



Appendix 7

Technical and legal aspects of central Queensland's local government ILUA template

1. Consent determination

Section 87 of the Native Title Act empowers the Federal Court to make a consent determination where agreement about a claim is reached between the parties. Section 94A requires all determinations of native title, including consent determinations, to set out details of the matters mentioned in Section 225 (which defines *determination of native title*).

Where a particular council and native title party adopt the ILUA template in the mediation of a claim, they commit to a consent determination as their preferred claim resolution outcome. Because determination orders must cover all of the matters in Section 225 and because a local government ILUA will generally be concluded early in the mediation process, the following conditions to a council's consent to final determination orders are included in the ILUA.

- The native title party agrees not to seek a determination of exclusive native title rights and interests in those parts of the claim area where there are *existing* local government or community interests. Exclusive native title can still be recognised for other parts of the claim area. For areas where there are existing local government or community interests, it is unlikely that the requisite exclusivity would apply to native title rights in any event.
- The nature and extent of local government interests and the relationship between those interests and native title must be stated in consent determination orders in a way which is consistent with the terms of the ILUA. Other provisions in the ILUA set out the relationship. This simply assures the council that, at a final determination hearing, the proposed consent orders will properly address the requirement in Section 225(c).
- There is a recognition that the State of Queensland will need to consent to the determination orders. This is a statement of the legal position in any event. It emphasises the need for the native title party to go on and mediate successfully with the state. The local government has the comfort of knowing that the state will address issues of connection when making its decision about whether to consent.



- It is acknowledged that the nature and extent of extinguishment over particular parcels of land needs to be included in the consent determination orders in a way that is consistent with the terms of the ILUA. Other provisions in the ILUA set out the agreed principles governing the identification of particular areas where extinguishment will have occurred. This is to ensure that, in terms of Section 225, there is accurate recognition in final determination orders about whether or not native title exists *in relation to a particular area*.
- As ILUAs take effect upon registration by the National Native Title Tribunal, there is a requirement that before the local government gives its consent, the ILUA is entered in the Register of Indigenous Land Use Agreements.

2. Conditions involving the state's requirements

The template ILUA anticipates a particular council respondent and the native title party as the parties to the agreement. In some cases the state as a respondent party to every claim, could choose to participate in the council/local government mediation and be included as a party to the ILUA.

The template ILUA, insofar as the conditions of a council's consent to a determination are concerned, specifies that the state's agreement will be required before consent determination orders are made by the court. That is a statement of the legal position that applies in any event. The condition does emphasise the need for native title parties to not only achieve agreement with council respondents, but with other respondents as well – most importantly the state.

3. Non-extinguishment principle and compulsory acquisitions

Sections 24EB(1)(d) and (3) of the Native Title Act, contain a technicality about the application of the statutory *non-extinguishment principle* to future acts covered by a body corporate or area agreement ILUA. In relation to the alternative future act compliance arrangements for local government activities in the template ILUA, the intention is that no act covered by those arrangements causes extinguishment. The parties expressly state that the non-extinguishment principle applies. The objective is to preserve native title to the greatest extent possible – even where council activities do affect native title.

There are very few acts where, for legal purposes, a council would require the extinguishment of native title. An example of where extinguishment would be necessary, is where council seeks a new grant of freehold title from the state over a particular parcel of land. The security of freehold title may, for example, be needed for a major project.

In cases like that, native title could only be cleared from the freeholding area by way of a surrender of native title under a further project specific ILUA (to which the state must be a party), or by way of the compulsory acquisition of native title. The ILUA template does not anticipate the state as a party. Consequently it does not provide for the surrender of native title (although the template could be varied in particular cases to provide for that where the state decides to participate).



In relation to the compulsory acquisition of native title for specific future council projects, where a freehold grant is required the template ILUA contains an innovative arrangement. Section 24MD of the Native Title Act provides that native title can be compulsorily acquired (and thereby extinguished) on the same basis as non-native title interests. The template ILUA includes an option for the council party to follow a process of reaching agreement with the native title party *before* a compulsory acquisition process is commenced in any particular case.

The process of attempting to reach agreement first, gives the parties an opportunity to resolve the native title issue in a non-controversial way. The native title party may agree not to object to the compulsory acquisition and agreed outcomes could be reached under which the council's compensation liability for the compulsory acquisition is resolved.