ILUAs

Disclaimer

The commentary contained in this section is general. It is not intended to be legal advice or applied uncritically to your specific circumstances. You should seek specific advice that relates to your particular facts and circumstances or the particular facts and circumstances relating to your claim group or PBC.

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What is an ILUA

“ILUA” is an acronym for Indigenous Land Use Agreement. An ILUA is a special kind of agreement created by the Native Title Act.

The Native Title Act provides for three types of ILUA. Those are:

- Body corporate agreement
- An area agreement, and
- An alternative procedure agreement.

Body corporate ILUAs

Because body corporate ILUAs are those most relevant to PBCs, this section will only consider LIUAs of that type. Under the relevant provisions of the NTA, the parties to an ILUA may agree to ignore, modify or replace all or part of the future act scheme under the Native Title Act. The agreement may validate future acts that have already been done without compliance with the future act provisions.

While ILUAs provide flexibility to the parties, including the native title party, it needs to be emphasised that entry into an ILUA is a voluntary process.

The purpose behind the provisions of the Native Title Act that support ILUAs was usefully summarised by Justice Reeves in QGC Pty Ltd v Bygrave (No 2):

... The ILUA process and the Act is intended to achieve a balance between allowing future acts to be validated, so as to provide certainty for the broader Australian community, but at the same time, ensuring that those who hold, or claim to hold, native title in the land and waters affected by such future acts, agree to them being undertaken and, if they do, to obtain a corresponding benefit from so
agreeing. By this process, those who hold or claim to hold native title in such land and waters should be able to share in the benefits that flow from the future use of their native title rights and interests in that land and waters.

ILUAs can provide flexibility to native title parties and the people or companies they do business with to design a way of dealing with a particular future act or a number of future acts of a particular kind to suit the circumstances.

For a project with multiple future act requirements over a number of years, the ability to design a consultation and consent procedure to suit the parties and incorporate them into an ILUA with the knowledge that registration of the ILUA provides security to the parties may be an attractive alternative to dealing with the multiple future acts as they occur.

The *Native Title (Prescribed Bodies Corporate) Regulations 1999* will be relevant if a PBC is a party to an ILUA in circumstances where:

- The agreement involves a “native title decision” as defined in those regulations, and
- There are representative bodies that are not parties to the agreement or there is no representative body for the agreement area.

Regulations 8 and 9 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (‘Regulations’) apply and require that there must be consultation with and consent by the common law native title holders to the proposed act.

Consultation requires that the PBC make sure that the common law native title holders understand the purpose and the nature of the proposed decision to enter into the ILUA. This would necessarily require an explanation of what acts may be done under the ILUA that would affect native title. Note that the group of common law native title holders may be larger than the members of the PBC.

The consent of the common law native title holders must be given either:

- By using the decision-making process under the traditional laws and customs of the common law holders where such a process exists and is required to be used, or
- If there is no such traditional decision-making process, by using a decision-making process agreed to and adopted by the common law native title holders.

Parties to a body corporate ILUA must include:

- All PBCs for the area subject to the ILUA (if the area covered by the ILUA spans more than one determination, there may be more than one PBC involved)
- If the ILUA includes provision for the surrender of native title, the State or Territory government is a mandatory party.

Other parties may include:

- The native title representative body (NTRB) relevant to the agreement area
- The State, Territory or Commonwealth government (or more than one of them)
Another person or corporation.

For an ILUA to have effect it must be registered by the National Native Title Tribunal (NNTT) and be on the register of Indigenous Land Use Agreements at the time the act is carried out.

Registration, Opposition, Role of the NNTT

Registration of ILUAs is a function of the Registrar of the NNTT. The NNTT website contains useful resources and information. An application to register an ILUA must be made in writing to the Native Title Registrar at the NNTT. A template registration application form can be downloaded from the NNTT’s website. The NNTT also publishes explanatory notes to the form and guidelines on its website. Section 24BG(3) of the NTA provides that the Registrar may give such assistance as considered reasonable to help a party to the ILUA prepare the application and accompanying material.

Provided that all of the parties agree, any of the parties to an ILUA may apply for the agreement to be registered. Responsibility for making the application may be included as a term of the agreement.

The application for registration must be accompanied by certain documents. Those documents are:

- A copy of the agreement;
- A signed statement from the parties to the agreement to the effect that they agree to the registration application being made. It is a requirement that the statement is signed by each of the parties to the agreement. That statement may be included as part of the agreement;
- A complete description of the agreement area which includes written description that enables identification of the boundaries of the area covered and any areas within the boundaries that are not covered, and a map of the agreement area that contains geographic coordinates. Those documents may be included as part of the agreement or provided separately;
- A copy of the determination of native title relating to the area of the agreement; and
- A statement from the PBC that it has informed the relevant native title representative body.

It is a requirement of the NTA that if the relevant native title representative body is not a party to the agreement then the PBC must inform the representative body of its intention to enter into the agreement before it actually enters into the agreement.

According to information published by the NNTT; the Registrar or their delegate will only consider whether the registration application is accompanied by a document certifying to the mandatory matters and signed in accordance with the Regulations. A certificate that satisfies regulation nine will be taken to be evidence of the consultation with and consent of the common law native title holders.

As part of the Application to Register a Body Corporate ILUA, the NNTT publishes an explanatory note relating to compliance with the things referred to in the previous paragraph:

EXPLANATORY NOTE:

If

- the agreement gives effect to a ‘native title decision’ as defined in Native Title (Prescribed Bodies Corporate) Regulations 1999
(PBC Regulations), and

- if there is no Representative Aboriginal and Torres Strait Islander Bodies (RATSIBs)/Native Title Service Providers (NTSPs) for any part of the area that will be affected by that native title decision, OR
- there is a RATSIB or NTSP for that area but it is not a party to the agreement THEN

your application must be accompanied by a document of the kind mentioned in Reg 9(1) of the PBC Regulations.

The PBC Regulations also require that a prescribed body corporate that is a trustee or agent for native title holders must consult with, and consider the views of, a RATSIB/NTSP for the area to which the native title rights and interests relate and, if it considers it appropriate and practicable to do so, to give the common law holders of native title notice of the views of that RATSIB/NTSP (see Reg 8(2)). A document as mentioned in Reg 9(6) of the PBC Regulations can be provided as evidence of compliance with Reg 8(2).

Under Reg 9(4), the Certificate must be signed by at least (five) 5 members of the prescribed body corporate, each of whom is a common law holder (an affected common law holder) whose native title rights and interests would be affected by the proposed native title decision.

However, if there are fewer than (five) 5 members of the prescribed body corporate who are affected common law holders, the certificate must be signed by at least 5 members of the body corporate, including each affected common law holder who is also a member of the body corporate (see Reg 9(5)).

The Registrar has developed the template set out on the schedule to this section to assist in drafting a Regulation 9 certificate.

Once an application for registration has been made the Registrar is required to “notify” the application. The notification period for body corporate agreement is within one month after the notification day specified in the Registrar’s notice.

Sections 24BI(2) and 24BI(3) of the NTA precludes the Registrar from registering the agreement if:

- Any of the parties to the agreement advise the Registrar within one month after the notification day that the party does not wish the agreement to be registered, or
- A native title representative body for the relevant area advises the Registrar that the statutory requirements were not complied with in relation to the agreement, and the Registrar is satisfied that those requirements would not complied with.