



National
Native Title
Tribunal



ILUA or the right to negotiate process?

A comparison for mineral tenement applications

The *Native Title Act 1993* (Cwlth) (the Act) allows two ways to deal with applications to mine, explore or prospect for minerals – an indigenous land use agreement (ILUA) or the right to negotiate process.

The National Native Title Tribunal manages most elements of the Commonwealth right to negotiate scheme¹. ILUAs are not managed by the Tribunal, but the Native Title Registrar is responsible for their registration. There are three types of ILUAs – area agreements, alternative procedure agreements and body corporate agreements. The Tribunal provides information on the three types and their purposes. Miners, explorers, prospectors and native title claimants or holders need to decide which method of agreement-making best suits their needs.

The following comparison of ILUAs and the right to negotiate scheme looks at time frames, parties, subject matter and certainty. Note that some, but not all, state governments have asserted that some grants to prospect and explore qualify for fast-tracking and therefore do not attract the right to negotiate.

1 The Government of South Australia operates its own right to negotiate scheme in relation to mining, however, the Tribunal still has jurisdiction in relation to petroleum titles. All other states and territories in Australia use the Commonwealth scheme.

This is provided as general information only and should not be relied upon as legal advice for a particular matter. 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.

Time frames

| Time frames | ILUA | Future act right to negotiate |
|---------------------------------------|--|--|
| Commencement of negotiations | Negotiations can start at any time before or after the mining grantee has applied to the state or territory government for a mining or exploration tenement. | Although negotiations can start at any time, agreements are usually made after the four-month notification period has finished. Notification is when the state or territory government issues a section 29 (s. 29) notice indicating that it proposes to grant the mining or exploration tenement. |
| Once negotiations have started | <p>ILUA negotiations have no set time frames. It is up to the parties to determine how long the negotiations take.</p> <p>ILUAs take time to negotiate to ensure that adequate consultation takes place for informed consent by all persons who hold or may hold native title. If the miners' planned dates are less than six months away, an ILUA will not serve their purposes.</p> <p>A further six months should be allowed as a minimum once an application to register the ILUA is made to the Tribunal. The Registrar must notify certain persons and organisations of the application to register the ILUA and in the case of area and alternative procedure agreements, must also notify the public. Time must also be allowed for any objections to the registration of the ILUA to be considered.</p> | <p>There are no set right to negotiate time frames. However, if the parties are unable to reach an agreement despite negotiating in good faith, then any party can ask the Tribunal to determine the matter if at least six months have passed since the notification day set out in the s. 29 notice.</p> <p>The Tribunal must take all reasonable steps to make a determination as to whether the future act can be done, as soon as practicable after the application has been made.</p> <p>The Tribunal usually makes its determination within six months of the application being made.</p> |

Parties

| Parties | ILUA | Future act right to negotiate |
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| Government parties | The state or territory government must be a party when extinguishment of native title is being negotiated. Otherwise its role as a party is not compulsory. | The state or territory government is always a party to the negotiations, and must undertake those negotiations in good faith. |
| Native title claimants | <p>For body corporate agreements, all registered native title bodies corporate (RNTBC) for the area must be parties to the agreement.</p> <p>For area agreements, all registered native title claimants and all RNTBCs must be parties to the agreement. Where there are no such persons or bodies, any person who claims to hold native title in relation to the area and/or any representative Aboriginal and Torres Strait Islander body (RATSIB)¹ for the area must be party to the agreement.</p> <p>For alternative procedure agreements, all registered native title bodies corporate and all RATSIBs for the area must be party to the agreement.</p> <p>Any potential native title holders in the area not a party to an ILUA at the time will be bound by its terms once it is registered. This provides certainty for future developments and the opportunity for the miner and the native title holders to commence a relationship that can last long-term.</p> | <p>All RNTBCs and/or registered native title claimants for the area of the proposed future act, who are registered at the time of the four month closing date published in the s. 29 notice must be parties to the negotiations and agreement.</p> <p>Where a proposed tenement straddles more than one registered native title claim or determination area, or there are overlapping registered claims or determinations over the area of the proposed tenement, separate agreements may be necessary between each of the native title parties, the grantee party and the government party. The native title parties must also negotiate in good faith.</p> |
| Miners, explorers or prospectors (the grantee party) | The miner, explorer or prospector who expects to benefit from the proposed future act is generally a party to the negotiations, however this is not compulsory. | The miner, explorer or prospector (the 'grantee party') who expects to benefit from the proposed future act, is always a party to the negotiations, and must undertake those negotiations in good faith. |
| Parties and the Tribunal | Negotiations are conducted by the parties, and although the Tribunal can be asked to assist it is not obliged to do so. | Any party can ask the Tribunal to mediate and assist the parties to reach an agreement. If asked the Tribunal must assist. |

¹ A representative Aboriginal and Torres Strait Islander body (RATSIB) is a regional organisation recognised by the Federal Indigenous Affairs Minister and funded to represent Indigenous Australians in native title issues in a particular region. Other people and bodies may be funded under s. 203FE of the Act to perform some or all of the functions of a RATSIB. Where a person is funded to perform a particular function, the references to the RATSIB that relate to that function should be read to include the person or body.

Subject matter

| | ILUA | Future act right to negotiate |
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| Scope | <p>While the scope of an ILUA is very broad under the terms of the Act it must be about something related to native title.</p> <p>The type of benefits for native title holders are unlimited in scope and are up to the parties to negotiate, but have included:</p> <ul style="list-style-type: none"> • employment and training • protocols and agreements for future developments • fostering of good long-term relationships between Indigenous people and mineral tenement proponents, and government agencies • use and access agreements between native title groups and mining companies • compensation payments if there is a loss or impairment of native title. <p>ILUAs can also provide a framework for the making of other agreements relating to native title rights and interests.</p> | <p>The Act provides that future act negotiations are unlimited in scope. However, most states and the Northern Territory require a tripartite agreement (also referred to as a State Deed) to be entered into which confirms that the grant of the tenement can occur.</p> <p>In addition, ancillary (confidential) agreements can be made (between the grantee and the native title party) which may include, in appropriate circumstances, elements such as:</p> <ul style="list-style-type: none"> • employment, education and training • heritage protection • compensation payments • dispute resolution mechanisms • establishment of liaison committees • cross-cultural awareness training. <p>Agreements may also be given effect by parties requesting the Tribunal to make a future act determination by consent, imposing certain conditions on the parties. Such conditions, however, cannot include, for example, a requirement that the grantee profit share with the native title group, as the Tribunal cannot make a determination that includes a condition that the native title party is entitled to payments worked out by reference to profits, income or production.</p> |
| Cost effectiveness | <p>An ILUA can cover future mining activities, and/or multiple projects in the one agreement. An ILUA is potentially more cost effective in the long run than the right to negotiate process for large, complex projects or many tenement applications in one area. The technicalities of an ILUA require a degree of expertise in the drafting.</p> | <p>Only proposed grants advertised in the s. 29 notice can be the subject of the agreement, although the agreement can deal with sequential or related project acts.</p> |

| | ILUA | Future act right to negotiate |
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| Other native title business | Parties may decide to deal with future act matters at the same time as their native title determination application, and an ILUA is a vehicle to allow that to happen. | Right to negotiate matters are processed independently from a native title determination application. |
| Information provided – use of information | Where the Tribunal provides assistance in the negotiation of an ILUA (or in withdrawing an objection to an ILUA), the Tribunal cannot use or disclose any information obtained solely as part of these assistance activities for any other purpose, without the permission of the person who provided the information. Importantly, this information cannot be used, without prior consent, to determine whether the ILUA can be registered. | Where the Tribunal provides assistance as the arbitral body in future act negotiations, it cannot use the information obtained solely as part of those assistance activities without the permission of the person who provided the information for any other purpose. However, if the negotiations fail and an application for determination is made, this information may be used, without consent, to establish whether a party has negotiated in good faith. |

Certainty

| | ILUA | Future act right to negotiate |
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| Validation of invalid future acts | <p>ILUAs can validate certain future acts that were invalidly done in the past. A future act will be made valid if the parties to the ILUA consent to its validation, and the Crown and any person who is or may be liable to pay compensation in relation to the future act(s) are parties to the agreement</p> | <p>The right to negotiate cannot operate to validate those acts done by governments (such as the grant of a mineral tenement) which were done invalidly.</p> |
| Authorisation by the native title parties | <p>For body corporate agreements the prescribed body corporate must consult with, and obtain the consent of, the ‘native title holders’.</p> <p>For alternative procedure agreements all RNTBCs and all RATSIBs for the area have to be a party to the ILUA. The RATSIB must, as far as practicable, consult with, and have regard to the interests of, people who hold or may hold native title in relation to the agreement area.</p> <p>For area agreements, all agreements have to be properly authorised. Except in relation to certified applications, for the agreement to be registered the Registrar must, among other things, be satisfied that all reasonable efforts have been made to identify all people who hold or may hold native title in relation to the agreement area, and that those people have authorised the making of the agreement.</p> <p>Authorisation is more complex than obtaining the consent of all the registered native title claimants. Questions may arise regarding whether a particular claim group has authorised the making of the agreement and whether all potential native title holders have been identified.</p> <p>Delays may also occur where native title claimants are not represented by a RATSIB.</p> | <p>When agreement is reached, all registered native title claimants and/or all RNTBCs at the time of the four-month closing date of the s. 29 notice must sign tripartite agreements consenting to the grant of the tenement.</p> |

| | ILUA | Future act right to negotiate |
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| Finalisation of the agreements | <p>An application must be made to the Registrar for registration of the ILUA.</p> <p>Before registration the Registrar checks the ILUA complies with the regulations.</p> <p>If the ILUA satisfies all of the conditions set out in the Act, the Registrar notifies certain people and organisations. In the case of area and alternative procedure agreements, the public must also be notified that the ILUA has been lodged for registration.</p> <p>For the latter two types of agreement there is a three-month notification period. In some cases, objections can be lodged with the Registrar against the registration of the ILUA.</p> | <p>The state or territory department checks the tripartite agreement for compliance against its own policy.</p> <p>A copy of the tripartite agreement or state deed must be lodged with the Tribunal and the parties must advise the relevant minister of the making of the agreement.</p> <p>There is no formal notification or registration process by the Tribunal.</p> <p>Confidential ancillary agreements are not usually lodged with the Tribunal.</p> |
| Registration and public access | <p>The Registrar places the ILUA on the Register of Indigenous Land Use Agreements. The Registrar maintains the register and certain details of the ILUA are available to the public. However, confidential details of the agreement are not disclosed on the register. The Registrar will not disclose confidential details unless compelled by law or the parties have consented to that disclosure.</p> | <p>The copy of the agreement held by the Tribunal is not generally available to the public.</p> <p>The Tribunal will disclose the details of the agreement if compelled by law or the parties have consented to that disclosure.</p> |
| If negotiations fail | <p>If the requirements for registration are not met and cannot be overcome by taking further steps or providing more information, there is no process available to finalise the agreement. The parties may undertake further negotiations, use a different process or walk away.</p> | <p>If an agreement cannot be reached, any party can apply to the Tribunal to arbitrate and determine the matter.</p> <p>The Tribunal will hold an inquiry and make a determination on whether or not the mining, exploration or prospecting tenement can be granted. If the decision is that the tenement may be granted, conditions may be imposed on the parties.</p> <p>A decision must be made.</p> <p>In most cases the decision is made within six months of the application being made to the Tribunal.</p> |

| | ILUA | Future act right to negotiate |
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| Grant of tenements | After the ILUA is registered, the grantee party notifies the government party requesting that the ILUA tenement/s be granted. The government may grant the tenement/s. | After signing the tripartite agreement, the government party may grant the tenement; or following a determination by the Tribunal that the future act may be done (with or without conditions) the government party may grant the tenement/s; or if the Tribunal determines that the future act cannot be done, no grant may be made. |
| Contractual | Once registered, an ILUA has the effect of a contract between the parties. It also binds all native title holders for the area whether or not they are parties to the agreement. | Both the tripartite agreement and the ancillary agreement are contracts between the parties who sign them. |
| Deregistration | <p>The details of an ILUA may be removed from the register under the following conditions:</p> <ul style="list-style-type: none"> • if there is a new determination of native title over the area and the persons who previously were determined to hold native title are not the same as those who are now determined to hold native title for the area • if a determination of native title is made and any of the persons determined to hold native title for the area is not a person who authorised the making of the ILUA • if a party advises the Registrar in writing that the agreement has expired and the Registrar believes, on reasonable grounds, that the agreement has expired; • all the parties advise the Registrar in writing that they wish to terminate the agreement • if the Federal Court orders that it be removed. | As contracts, both the tripartite agreement and the ancillary agreement may include terms which govern the relationship between the parties, if subsequent to the agreement being made, the native title claim is deregistered or a determination is made that native title does not exist. |

Contact the Tribunal

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

The Tribunal also has a wide range of information available online at www.nntt.gov.au

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