered by the Tribunal; otherwise there is a risk the process could take longer than the parties anticipate.

Often the time required to develop the ILUA may be influenced by the level of complexity and comprehensiveness of the matters to be agreed upon, or it may be the level at which negotiations may need to take place. As mentioned previously, both parties need to establish a mandate and will have established decision-making procedures in place which each party will be required to follow before commitments can be entered into. These procedures may involve minimum periods of time to enable people to absorb, consider and respond to ideas and proposals. These timeframes are often unavoidable and will need to be included in the amount of time that may be required to successfully complete the negotiations, especially where some degree of sensitivity is involved. The native title holders/claimants must be given time to absorb, communicate, reflect and evaluate information throughout the process. Some Councils and native title holders/claimants have negotiated a Memorandum of Understanding (MoU) or negotiation protocol that sets out a framework for negotiations to enable the parties to reach an ILUA. This is discussed in more detail in Step 3, page 34.

Personnel. The personnel to be involved in the negotiations and their level of involvement will need to be considered early in the process. Council will need to decide at what level the negotiations will take place, including the level of involvement by the mayor or president, other elected members, the chief executive officer or general manager, other senior managers and other staff. At some stage the mayor or president will need to be involved in closing the negotiations, but it may be that most of the negotiations can be handled by the chief executive officer, general manager or other senior staff. These matters need to be sorted out in advance, but may need to be reviewed from time to time during the negotiations to renew the mandate as and when necessary. Council may consider appointing a negotiating committee comprising the mayor or president, the chief executive officer or general manager, and other senior managers and staff with expertise

Developing indigenous land use agreements - A guide for local government

in the areas to be addressed in the ILUA. The committee should be required to report back to Council at appropriate intervals. At every stage of the negotiations and as mentioned in Step 2, members of the negotiating parties need to be of equal status as this will assist in maintaining the legitimacy of the negotiations and their outcomes.

Expertise. The scope and content of the ILUA may require input from practitioners or other sources not currently available from within Council. The level of advice or assistance from specialist expertise will depend largely on the matters to be agreed upon. For example, the local Aboriginal or Torres Strait Islander history might never have been accurately recorded. Other parties to the ILUA may also require access to expert advice or assistance. It may be in everyone's best interests to share that expertise. Ways of sharing expertise include joint arrangements for engaging consultants or experts, or simply creating a library of relevant material accessible to all parties. Aboriginal and Torres Strait Islander peoples' knowledge should be respected as expert advice, acknowledging that they hold the most comprehensive knowledge in relation to their own culture and history.

As native title law is complex, Council is also likely to require assistance from a suitably qualified legal practitioner.

Consultation. Consultation by the parties with their own constituents or members may be required during the development of an ILUA to ensure its legitimacy and broader acceptance. Such exercises have implications on time and may involve additional costs. While Council will have well established and resourced consultation mechanisms and processes, it needs to be borne in mind that the native title holders/claimants may not have similarly established and resourced consultation mechanisms, and that some allowances may need to be made for these factors, including the provision of assistance. For example, in large local government areas where long-distance travel is required to bring people together, Council may be able to provide assistance with transport, meals, meeting venues and other facilities or services. Allowances will also need to be made for different timeframes for consultation by the native title holders/claimants with their own communities compared with Council's processes.

Administrative support. The process of developing an ILUA will require administrative support, including meeting facilities, word processing, photocopying, telephone, printing, and keeping appropriate records. In most instances, Councils are generally well-equipped with these services and facilities. However, it is also important to take into consideration whether the native title holders/claimants have ready access to the same level of administrative resources. In many cases the relevant Native Title Representative Body or Native Title Service Provider will provide this support, but this may not always be the case. If not, then Council may wish to consider ways of sharing resources or making resources available to the native title holders/claimants.

Budget. The development of an ILUA will require a level of financial resourcing to cover the administrative and human resource costs involved. It may not be easy to predict what level of financial resources may be required. However, it should be possible to make an estimate based on the cost, for example, if there is a need to bring in facilitation expertise or an estimate of staff time that may be involved.

Implementation of the ILUA may require new or additional expenditures by Council, with or without assistance from external sources. These may be as basic as additional community consultations at venues other than Council facilities. Such expenditure needs to be viewed as an investment that will be beneficial to the local community. Where commitments may require external support, then it is suggested that every effort be made to involve those parties. Where it is not possible to involve those parties, then perhaps the scope of the ILUA needs to be reappraised.

The budget for developing an ILUA should include estimates for:

- secretarial/administrative support
- hire of meeting venues
- catering, if necessary
- transport
- publicity
- printing
- specialist research assistance
- legal advice (if likely to be required)
- independent mediation services, if necessary, and
- possible administrative support for the native title holders/claimants, if required.

Careful consideration of these resource requirements prior to commencing negotiations for an ILUA will assist in making the process run smoothly. Parties are encouraged to discuss these matters openly and frankly at an appropriate level before formal negotiations get under way. As mentioned above, developing a MoU around many of these matters can help clear up any undue delays and deal with expectations around peripheral matters that can be a distraction to the substance of the negotiations for an ILUA.

Resource requirements

Things to think about

1. How will Council establish a suitable timeframe for developing an ILUA? Will the timeframe allow native title holders/claimants to communicate, absorb, reflect and evaluate information throughout the process? What if agreed timeframes start to blow out? Will Council consider developing a MoU that sets out the protocols for negotiations?
2. What level of Council officers or elected members will be involved in the negotiations? Will Council consider appointing a negotiating committee?
3. If external expertise is required, how will the parties go about obtaining that input so that it will be mutually beneficial?
4. Will Council need to consult with its wider constituency during the process? What assistance is Council able to provide the native title holders/claimants with when consulting their own communities?
5. What administrative support will Council require? What administrative support is Council able to provide to the native title holders/claimants?
6. While it may not be easy to predict what level of financial resources will be necessary, it is important to prepare an estimate of likely costs for developing the ILUA as well as for implementing what may come out of the negotiations.

4. Developing an ILUA

There are many phases or steps involved in developing an ILUA. The following information is provided as a guide only. Figure 1 shows a logical sequence of steps for developing an ILUA.

Figure 1 Developing an ILUA

Step 1

Identifying whether an ILUA is necessary or appropriate

Step 2

Developing a negotiating position and style

Step 3

Developing a negotiating framework

Step 4

Managing the negotiations and focusing on outcomes

Step 5

Reaching agreement and settlement of final terms

Step 1 Identifying whether an ILUA is necessary or appropriate

Before going too far down the ILUA path, it is important that all parties understand the need for an ILUA. An ILUA cannot be used where the matters to be dealt with do not relate to native title issues. In particular, an ILUA can provide validity for the doing of a future act or acts, or validate some acts previously done invalidly, if it is registered by the Native Title Registrar.

In some cases, an ILUA may not be the best way to proceed, especially if the requirements are too complex or time consuming for someone wanting to do an individual future act which has little impact on native title. But in other cases the parties don't have a choice because an ILUA may be the only option under the Native Title Act to ensure the validity of the act in question. Sometimes an ILUA might be unnecessary or another form of agreement might be easier. Often it is upon the instruction of the state government that a Council is required to proceed with negotiating an ILUA; Councils are required to work with state governments when contemplating the doing of certain future acts.

An ILUA can be negotiated over areas where native title has or has yet to be determined to exist. They can be part of a native title determination, or settled separately from a native title claim. There doesn't need to be a claim on foot for an ILUA to be made.

An ILUA may cover a range of matters including the following:

- native title holders agreeing to a future act or group of future acts
- compensation for the loss or impairment of native title rights and interests
- how native title rights and interests coexist with the rights of other people
- access to an area
- extinguishment of native title rights and interests by surrender to state/territory governments
- framework agreements (that is, agreements that define terms and conditions for future act negotiations, decision making or other activities)
- the exercise of native title rights and interests, or
- validating any previous acts that were done invalidly because of the existence of native title.

The reasons for entering into an ILUA will usually, but not always, include:

- how a particular native title claim will be resolved in so far as it may affect Council's roles and functions in providing local government facilities and services in the area affected by the claim
- how Council's rights and interests will be provided for in any determination of the native title claim by the Federal Court
- how Council may continue participating in the claim resolution process before the Federal Court as a respondent to the claim
- how and where any native title rights and interests may have been extinguished at law
- the relationship between Council's rights and interests and the rights and interests of the native title holders (or claimants pending a determination by the Federal Court)

- providing the parties with an alternative, more practical system for managing future acts than the processes provided for by the other provisions of the Native Title Act to ensure they are valid to the extent they affect native title
- how disputes between the parties can be resolved without having to resort to litigation
- other issues which may or may not involve native title matters per se, but the parties believe they can work together to achieve mutually beneficial outcomes for the parties and/or the wider community, and
- ways to promote practical and effective reconciliation at the local level (LGAQ 2009, LGASA 2006).

ILUAs can also cover cultural heritage issues, the provision of public works and infrastructure, and employment and economic opportunities for native title groups. This is a good time to consider a protocol for dealing with Aboriginal or Torres Strait Islander cultural heritage matters or other economic and social benefits for the native title holders/claimants and the wider Aboriginal or Torres Strait Islander communities in Council's area. However, it is important not to put anything into an ILUA that cannot be acted upon by the parties.

The primary reason for developing an ILUA is to find a way of working together to resolve native title matters between the native title holders/claimants and Council, primarily so Council can continue going about its business of providing facilities and services to the local community. In some cases, native title issues may not be relevant because native title has been extinguished over the area in question. Legal advice may assist in identifying circumstances where native title issues must be addressed.

If the ILUA is to be registered under the Native Title Act, then it will be necessary to discuss the proposed ILUA with the Tribunal to ensure Council has an understanding of the requirements for registration. The requirements for registration are discussed in more detail in the *Background information about ILUAs* (Part 1 of this guide).

Step 1. Identifying reasons

Things to think about

1. Is the area to be included in the ILUA subject to a native title claim or subject to a determination that native title rights and interests continue to exist?
2. Has Council considered how it would like to see the native title claim resolved in so far as the claim(s) affects Council's roles and functions? How would Council want its rights and interests to be provided for by the Federal Court in any determination of the native title claim(s)? How will Council continue participating in the claim during the ILUA negotiations?
3. Does Council want to carry out a future act or acts in the areas covered by a native title claim or determination? What kind of alternative processes for future acts would Council like to see included in the ILUA? What kinds of future acts is Council seeking validity for? Are the future acts likely to involve compensation for the loss, diminution or impairment of native title rights and interests?
4. Has Council considered how its rights and interests could coexist with native title rights and interests?
5. Has Council considered how the native title holders/claimants may be able to access the area to be subject to an ILUA?
6. Is the ILUA likely to involve the extinguishment of native title rights and interests by surrender to government?
7. Has Council considered a framework agreement? (This is discussed in more detail in Step 3).
8. Has Council considered a protocol for Aboriginal or Torres Strait Islander cultural heritage matters that could be incorporated into an ILUA?
9. Has Council considered other matters that it may wish to include in an ILUA, such as economic and social benefits for Aboriginal and Torres Strait Islander people and communities, or ways of promoting practical and effective reconciliation?
10. Is the ILUA to be registered under the Native Title Act? Has Council contacted the National Native Title Tribunal to obtain more information about what is required for an ILUA to be registered?

Step 2 Developing a negotiating position and style

Before commencing negotiations, be clear about the potential scope and content of the proposed ILUA and Council's negotiating position. This means assigning relative priorities to Council's objectives and questioning whether they are realistic. It is crucial that the objectives and expected outcomes of an ILUA are not pitched too high as to be unrealistic and unachievable.

Council may have received information from the native title holders/claimants or their representatives on the matters they want to have addressed through an ILUA. This will help Council understand the initial expectations of the native title holders/claimants and assist Council in identifying its position.

In order for the negotiations to proceed smoothly, it is important to assemble beforehand as much information as possible, and to make this accessible to the native title holders/claimants and any other parties. For example, Council may have compiled information about the local history of the area, including information about Aboriginal or Torres Strait Islander people who lived in the area and have some connection with the area. Or Council may be aware of future development plans by others that may affect native title rights and interests in the area. Sharing this information with the native title holders/claimants and any other parties will go a long way toward establishing a level of mutual trust between the parties.

In developing a negotiating position, it may be helpful to consider each matter to be included in an ILUA along a spectrum of possible outcomes ranging from 'highly desirable' or 'maximum possible outcome', to 'unacceptable outcome' at the other end, with 'reasonable outcomes' somewhere in between. Although for some matters, this may not be an appropriate approach. For example, for some future acts, Council may not be in a position where it has much room to negotiate about whether or not particular future acts will proceed, but only on the timing or extent of impact. Any limits on the extent of Council's powers and responsibilities must be made clear at the outset of any negotiations.

A large part of the negotiating process could be taken up with finding the middle ground between 'aspirations' and 'resistance'. For effective negotiations leading to acceptable outcomes, it is useful to identify possible trade-offs for each issue and to have fall-back positions. It may help to identify or itemise any concessions that are not costly to Council, but may be of great value to the native title holders/claimants.

The style of negotiation is also an important factor. Negotiating styles can take many forms, ranging from competitive to cooperative. An important consideration is the effect the choice of style will have on the negotiation, having regard to the short and long term consequences. Keep the negotiations simple and flexible.

Developing indigenous land use agreements - *A guide for local government*

There are many contexts within which negotiations for entering an agreement can occur. Factors which can influence the context and negotiating style include:

- the need to develop a common understanding of each other's position
- the need for joint gains
- the need for a long term and continuing relationship
- the need for certainty
- the level of trust
- the absence of preconceived solutions or outcomes
- the range of potential options or solutions available, and
- the willingness of the parties to be cooperative.

These contexts can affect the choice of style. If there is a high level of trust between the parties, then the choice of style is more likely to be cooperative. If there is a lack of trust and one or other party is withholding information, then the choice of style is more likely to be competitive.

In terms of presenting Council's proposals, commence by stating Council's ideal position, addressing the proposals to the interests and concerns of the native title holders/claimants, value any concessions in the native title holders/claimants terms, and where appropriate, link items to present a more complete picture.

In terms of receiving proposals, listen and ask questions seeking clarification. Council may need to ask for more time to consider their proposals. When ready, give Council's considered response.

Be careful not to state grievances without proposing a remedy. If Council is on the receiving end of a grievance, ask 'What do you want Council to do about it?' The response should provide a basis for further discussion.

Council's negotiating team should be well prepared before entering the negotiations. A sound understanding of the subject matter or proposed content of the negotiations and the outcomes being sought by the parties is as important as the process.

Before commencing the negotiations, try seeing things from their perspective and consider the benefits to be gained from an ILUA. As well, consider the possible reservations they may have about entering into an ILUA with Council, and an understanding of some of the discussions that will need to occur to reach agreement.

It is best to go into the process with an open mind. Go in knowing what is possible in terms of what may emerge from the process and be open to the fact that the process has the potential to change the way Council deals with native title matters and with Aboriginal and Torres Strait Islander people. It is important to understand what is at stake for the native title holders/claimants: how Council's activities will impact on the native title holders'/claimants' native title rights and interests.

Tips for negotiating

| Do | Don't |
|---|----------------------------|
| Listen | Interrupt |
| Question for clarification | Interject |
| Seek and give information | Blame |
| Test the other party's commitment | Shout the other party down |
| Summarise issues neutrally | Point score |
| Challenge the other party to justify on an item by item basis | Be 'too clever' |
| Respect the other party's knowledge | Use sarcasm |
| | Attack |
| | Talk too much |
| | Use threats |

Adapted from Anscombe et al 1997:233

Step 2 Developing a negotiating position and style

Things to think about

1. What are Council's objectives for wanting to develop an ILUA? Are they realistic?
2. What data or information is Council assembling beforehand? Will Council be willing to share information with the native title holders/claimants and be open and trusting? Will Council be willing to share information with any other parties?
3. What level of understanding does Council have of the critical issues? What additional information may be necessary to avoid delays in the negotiations?
4. What additional information may be required by the other parties? How can Council assist in providing or accessing this information?
5. Is the interaction between Council and the native title holders/claimants frequent and on good terms? Will the discussions commence with reasonable and realistic propositions? Has Council received any information directly from the native title holders/claimants or their representatives on what they would like to see included in the ILUA?
6. What will Council say in its opening statement in terms of its position? For example, will Council have an open mind as to what may emerge from the negotiations? Will Council's negotiating team adopt an open and flexible style?
7. What fallback positions are likely to be acceptable to Council? What concessions are Council likely to agree to?

Developing indigenous land use agreements - *A guide for local government*

8. Will Council ask questions, rather than make statements? Will Council discuss compromise, rather than attempt to coerce? Will Council be genuinely interested in the issues the native title holders/claimants want addressed through the ILUA?
9. Will Council look for outcomes that are acceptable to all parties? Will Council continue to be interested in the issues affecting the local native title holders/claimants beyond the scope of the current ILUA negotiations? If so, how?

Step 3 Developing a negotiating framework

Establish from the outset a framework for the negotiations. Many of the factors discussed in Chapters 1 to 3 (pages 13–25), such as representation of the parties, mandate, resourcing, and meeting venues, are crucial ingredients in being able to negotiate effectively and successfully.

Many Councils are entering into a Memorandum of Understanding (MoU) or a negotiation protocol with native title holders/claimants as a prelude to negotiating an ILUA. The purpose of entering into a MoU is to ensure as far as possible the negotiations for an ILUA are conducted in a timely and efficient manner and that the parties will conduct themselves in a way that will most likely result in agreement. The MoU commits the parties to a set of agreed ground rules for the conduct of the negotiations and establishes the parameters. These are discussed in more detail below. Acting reasonably and in good faith are essential ingredients to reaching and implementing an agreement (LGAQ 2009). So developing a framework for the negotiations will assist the parties in working through the process constructively.

There are a number of matters to be considered in developing a framework for the formal negotiations between the parties for an ILUA.

With respect to native title matters in particular, these may include:

The objectives of the ILUA. It may be desirable for the parties to articulate the objectives of what they want to reach agreement about in an ILUA. Refer to the reasons for the ILUA discussed in Step 1.

Participation in the claim resolution process while the ILUA is being negotiated.

Depending on what stage the claim is at in the native title resolution process, there may be a need to clarify how Council participates in proceedings in which it is a party before the Federal Court or in any relevant court-ordered mediation while the ILUA is being negotiated.

With respect to other matters, the negotiating framework should consider the following. Many of these matters have been discussed in Chapters 1, 2 and 3 (pages 13–25).

Holding preliminary discussions. A preliminary meeting with the native title holders/claimants will assist in establishing the issues to be negotiated (at least in short form), as well as identifying the parameters of the discussions. Many of the practical matters discussed below should be the subject of the preliminary meeting between Council and the native title holders/claimants.

Choosing representatives. Representatives from each party should be of equal standing in terms of being able to speak for and make decisions on behalf of their community and/or constituency.

Developing indigenous land use agreements - *A guide for local government*

Choosing a mediator. Sometimes it might be considered appropriate for a mediator or independent facilitator to be appointed in order to assist with the negotiation process. This is particularly so with more complex matters. The Tribunal may be able to assist parties to negotiate an ILUA.

Maintenance of mandate. Representatives at the negotiating table may, from time to time, be given an opportunity to discuss progress with their principals. This enables the negotiators to confirm they accept of the directions of the negotiations and to maintain their mandate.

Methods of communication. The methods of communication and exchange or transmission of documents, especially outside of the formal face-to-face meetings should be established as soon as possible. These may include telephone, email, facsimile, post, express courier, regular meetings or by any other means. Be sure there is clear understanding of which methods should be used and for what purposes to avoid misunderstandings.

Costs and resourcing. Developing an ILUA will need to be adequately resourced. Native title holders/claimants may not be as well resourced as Council, and therefore some assistance for them may be necessary. Depending on the scope of the ILUA, the processes will be time consuming and may have cost implications for Council. The substance of the ILUA may have budgetary implications for Council. These factors need to be adequately budgeted for in advance to avoid delays through lack of resources to complete the process, or to honour the commitments being entered into.

Without prejudice and confidentiality. The negotiations for an ILUA may be conducted on a 'without prejudice' basis. For the purposes of being able to maintain mutual trust throughout the formal negotiations, it is good practice to also include relevant clauses about confidentiality of negotiations in a framework agreement or MoU. Typically, provisions on confidentiality provide for the non-disclosure of documents or materials brought to the negotiations and any discussions between the parties unless the parties agree otherwise, and an allowance for communications by either party with the Tribunal for the purposes of assisting that party with the mediation will if requested and to the extent allowed by the law remain confidential to that party (LGAQ 2009:5). Some consideration may need to be given to the issue of what information may be disclosed by Council to its constituents about the negotiations as they progress.

Handling the media. Some ILUA negotiations are likely to attract media attention. Irrespective of whether that attention is coming from the local media or more widely, it is always good practice to have agreed media handling procedures in place beforehand. It is suggested that the parties each appoint spokespersons for dealing with media enquiries and that at the end of each negotiation meeting, the parties agree on the outcomes and what, if any, information can be released to the media.

Timeframes for negotiation. As discussed in Chapters 2 and 3 (pages 18–25), the timeframes for negotiation need to be agreed between the parties as a form of discipline over the process. Lack of agreed timeframes could lead to protracted negotiations which would not be in anyone’s interests. While it may be difficult to be too accurate about timeframes at the outset of the negotiations, the initial timeframe should be subject to discussion and review at regular intervals.

Location and venues for meetings. It is important that negotiation meetings be held at venues that are acceptable to both parties. Depending on the relations between Council and the native title holders/claimants, it may be necessary to consider a venue that is not Council property, or, depending on the location of the native title holders/claimants, it may be necessary to travel to a venue that is less convenient for one or other party, or to alternate between venues.

No matter how mundane or unimportant these matters may seem, all of these matters must be given appropriate attention early in the proceedings. The arrangements and procedural matters should be the subject of preliminary discussions so they do not distract from the purpose of the negotiations. All of these matters can be dealt with in a MoU if Council and the native title holders/claimants wish to.

Step 3 Developing a negotiating framework

Things to think about

1. Has Council given consideration to the objectives of the ILUA?
2. Will Council need to continue participating in the claim resolution process before the Federal Court or any Court ordered mediation while the ILUA is being negotiated? If so, how will this be discussed with the native title holders/claimants?
3. How will the preliminary discussions between Council and the native title holders/claimants be arranged? Will the negotiations benefit from the assistance of an independent facilitator or mediator?
4. Have all of the factors listed above been listed for preliminary discussions with the native title holders/claimants?
5. On each occasion the parties meet, will the representatives from each party be of equal standing in terms of being able to speak for and make decisions on behalf of their community and/or constituency?
6. Will there be opportunities for consultation between representatives and principals during the negotiations to enable mandates to be maintained?
7. Has Council considered which methods of communication will be used and for which purposes?
8. What resources have been set aside to cover the costs of developing the ILUA? Have the implications of the proposed ILUA been properly costed, both in terms of effort involved in developing and finalising the ILUA, as well as the resources required to implement the substance of the ILUA? Has Council sought the relevant budgetary approvals? Will Council be able to assist the native title holders/claimants with financial or other resources, if necessary, to enable them to participate equally in the negotiations?
9. What measures will Council put in place to ensure confidentiality of the proceedings and documents relating to the proposed ILUA?
10. What measures will Council agree to in relation to handling the media?
11. Has an acceptable timeframe for the negotiations been discussed and agreed?
12. Have suitable meeting venues been agreed upon and arranged in advance to avoid unnecessary disappointments and delays?

Step 4 Managing the negotiations and focusing on outcomes

A negotiation process has several phases. These phases are particularly important in terms of timing, making concessions, settling matters and closing the negotiations, and finalising the agreement.

Where the negotiating team comprises more than one person, allocate tasks to each person in terms of their role in the discussions and negotiations. For example, it may be possible to assign separate tasks to different people in terms of their role as leader, questioner, concession maker, summariser, report writer and observer.

Ensure the negotiations progress as smoothly as possible. As discussed below, the negotiations will flow through a series of phases including opening, presentation of basic information and background, exchanging positions, and conferring with each other over particular points of contention. It is vital that the discussions seek to share information and views about each other's objectives and desired outcomes for each matter that is to be included in the ILUA.

Be open minded and imaginative about matters as they come up for detailed discussion. Do a reality check to test their feasibility or level of acceptance by the other party.

Introductory phase

This phase is the initial round of discussions where introductions may be necessary; there will be informal talk to establish communication, and opening remarks from each of the parties. It is the phase which sets the general tone of the proceedings. Matters such as meeting location and venue, level of representation and the outcomes of any preliminary discussions will be crucial determinants in the success of the introductory phase.

Aboriginal and Torres Strait Islander people like to 'welcome' others who come to meet and talk in the country over which their ancestors held traditional ownership. Today, Aboriginal or Torres Strait Islander people may have either interests in, or custodianship over, those same lands. It is widely practised and courteous for other Aboriginal and Torres Strait Islander people and other non-Indigenous people to respond with an acknowledgement of traditional ownership at the commencement of any meeting.

Considering the following questions may assist in managing the first phase.

Is it possible in consultation to draw up a simple agenda for the first meeting?

Who will initiate the opening remarks—Council or the native title holders/claimants?

What will Council's introductory style be?

Will Council be seeking responses to its opening remarks?

How will Council manage the move to the next phase?

Differentiation phase

This phase involves the parties in mapping out their interests and concerns that they want the ILUA to address or deal with. This is the phase where views and feelings will be expressed, and issues and positions will need to be clarified. Clearly, any differences, misunderstandings or misinterpretations and areas of conflict will emerge. The outer limits of the negotiating range will need to be established.

Considering the following questions may assist in managing this phase.

How much differentiation between the parties is likely to emerge?

How will Council respond to the differences?

How will Council seek clarification of issues and positions?

How will Council check the understanding of the outer limits of the negotiating range?

What deadlock situations might emerge?

How will Council move to break them?

How will Council manage the move to the next phase?

It is possible that each of the matters discussed in Chapter 1 as the reasons for seeking to develop an ILUA will need to go through this phase.

Integration phase

This phase involves the parties in getting down to details, sharing information and views, stating detailed positions, and problem solving. It is the phase where concession-making commences and, where possible, deadlocks are broken.

Considering the following questions may assist in managing this phase.

How will Council show understanding of the native title holders/claimants' needs—through listening, acknowledgement and/or empathy?

How will Council focus on the areas of common interest or concern?

How will Council shift the focus of attention to areas of differentiation or conflict?

How will Council search for options?

How will Council indicate that it is willing to cooperate or make concessions?

What additional matters would be useful to consider?

How will Council manage the concession-making/gaining process?

Will Council be looking for some kind of reciprocity?

What process concessions can Council make?

How can Council help the native title holders/claimants make concessions?

How will Council lock in concessions/gains as they are made?

How will Council manage the move into the next phase?

The closing and agreeing phase

This phase involves identifying the areas of agreement and narrowing down the range of issues where there may still be disagreement. This is the phase where agreements are drawn up and the content of commitments being entered into are firmed up and prepared for agreement by the principals. During this phase, respective parties may need to undertake consultations with their members and/or constituents to ensure that the final settlement phase can proceed without unexpected impediments or last minute disagreements. This phase is the appropriate point to reconsider the original reasons for an ILUA and to jointly determine whether the outcomes are to everyone's satisfaction.

Considering the following questions may assist with managing this phase.

On completion of the above phases, would it be useful to reconsider the other party's objectives and need for the ILUA?

What reconsideration should be given to Council's objectives?

Have the needs of both parties been addressed and satisfactorily met?

What matters can be clearly agreed upon?

Can appropriate clauses of an ILUA be drafted and agreed in principle? (This is where the ILUA templates produced by the Queensland and South Australian local government associations will be very helpful.)

What matters remain to be agreed?

Will these be difficult to resolve?

Will the parties consider approaching the National Native Title Tribunal to assist with resolving these outstanding matters, if it has not already been involved?

Can the parties agree to disagree and respect each other's positions?

Has any consideration been given to announcing the final agreement?

What arrangements need to be made?

What arrangements or protocols are to be put in place to ensure that harmonious relationships between the parties can be maintained?

How will Council manage the final phase?

Step 5 Reaching agreement and settlement of final terms

This is the phase where clear commitments and final offers are made and agreements-in-principle are reached. It is the phase where a draft ILUA is drawn up and final decisions are made. If either party is unable to make final and binding decisions, then it is advisable to reach agreements-in-principle pending confirmation. The agreement reached must be acceptable to all parties. Be sure to document outcomes.

As discussed in the background information about ILUAs elsewhere in this guide, for an ILUA to be registered under the Native Title Act, it must meet certain criteria. It would be appropriate at this time to consult the National Native Title Tribunal to assist in ensuring that the draft ILUA meets the requirements for registration. This is so whether or not the Tribunal has previously provided assistance to negotiate the ILUA.

Step 5 Reaching agreement and settlement of final terms
Things to think about

1. How will Council draw the negotiations to a reasonable conclusion? Have the negotiations resulted in outcomes that satisfactorily meet the objectives of all parties to the ILUA?
2. How will Council lock in the agreements reached?
3. How will Council demonstrate that it is fully committed to implementing the ILUA?
4. Will the parties want or need to have the ILUA registered by the Native Title Registrar? Who will make the application to the Registrar to register the ILUA? Have the parties been consulting the Tribunal along the way to ensure the final draft of the ILUA will meet the registration requirements?
5. If the ILUA is unable to be registered, have the parties put arrangements in place, if required, to reconvene to resolve any outstanding matters so that it can be registered?

5. Implementing the Agreement

Developing and maintaining effective communication links; fulfilling the commitments; dispute resolution procedures; monitoring and reviewing the ILUA.

This part of the guide focuses on the implementation of an ILUA once it has been signed and registered.

An ILUA is a collaborative outcome between two or more parties and needs to be 'owned' by the parties if it is to be successfully implemented. Ownership helps to ensure commitment and goodwill. The outcomes will not be achieved by the mere existence of the agreement. The parties have to work at achieving the outcomes.

An ILUA in most cases will be a living document in that it will have set out the actions that the parties will carry out jointly or separately. A commitment by the parties to following through with the matters agreed upon is essential if an ILUA is to work. The objective in developing an ILUA is to get some action on particular matters, not merely an agreement. An important part of the preparation therefore is to plan how the commitments being entered into will and can be fulfilled. Ultimately, the successful implementation of an ILUA, from Council's perspective, will depend on councillors and Council staff. They must be involved and committed to its objectives.

The following information is intended to assist Council in meeting the commitments it may have entered into in an ILUA.

Developing and maintaining effective communication links. Effective communication between the parties is critical to successfully implementing an ILUA. The continuance of cooperation requires continual contact and communication. It helps when the parties agree on the means of communication for progressing the implementation of the agreement, including the frequency of contact. A range of techniques are possible, including:

- Assigning responsibility for particular actions to particular Council officers. Where more than one person is involved in implementing parts of the ILUA it may be necessary to establish an internal coordination point to avoid duplication or oversights from occurring.
- Identifying a first point of contact between the parties, whose role and responsibility could include maintaining regular contact with the other parties, ensuring the appropriate protocols and procedures are observed by Council, communication is initiated at the earliest opportunity if disputes arise, and ensuring Council maintains its mutual respect and goodwill toward the native title holders/claimants.
- Establishing an implementation committee following completion of the negotiations. The committee could include representatives of the parties to the ILUA and its tasks could include ensuring appropriate protocols are observed, communications between the parties are culturally appropriate, language and literacy requirements are respected, and communications outside the committee are between officers and members of equal status.

Fulfilling the commitments. The most crucial factor in the success of any ILUA is a firm commitment to achieving its objectives. Where relevant, the usual procedures for obtaining Council approval should be used, as Council would for any other matter unless there are exceptional circumstances that call for different procedures. Depending on what the ILUA contains, it may be necessary to undertake a number of activities, such as briefing Council staff on the agreement and any actions arising, holding a public launch, printing a summary for the wider community, developing a presentation that senior Council staff or elected members can use at other meetings or forums, and promoting the ILUA to others in the community to raise awareness. Other actions may also be necessary, including developing a communication strategy, aligning Council's strategic and corporate plans to reflect the priorities identified in the ILUA, incorporating priority actions into Council's annual work plan or budget cycle, establishing mechanisms for monitoring and evaluation, incorporating specific actions in individual staff work plans and performance review systems, and allocating resources to facilitate implementation.

Dispute resolution procedures. In any negotiated situation there is potential for conflict, friction or disagreement to arise. It is advisable therefore to include the details of how disputes are to be resolved. The parties to the ILUA should make every effort to ensure that disputes do not arise. If they do arise, then every reasonable effort should be made to resolve the dispute through mediation and where necessary through the services of an independent mediator. The use of independent mediation enables the parties to preserve their dignity, professionally and personally. Should these avenues fail, the parties can approach the Tribunal to assist with renegotiating the terms of the ILUA or the parties could initiate an action in the Federal Court. Going to court is not a desirable course of action, and one which should be avoided if at all possible.

Monitoring and reviewing the ILUA. An agreement is by necessity a living document. While the content and commitments entered into are relevant at the time the ILUA is made, it may need to be reviewed at a particular stage. Progress in achieving its objectives and outcomes should be monitored and evaluated along the way or at an agreed 'end point'. Some provisions for monitoring and review should have been included in the ILUA, especially for more complex and long lasting agreements. The objective should be to develop a level of monitoring and evaluation that is commensurate with the subject matter covered by the agreement. The techniques used for monitoring and reporting should enable progress to be recorded and to show up any discrepancies between what is actually happening compared with the commitments in the ILUA. There may be many reasons for reviewing an agreement, including to report progress based on monitoring and evaluation, reaffirming the original objectives of the ILUA, altering the content in response to changed circumstances, and providing a basis for renegotiating the ILUA or developing a new ILUA.

Implementing the Agreement

Things to think about

1. Have methods of ongoing communication between the parties been discussed and agreed? What arrangements need to be put in place to ensure the communication links are maintained? Who in Council will take on the responsibility as the first point of contact for the native title holders/claimants? Who will be responsible for ensuring the necessary protocols are observed? Has Council considered whether an implementation committee may be an appropriate way of ensuring the commitments in the ILUA are implemented?
2. What actions does Council need to take to ensure staff are aware of the ILUA and its commitments? Will Council brief relevant staff? Will Council prepare a summary for wider use and for raising awareness? Will Council's strategic or corporate plans need to be amended? Will Council need to incorporate priority actions into its work plans or budgets? Will specific actions need to be inserted into individual work plans and performance review systems?
3. What mechanisms does Council need to put in place to ensure disputes do not arise? Or if they do arise, that they can be resolved quickly through the processes agreed in the ILUA? What if independent mediation fails? Will Council seek to renegotiate the terms of the ILUA?
4. What consideration was given to ensuring regular reviews or that an 'end point' review will be undertaken? Who will be responsible for conducting the review? What will be the scope of a review? Are there any arrangements or procedures that need to be put in place for reporting the results of the review to the parties, and how will the results be reported to the wider community?

6. Conclusion

Local Councils play a vital role in developing harmonious relations in their communities. Councils set the general tone of the community in terms of whether all citizens, regardless of race, creed, gender or age, find local communities welcoming and inclusive. The level of infrastructure and facilities, service delivery, and commitment to social harmony closely affects the daily lives of Aboriginal and Torres Strait Islander people and communities.

An ILUA can play a vital role in building a meaningful relationship between Council and the native title holders/claimants and other Aboriginal and Torres Strait Islander people in the local community. It can also be an important way of showing leadership in progressing reconciliation and ensuring Council meets its native title and cultural heritage protection responsibilities in a coordinated way.

An ILUA offers a positive and constructive approach to resolving how Council can work with native title holders/claimants. They often mark the beginning of a new relationship between Council and Aboriginal and Torres Strait Islander people and provide an opportunity to develop longer term relationships built on mutual trust and understanding for each other's rights and interests.

The agreements developed at the local level are in many respects as important as those at the state or national level, because at the local level the relationships are actual face-to-face, everyday occurrences of an enduring nature (Shain et al 2006:203).

The purpose of this guide is to resource Councils with general information on how to develop an ILUA. The information is provided as a guide only and Council should obtain independent professional advice when deciding to develop an ILUA for any particular native title circumstances.

Part 3
Technical
issues

For an agreement to be entered on the Register of ILUAs and thus get the benefits of being registered, it must meet certain criteria. The criteria are quite technical and sometimes difficult for parties to grasp. The Tribunal can assist parties by providing, for example:

- geospatial assistance (i.e. maps of the relevant area)
- comments on drafts of the agreement, and
- further information about the registration requirements.

1. Three types of ILUAs and what they can and cannot be about

The Native Title Act specifies three types of ILUAs:

- Body Corporate Agreements (ss 24BA-24BI)
- Area Agreements (ss 24CA-24CL)
- Alternative Procedure Agreements (ss 24DA-24DL).

The type of agreement to be used will depend on the circumstances, the area involved and the nature of the issues to be resolved. It is important that the right type of agreement is selected.

Even prior to a determination of native title, depending on the type of ILUA, the parties may agree to recognise long standing traditional rights and interests over an area or to the surrender of native title over an area. They may agree on the traditional rights and interests: how any rights and interests in the area are to be exercised in council-controlled areas; the relationship between traditional rights and interests and the rights and interests of council in relation to the area; and which issues are covered or not covered by the agreement. In this way, ILUAs are able to deal with social, economic, environmental and cultural matters.

Subject to some legislative constraints, the content, duration and implementation of ILUAs are at the discretion of the parties involved. Parties are not obliged to develop an agreement.

All three kinds of ILUAs may deal with:

- the doing, or doing subject to conditions (which may be about procedural matters) of future activities (including advance permission for entire classes of proposed future acts)
- validating future acts (other than intermediate period acts³) and acts (other than intermediate period acts) affecting native title that have already been done prior to the agreement being entered into
- withdrawing, amending or varying native title applications to the Federal Court
- the relationship between native title and non-native title rights and interests
- the manner of exercise of native title and non-native title rights and interests
- providing a framework for the making of other agreements about matters relating to native title rights and interests
- compensation for past acts, intermediate period acts or future acts, or
- any other matter concerning native title rights and interests in relation to the area.

3. An intermediate period act is an act that is invalid to any extent because of the existence of native title but would have otherwise been valid which took place in the period from the beginning of 1 January 1994 to the end of 23 December 1996 over an area where native title continued to exist in relation to particular land or waters and at any time before the act was done, a valid grant of freehold estate, a valid lease (other than a mining lease) or a validly constructed public work must have covered any part of the area affected by the act. See s. 232A of the *Native Title Act 1993* (Cwlth).

Developing indigenous land use agreements - *A guide for local government*

Specifically:

Body Corporate Agreements must be used where there is a registered native title body corporate for the whole of the agreement area.

Body Corporate Agreements and **Area Agreements** may also be about:

- the extinguishment of native title rights and interests by surrendering them to the Commonwealth, state or territory
- changing the effect of a validated intermediate period act on native title.

Body Corporate Agreements, Area Agreements and **Alternative Procedure Agreements** may be about:

- providing a framework for the making of other agreements about native title rights and interests.

However, **Alternative Procedure Agreements** cannot be about:

- the extinguishment of native title rights and interests by surrendering them to the Commonwealth, state or territory.

Despite these constraints, ILUAs can be as wide or as narrow in their operation as the parties decide since they can also deal with issues outside native title, so long as they continue to be agreements about native title matters.

2. Parties to an ILUA

The Native Title Act states who must be a party to each type of ILUA. Making sure that the right people and organisations are party to an ILUA is essential for registering an ILUA. If the right people are not a party, then the agreement cannot be registered or there may be delays in the decision about registration. The table on pages 49–50 shows who must be a party for each type of ILUA. Any other person may also be a party.

Persons who must be a party

| People or organisation | Body Corporate Agreement | Area Agreement | Alternative Procedure Agreement |
|---|--|--|---|
| People claiming to hold native title including unregistered claimants | No (no unregistered claimants) | One or more must be a party if there is no: <ul style="list-style-type: none"> • registered native title claimant • registered native title body corporate, or • representative body as a party – otherwise they may be a party | No |
| Registered native title claimants | No (no unregistered claimants) | Must be a party, if they exist | No |
| Registered native title bodies corporate | Must be a party | Must be a party, if they exist | Must be a party, if they exist |
| Commonwealth, state or territory governments | Must be a party if the agreement: <ul style="list-style-type: none"> • extinguishes native title by surrender (that is, when native title holders agree to give up their native title rights and interests) • validates future acts which have already been done invalidly • allows for a change in the amount of extinguishment of native title caused by the validation of an intermediate period act | Must be a party if the agreement: <ul style="list-style-type: none"> • extinguishes native title by surrender (that is, when native title holders agree to give up their native title rights and interests) • validates future acts which have already been done invalidly • allows for a change in the amount of extinguishment of native title caused by the validation of an intermediate period act | The relevant government must be a party |

Developing indigenous land use agreements - A guide for local government

| | | | |
|--|--|---|--|
| Representative Bodies/Native Title Service Providers | No | Must be a party if there is no: <ul style="list-style-type: none"> • registered native title claimant • registered native title body corporate • persons claiming to hold native title | Must be a party |
| Others, such as local governments, miners, pastoralists and energy companies | No | No | No |
| Anyone liable to pay compensation | Must be a party if the government provides for validation of a future act or for a change in the amount of extinguishment of native title caused by the validation of an intermediate period act | Must be a party if the agreement provides for validation of a future act or for a change in the amount of extinguishment of native title caused by the validation of an intermediate period act | Must be a party if the agreement provides for validation of a future act |

For area agreements the Native Title Act requires that the parties can demonstrate that all reasonable efforts have been made to identify all the persons who hold or may hold native title for the agreement area, and that those identified have authorised the making of the ILUA (National Native Title Tribunal 2009).

The Tribunal may assist by providing information about native title claimants, Representative Aboriginal and Torres Strait Islander Bodies or Native Title Service Providers and prescribed body corporate for an ILUA area. When no determination of native title has been made, further steps will be necessary to determine who must be a party to, and authorise, an ILUA. This should include consulting with any relevant Representative Aboriginal and Torres Strait Islander Bodies or Native Title Service Providers for the area.

3. Important points in relation to ILUAs

Important considerations that apply in relation to ILUAs.

Future acts done in accordance with a registered ILUA are valid and its terms are intended to take precedence over any other processes for future acts in the Native Title Act so long as the ILUA contains the consent of the parties to the doing of the future act.

Mandatory parties to an ILUA vary depending on the type of ILUA to be used and the area to be covered. The making of body corporate and area agreements must be 'authorised' by the relevant persons. Different authorisation processes apply to the different types of agreements. For Area Agreements, for example, the agreement must be authorised by those persons identified by all reasonable efforts as persons who hold or may hold native title for the area to be covered by the agreement.

The native title group must inform a Native Title Representative Body or Native Title Service Provider before entering into a body corporate or area agreement if the Native Title Representative Body or Native Title Service Provider is not going to be a party to the agreement.

Before the Native Title Registrar can register an Area Agreement or an Alternative Procedure Agreement, the proposed ILUA must be publicly notified so that persons who hold or may hold native title in the area have an opportunity to object to the registration of the agreement. The types of objections which can be made are specified in the Native Title Act. A range of other bodies, including local government, must also be notified.

The Native Title Registrar must give notice of an application to register a Body Corporate Agreement to certain persons who are not parties to the agreement, including the relevant local government, but there is generally no provision for objections or comments from persons not party to the Body Corporate Agreement. The Representative Body or Native Title Service Provider can assert that they were not informed by the registered native title body corporate of its intention to enter into the agreement. If the Registrar is satisfied that is the case, the agreement cannot be registered. A party to a Body Corporate Agreement can also advise the Registrar that they do not want the agreement registered.

Once an ILUA is registered, it binds all native title holders in the area covered by the agreement even if they are not parties to the ILUA.

4. Notification and registration requirements

Some of the details provided in the application for registration of an ILUA must appear in the public notice and on the Register of ILUAs.

The Native Title Act provides that, upon receiving an application for the registration of an ILUA, the Registrar is required to notify the public (only for Area Agreements and Alternative Procedure Agreements) and certain other stakeholders that the parties have applied for registration of the ILUA. Those public notices must:

- describe the area covered by the agreement
- state the name and address of each party to the agreement
- include any statements made in the agreement regarding:
 - consent to the doing of future acts (with or without conditions)
 - exclusion of the 'right to negotiate' regime, or
 - the surrender of native title
 - the validating of a particular future act or future acts (with or without conditions) that have been done invalidly, or
 - (in the case of a Body Corporate Agreement or Area Agreement) changing the effects on native title of an intermediate period act
- in the case of an Area Agreement (where the application for registration of the agreement is certified) or alternative procedure agreement, include a statement that any person claiming to hold native title has three months in which to object to registration (on the ground for an Area Agreement that the requirements for identification and authorisation (either or both) were not met or on the basis that it is not fair and reasonable to register an Alternative Procedure Agreement), and
- in the case of an Area Agreement (where the application has not been certified), include a statement that any person claiming to hold native title in relation to land or waters in the area covered by the agreement may wish to make a native title determination application.

The Native Title Act also provides what information must be entered in the Register, namely:

- a description of the area covered by the agreement
- the name of each party to the agreement and the address at which the party can be contacted
- if the agreement specifies the period during which it will operate, that period
- if the agreement includes any of the following statements:
 - that the parties consent to the doing of the particular class or classes of future act, with or without conditions, and
 - that it has been agreed that the right to negotiate is not intended to apply to those particular acts, or
 - that surrender is intended to extinguish native title, or
 - agreeing to changing the effects on native title of an intermediate period act (in the case of body corporate or area agreements), or
 - agreeing to the validation of a future act (other than an intermediate period act) that has already been done invalidly, a reference to that fact, or
 - that surrender is intended to have extinguished native title, and
- any other details of the agreement that the Registrar considers appropriate.

This information (other than that covered by the last dot point) cannot be kept confidential.

There are several steps to registering an ILUA. If the agreement is about native title matters, then the following steps are a guide to the registration of the ILUA. Once registered, the future acts authorised in the ILUA can be validly done subject to compliance with the relevant provisions in the ILUA.

| Nine steps to ILUA registration | |
|---------------------------------|---|
| 1. | Select the right ILUA for the particular circumstances. |
| 2. | Make sure that the ILUA is about at least one of the required subject matters. |
| 3. | Make sure that the right persons are parties to the ILUA. |
| 4. | Make sure the authorisation process (where required) is properly carried out and that the relevant parties understand the proposed agreement. This may include attending the authorisation meeting to explain the agreement from Council's perspective. |
| 5. | Include all the required information in the written application and attach all the required documents. |
| 6. | Address any problems with the ILUA or application raised by the Registrar in the initial compliance check, where Council is able to address them. |
| 7. | Wait while the Registrar notifies all relevant persons and organisations of your ILUA. |
| 8. | Engage, as appropriate, in the resolution of any objections or obstacles to registration that may have arisen. |
| 9. | If satisfied that the application and ILUA comply with the conditions and other requirements of the Native Title Act, the Registrar registers the ILUA and writes to the parties to advise them of registration. |

Adapted from National Native Title Tribunal 2008

Developing indigenous land use agreements - *A guide for local government*

The Native Title Representative Body or Native Title Service Provider has the function to notify, where reasonably practicable, any person or organisation that holds, or may hold, native title in relation to land and waters over which they have received a notice. The Native Title Representative Body or Native Title Service Provider must as far as is reasonably practicable also advise those persons of any time limits that may apply within that notice.

If requested to do so, and to the extent of their resources and priorities, the Native Title Representative Body and Native Title Service Provider is also responsible for assisting native title holders or applicants. This assistance may include representing them or facilitating their representation in proceedings relating to native title matters, or the operation of the Native Title Act. They may also be able to assist Council with protocols and communication with the native title holders or claimants.

What is a Future Act

Section 233 of the Native Title Act provides:

233 Future Act

Definition

- (1) Subject to this section, an act is a future act in relation to land or waters if:
- (a) either:
 - (i) it consists of the making, amendment or repeal of legislation and takes place on or after 1 July 1993; or
 - (ii) it is any other act that takes place on or after 1 January 1994; and
 - (b) it is not a past act; and
 - (c) apart from this Act, either:
 - (i) it validly affects native title in relation to the land or waters to any extent; or
 - (ii) the following apply:
 - (A) it is to any extent invalid; and
 - (B) it would be valid to that extent if any native title in relation to the land or waters did not exist; and
 - (C) if it were valid to that extent, it would affect the native title.

Validation and extinguishment legislation excluded

- (2) If:
- (a) the act consists of the making, amendment or repeal of legislation; and
 - (b) the act purports to:
 - (i) validate any past act or intermediate period act; or
 - (ii) extinguish native title, or extinguish native title rights and interests to an extent; and
 - (c) the act is done or permitted to be done by Division 2, 2A or 2B of Part 2;
- subsection (1) does not apply to the extent that the act purports to validate the act, or to extinguish the native title or the native title rights and interests.

Acts creating or affecting Aboriginal/Torres Strait Islander land or waters excluded

- (3) Subsection (1) does not apply to any of the following acts:
- (a) an act that causes land or waters to be held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under a law mentioned in the definition of Aboriginal/Torres Strait Islander land or waters in section 253;
 - (b) any act affecting Aboriginal/Torres Strait Islander land or waters.

References

Legislation – Commonwealth

Native Title Act 1993

Native Title Amendment Act 2007

Native Title Amendment (Technical Amendments) Act 2007

Native Title (Indigenous Land Use Agreements) Regulations 1999

Other reference materials

Anscombe AW, King K, Doyle R (1997) *Talking Together, Agreeing Together, Achieving Together*, Regional Agreements Pilot Study undertaken for the Binaal Billa Regional Council of ATSIC, NSW.

Australian Local Government Association and the Aboriginal and Torres Strait Islander Commission (1998) *Working out Agreements between Local Government and Indigenous Australians*, ALGA, Canberra.

Australian Local Government Association (1999) *Working with Native Title: A practical guide for Local Government*. 2nd Edition. ALGA, Canberra.

Australian Local Government Association (2002) *Indigenous Land Use Agreements Involving Local Government*. Issues Paper No. 4, ALGA, Canberra.

Everard D (2009) *Scoping Process Issues in Negotiating Native Title Agreements*, Research Discussion paper Number 23. AIATSIS Canberra. Accessed 9 July 2009.
www.aiatsis.gov.au/ntru/overview.html

Department of Natural Resources, Water and Mines, Queensland Government (2006) *Guidelines for negotiation of an Indigenous land use agreement (area agreement)* Accessed 18 May 2009. www.nrw.qld.gov.au

Langton M, Mazel O, Shain K, Palmer L, Tehan M (eds.) (2006) *Settling with Indigenous People: Modern treaty and agreement-making*, Federation Press, Annandale, NSW.

Local Government Association of Queensland (LGAQ) (2009) *Queensland Local Government Template ILUA*. Accessed 5 May 2009. www.lgaq.asn.au

Local Government Association of South Australia (LGSA) (2006) *Agreeing on native title – Indigenous Land Use Agreements – A Template for Local Government*. Accessed 5 May 2009.
www.lga.sa.gov.au

National Native Title Tribunal documents from www.nntt.gov.au

Alternative procedure agreements – Guidelines for Registration

Area Agreements - Guidelines for Registration

Body Corporate Agreements – Guidelines for Registration

Guidelines for providing Assistance (2007)

ILUAs procedures and guidelines (2008)

Local Government Agreements: Content Ideas (2005)

Map and area description (2009a)

Short Guide to ILUA Registration

Steps to an Indigenous Land Use Agreement (2009)

Shain K, Genat W and Wensing E (2006) *Agreement-Making in the Local Context: Case Studies from Regional Australia*, Chapter 9 in Langton et al 2006.



National Native Title Tribunal



For more information about native title and services of the Tribunal please contact the National Native Title Tribunal, GPO Box 9973 in your capital city or **freecall 1800 640 501**. Information is also available at **www.nntt.gov.au** .

The National Native Title Tribunal has offices in Adelaide, Brisbane, Cairns, Melbourne, Perth and Sydney.