

# FACT SHEET

## Indigenous land use agreements (ILUAs) for PBCs\*


### What is an ILUA?

An ILUA is an agreement between the PBC and those who want to do a future act, that has been registered by the National Native Title Tribunal (NNTT). It can also cover things other than future acts. It binds all the parties, and all native title holders for the area covered by it, whether they were involved in making the ILUA or not. Before it can be registered by the NNTT, certain processes have to be followed. The NNTT can help parties negotiate an ILUA. PBCs should get legal advice before making an ILUA.

A registered ILUA:

- works as a contract between the parties to the ILUA
- can validate (make it legal to do) future acts

- legally binds all the native title holders for the area covered by the ILUA (even if they weren't involved in making the ILUA)
- usually provides for the non-extinguishment principle to apply (if the ILUA does extinguish native title by surrendering it to a government, that government must be a party to the ILUA)
- can provide compensation for future acts, but usually compensation is limited to what is in the ILUA (you can't ask for more in the future)
- can provide other benefits to the native title holders and the PBC (eg freehold grants, cultural heritage protection, positions on committees, employment, training etc).



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### Statutory (legal) requirements

The law says that ILUAs must properly describe the future act(s) and the area covered by the ILUA (with a map and description). If the ILUA replaces the right to negotiate, it must say so.

### Consent of the native title holders

Before a PBC can make an ILUA, it must consult with the native title holders whose native title will be affected by the future act and get their consent (see [PBC Decision Making Factsheet](#)).

### Features of ILUAs

- An ILUA can only be made if the PBC and native title holders want one – they cannot be forced to sign
- Third parties are not involved (unless you want them to be)

- The terms of an ILUA are negotiated, they cannot legally be imposed by government, the NNTT, a court, or by anyone else (though in practice, people's choices might be limited)
- Flexibility – an ILUA can include any benefits the parties agree on
- Relationship building – an ILUA can help build a relationship between the parties which can be useful in the future (eg with government or companies)
- An ILUA binds all the native title holders even if they didn't help make the ILUA
- ILUAs take time to negotiate and register.

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### Types of ILUAs

There are three types of ILUAs: Body Corporate, Area and Alternative Procedure ILUAs.

The different types of ILUAs have different rules about when they can be used and how they must be made. Usually (but not always) PBCs make Body Corporate ILUAs.

Native title holders must be consulted and give their consent before a PBC can make any of these types of ILUA (see **PBC Decision Making Fact Sheet**).

**Body Corporate ILUAs** ('Subdivision B') are used where the whole ILUA area is covered by registered PBCs. All of these PBCs must be parties. They can be registered relatively quickly once the parties have completed the negotiations (although the negotiations can take time).

**Area ILUAs** ('Subdivision C') are used where parts of the ILUA area are not covered by registered PBCs. All the PBCs and registered claimants for the area covered by the future act must be parties to the ILUA. These can take longer to negotiate and register, especially if someone claiming to be a native title holder objects to something about the ILUA.

### Alternative Procedures ILUAs

('Subdivision D') are used where parts of the ILUA area are not covered by registered PBCs. At least one PBC or Native Title Representative Body/ Native Title Service Provider (**NTRB**) for the area must also be a party to the ILUA. No-one has registered an Alternative Procedures ILUA so far.

For all ILUAs the Government must be a party if the ILUA extinguishes native title. Remember, an ILUA can only be made if the PBC and native title holders want one, so native title can only be extinguished in an ILUA if the native title holders choose to surrender it – usually in return for compensation or another benefit.

Other parties to ILUAs can include:

- people who claim to hold native title (but don't have a registered claim or a determination)
- NTRBs
- anyone who wishes to do a future act on native title land or waters.





## FACT SHEET

### Important questions to ask before making an ILUA

- Do you have the advice of a lawyer?
- What type of ILUA should it be?
- Who should be parties to it?
- What do you want to include in it?
- Are the right parties involved?
- Have the statutory (legal) requirements been complied with?
- Has the ILUA been properly notified?
- Have any objections to registration been dealt with?



### Body Corporate ILUAs ('Subdivision B')

#### Registration

1. Any party may apply to the NNTT Registrar to register the ILUA
2. The Registrar must notify the parties, the relevant NTRB, governments, and any other appropriate person of the ILUA
3. Any party to the ILUA may tell the Registrar within one month that it doesn't want the ILUA registered (like a cooling off period)
4. The relevant NTRB may tell the Registrar within one month that it wasn't told about the ILUA before it was made
5. Otherwise, the ILUA must be registered.





## FACT SHEET

### Area ILUAs ('Subdivision C')

#### Authorisation

Before it can be registered, the making of an Area ILUA must be authorised by the native title group. The native title group might include:

- all PBCs and registered claimants for the area;
- anyone claiming to hold native title in the area;
- the NTRB for any other part of the area.

Authorisation must be proved to the NNTT by:

- a certificate issued by the NTRB; OR
- evidence provided by the native title group.

The NNTT Registrar must be satisfied that

1. all reasonable efforts have been made to identify native title holders in the area; AND
2. all of those identified native title holders have authorised the making of the agreement.

This is easy for the part of the area for which there is a PBC that has provided evidence that it has followed the consultation and consent requirements necessary before it can make an ILUA (see **PBC Decision Making Factsheet**).

It can be difficult for any part of the area which has not yet received a native title determination, especially if no native title claim has yet been registered.

#### Registration

1. Any party may apply to the NNTT Registrar for registration, showing evidence of authorisation, that the PBC has consulted the native title holders whose native title is affected by the future act and obtained their consent to making the ILUA
2. The Registrar must notify the parties, the NTRB, governments, any other appropriate person, and the public of the ILUA (using letters and public notices)
3. If no-one objects within three months, the ILUA can be registered.

BUT

1. A person who claims to hold native title has three months to:
  - a. object if the ILUA has been certified by the NTRB and they believe that native title holders were not identified in the process or did not authorise the agreement, OR
  - b. make a native title application that is later registered, if the ILUA hasn't been certified by the NTRB.
2. These issues are resolved by:
  - a. negotiating with the person who made the objection so they withdraw their objection (eg there might be part of the ILUA they want changed), OR
  - b. making sure all registered native title claimants are party to the ILUA.
3. Once all issues are resolved the ILUA can be registered.
4. Registration usually takes six months, but can take longer.







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## Legal context for PBC\* decision making

### Legislation

There are two pieces of legislation which talk about PBC decision making about native title:

- the Native Title Act 1993 (Cth)
- the Native Title (Prescribed Body Corporate) Regulations 1999 (Cth), (**PBC Regs**) which were made under the *Native Title Act*.

These apply whether a PBC is:

- a trustee PBC – holding native title on behalf of the native title holders, OR
- an agent PBC – managing the native title on behalf of the native title holders, who hold the native title.

### PBC legal responsibilities

The Native Title Act and the PBC Regs say that the PBC needs to:

- **consult** with the native title holders about surrendering or doing things (acts) that will affect their native title; AND
- make sure the native title holders **understand** the purpose and nature of the proposed decision (**PBC Regs 8(2)**); AND
- obtain their **consent** before they go ahead with the acts (**PBC Regs 8(1)**).

Plus the PBC Regs say that the PBC must:

- consult with the relevant Native Title Representative Bodies/ Native Title Service Provider (**NTRB**), consider its views and, if appropriate and practical, tell the native title holders about these (**PBC Regs 8(2)**).

### What is a decision that affects native title?

A '**native title decision**' is a decision to give up native title rights and interests, or to do (or agree to do) something that would affect the native title rights or interests of the native title holders.

For example:

- decisions about future acts (responding to future act notices)
- making right to negotiate agreements
- signing Indigenous land use agreements (ILUAs).



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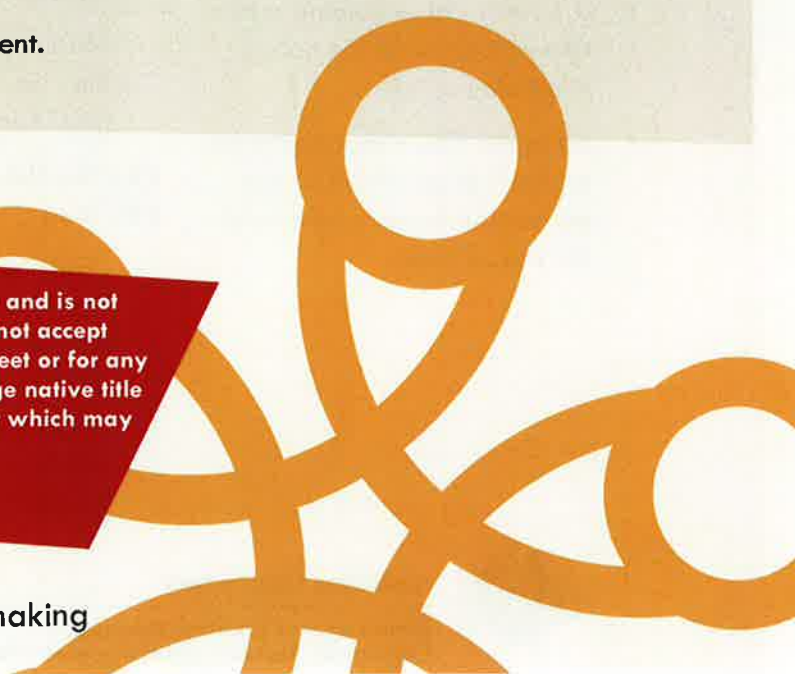
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### What sorts of decisions can a PBC make?

PBCs have to make three kinds of decisions. This fact sheet focuses more on native title decisions (which are covered in points 2 and 3 on this page):

1. Those made by the PBC directors with their own thinking about the internal governance of the PBC. These decisions come under Australian law, for example the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (CATSI Act)* and the common law. Breaching some of the requirements of that law can be a criminal offence. These kind of decisions cover for example:
  - how the PBC is to be run
  - the powers of the CEO and the board in running the PBC
  - rules for PBC members' meetings (eg annual general meetings ) and special general meetings)
  - financial management.

2. Decisions that directors can make where they have to follow any rules made by the native title holders, for example:
  - a. alternative consultation processes (see page 3)
  - b. standing consents (see page 4).
3. Decisions that have a large effect on native title must be made by the native title holders. They include making ILUAs and agreements under the right to negotiate. The PBC directors then pass on these decisions to government. These decisions are NOT the directors' own thinking.



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## FACT SHEET

### Deciding how native title decisions will be made

The way that PBCs make decisions is controlled by the CATSI Act, the PBC Regs, and their Rulebook.

PBC Regs 8(3) & (4) and section 251 of the Native Title Act talk about the PBC having to use particular decision making processes for making ILUAs and other native title decisions:

1. a decision making process that must be followed under traditional laws and customs, for example:
  - elders make the decision; or
  - native title holders particularly affected make the decision.

OR:

2. if there is no traditional process, a process agreed to by native title holders, for example:
  - everyone has one vote at a meeting;
  - one person makes the decision
  - PBC directors make the decision; OR
  - some other process

There are two other kinds of decision making processes where the directors of the PBC can make the decision but they have to follow the rules made by the native title holders:

- a. alternative consultation processes
- b. standing consents.

These are explained below.

#### **a. Alternative consultation processes (PBC Regs 8(1)(d) & 8A)**

The native title holders can agree to one or more alternative consultation processes for making decisions about their native title which:

- they have been consulted about and have consented to; AND
- are set out in the PBC's Rulebook.

An alternative consultation process:

- can be about whatever the native title holders decide, except when:
  - making ILUAs, OR
  - making agreements under the right to negotiate, OR
  - allowing non-native title holders to be members, OR

- setting up an alternative consultation process (PBC Regs 8(1)); AND

- must be followed before the PBC can make a decision that is covered by it.

Any 'alternative consultation process' must be in the PBC's Rulebook which must set out:

- the types of decisions which can be made by the alternative process; and
- the details of the process.



## FACT SHEET

### b. Standing consents (PBC Regs 9(1)(a)(ii))

Under a standing consent given by the native title holders to the PBC Directors, the PBC makes decisions about certain kinds of native title matters and doesn't have to consult the native title holders every time.

This can save both the native title holders and the PBC Directors lots of time and effort.

For example decisions about:

- the right to comment on low level Future Acts (e.g. granting grazing licences near pastoral leases or water licences)
- the right to comment on a National Park Management Plan.

## The native title determination and the PBC's decision making process

Your native title determination sets out who the native title holders are in general terms. It doesn't talk about who has specific rights to particular areas and has no effect on decision making. It just identifies the group, the native title (and other) rights and interests, and the area.

This means it is up to the PBC to make the decision making process

work on the ground. It will need to take into account a range of particular native title rights and interests within the group.

Native title holders often know, under traditional law and custom:

- which people can exercise what native title rights where (i.e. who can speak for what parts of the native title area)
- which people can make decisions about which future acts.

If the PBC is uncertain about which people to consult, or there is a dispute about this, it may seek assistance from the NTRB to undertake further anthropological work or some form of mediation or community facilitation, or it may consult and obtain consent from the whole native title group.



### How to consult native title holders

Although the *Native Title Act* and the *PBC Regs* say that PBCs need to consult with their native title holders and obtain their consent, they do not actually say how to do this. That is up to PBCs themselves.





## FACT SHEET

### Documents to prove consultation

To show that the consultation processes have been properly followed, the PBC needs to produce three certificates:

1. a certificate of the native title holders that they have been consulted and have consented (*PBC Regs 9(1)*)
2. a PBC certificate about NTRB consultation (*PBC Regs 9(6)(a)*)
3. an NTRB certificate about NTRB consultation (*PBC Regs 9(6)(b)*).

The native title holders' certificate (*PBC Regs 9(1)*):

- must state that the native title holders have been consulted about and have consented to the proposed decision under:
  - i. the process set out in the *PBC Regs*; OR
  - ii. the alternative consultation process set out in the PBC's Constitution/Rulebook; OR
  - iii. a standing consent, and there is a statement about the process of consultation and consent for the standing consent.
- must be signed by at least five PBC members whose native title rights and interests are affected by the decision (*PBC Regs 9(4)*).

The PBC Certificate about NTRB consultation (*PBC Regs 9(6)(a)*):

- must state that the NTRB has been consulted and its views have been considered; AND
- must be signed by at least five PBC members whose native title rights and interests are affected by the decision.

The NTRB Certificate about NTRB consultation (*PBC Regs 9(6)(b)*):

- must state that the NTRB has been consulted about the decision; AND
- must be signed by at least one authorised NTRB member.

In practice, these certificates might be in one document, which should be kept in the PBC's records.

### Charging for services

The PBC Regs also say when and how a PBC can charge a 'fee for service'. PBCs can charge those who are proposing future acts that may impact on the native title. The fee includes the cost of consulting with the native title holders to get their consent, where the PBC is required by law to do this (e.g. the cost of consulting and obtaining native title holders' consent about a proposed future act).









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## The non-extinguishment principle

Future acts don't always extinguish native title. Most future acts just suppress it so that the native title rights can't be exercised or used for the duration of the future act – this is called the non-extinguishment principle. Once the future act has finished then the native title returns with all its original rights and interests.

However, some future acts do extinguish native title. These include building public works on land reserved for a public purpose and the compulsory acquisition of native title by the government.

## Future acts for PBCs\*

A future act is an act done now which extinguishes or otherwise 'affects' native title rights and interests. An 'act' can be something that is done on native title land or water, or it can be the authorising of these kinds of activities. An act 'affects' native title if it is at least partly inconsistent with its existence, enjoyment or exercise. State or Territory governments are responsible for most future acts because of their responsibility for land management.

Future acts are only valid (can legally be done) if they follow the future act regime in the *Native Title Act 1993 (NTA)*. This means that, in some cases, certain procedures must be followed by those seeking to do the future act.

They might include:

- making legislation
- granting a licence, permit or authority
- creating any right which is recognised by the law
- other government acts, such as making proclamations or regulations.

They do not include:

- acts that are 'past acts'
- acts on land where native title has already been extinguished.

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## Categories of future acts

The NTA sets out the categories of future acts in a particular order.

The order for the different types of future acts in the NTA is:

- Indigenous land use agreements (ILUAs) [s 24EB] – see *ILUAs Fact Sheet*
- Procedures indicating absence of native title [s 24FA] – non-claimant applications
- Primary production on pastoral leases [s 24GB] – includes cattle farming, agriculture, aquaculture
- Off-farm activities directly connected to primary production [s 24GD] – includes grazing and taking water on areas adjacent to pastoral leases
- Third party rights on pastoral leases [s 24GE] – includes taking timber or sand, gravel, rocks etc
- Management of water and airspace [s 24HA] – includes licences to take water or fish
- Renewals and extensions [s 24ID] – includes exercising rights that existed before 23/12/1996, and extending some leases
- Public housing etc [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land
- Acts under reservations and leases etc [s 24JA] – includes the creation of national park management plans and the grant of forestry licences
- Facilities for services to the public [s 24KA] – includes building roads, power lines, water and gas pipelines
- Low impact future acts [s 24LA] – does not include things done on land subject to determined native title (not relevant for PBCs)
- some acts that pass the **freehold test** [s 24MD] - (including acts subject to the right to negotiate – see *Right to Negotiate Fact Sheet*). The freehold test means that it would be possible to do the act on land held under freehold title
- Offshore acts [s 24NA] – includes oil rigs, fishing rights.

The order is important because the future act must be dealt with under the first provision that applies to it, even if a later provision is also relevant.

For example, if an ILUA deals with a future act, then the terms of the ILUA apply, not any other later provision in the NTA.

Another example is the construction of a road under a law governing the management of a national park. In that case, Subdivision J (dealing with acts done under a reserve) would apply, not Subdivision K (dealing with the construction of things that service the public), and the procedural rights and the effect on native title would be different.





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### Procedural rights

Native title holders have certain rights when someone wants to do a future act. They do not have a right of veto (the right to say 'no' to a future act). They can have 'procedural rights' where a future act will impact on their native title. These include the:

1. right to comment
2. right to be consulted
3. rights of ordinary title holder
4. right to have an objection heard
5. right to negotiate - see *Right to Negotiate Fact Sheet*.

Not all categories of future acts have the same procedural rights. Also, the government can go ahead with some future acts without following the procedures in the Future Act Regime.

The government must comply with the requirements for building public housing etc (24JAA) and with the right to negotiate in order for those future acts to be valid.

### 1. Right to comment

Native title holders (through their PBC) usually have a right to comment for future acts that involve:

- Primary production on pastoral leases [s 24GB] – includes cattle farming, agriculture, aquaculture
- Off-farm activities directly connected to primary production [s 24GD] – includes grazing and taking water on areas adjacent to pastoral leases
- Management of water and airspace [s 24HA] – includes licences to take water or fish
- Renewals and extensions [s 24ID] – includes exercising rights that existed before 23/12/1996, that grant freehold or other exclusive rights

- Some acts under reservations and leases etc [s 24JA] – includes the creation of national park management plans.

These future acts are valid (they can be done), even if the government doesn't give the native title holders (through their PBC) the chance to make comments about them.

Native title holders always have a right to comment for future acts that involve:

- Public housing etc [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land.
- Third party rights on pastoral leases [s 24GE] – includes taking timber or sand, gravel, rocks etc



### 2. Right to be consulted

Native title holders (through their PBC) have a right to be consulted for certain types of future acts that involve:

- some renewals of non-exclusive agricultural and pastoral leases [s 24ID], where the term of the renewed lease is longer than that of the original lease
- public housing etc. [s 24JAA] – includes the construction of public housing on Aboriginal or Torres Strait Islander land

- acts that pass the freehold test [s 24MD] – includes acts that could be done on land held under freehold.

This is a right to be consulted about ways of minimising the future act's impact on native title, access to the land, and the way in which the future act might be done. It is not a right of veto (the right to say 'no' to a future act).



### 3. Rights of ordinary title holder

Native title holders (through their PBC) have the same procedural rights as any other title holder for future acts that involve:

- facilities for services to the public [s 24KA] – includes building roads, power lines, water and gas pipelines etc
- some Acts that pass the freehold test [s 24MD] – includes acts that could be done on land held under freehold (including acts subject to the right to negotiate)

- offshore acts [s 24NA] – includes oil rigs, fishing rights.

The nature of these rights depends on the Federal, State or Territory law under which the government is doing the future act. There might be rights to comment, rights to be consulted, rights to have an objection heard, or maybe no rights at all.





## FACT SHEET

### 4. Right to have an objection heard

Native title holders (through their PBC) have a right to object to the future act, and to have that objection heard by an independent body, for future acts that involve:

- some renewals of non-exclusive agricultural and pastoral leases [s 24ID], where the term of the renewed lease is longer than that of the original lease
- some acts that pass the freehold test [s 24MD].



### 5. Right to Negotiate

Please see the separate *Right to Negotiate Fact Sheet* for more information about this more complicated process.

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## Right to Negotiate (RTN) for PBCs\*

### The RTN process

The RTN process means that the native title holders have:

1. a Future Act Notice sent by the government to the PBC and the relevant NTRB/NTSP (s 29 NTA)
2. four months from the date of the notice to object to an expedited procedure notice
3. six months (or longer if agreed) from the date of the notice to negotiate in good faith.

During these six months, or longer if agreed, the parties must negotiate in good faith with the aim of reaching an agreement about whether the future act should be done or not. The National Native Title Tribunal (NNTT) can mediate.

After six months from the date of the notice, an application can be made to the NNTT for a determination that the future act can be done.

In a future act determination, the NNTT can decide that the future act must not be done, or that it can be done with or without conditions. The Commonwealth Minister can overrule the NNTT's determination.

The NNTT can take into account any agreement between the parties, and make a determination by consent. If the parties don't agree, in making its determination, the NNTT must consider the effect of the future act on matters including:

- the enjoyment by the native title holders of their registered native title rights and interests
- the way of life, culture and traditions of the native title holders

Native title holders should think about getting legal advice if they wish to exercise their right to negotiate, or if they wish to object to the government applying the expedited procedure.

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## FACT SHEET

- the development of the social, cultural and economic structures of the native title holders
- any area or site of particular significance to the native title holders
- the wishes of the native title holders in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests
- the economic or other significance of the future act to Australia, the state or territory, or the region.



### When do native title holders have the RTN?

Native title holders (through their PBC) have a right to negotiate for future acts that involve:

- mining (including exploration and extraction of minerals, petroleum and gas), OR
- the compulsory acquisition of native title rights and interests for the benefit of third parties, (but not for the purpose of providing an infrastructure facility like a port or a power station).

They don't have the right to negotiate where the future act involves:

- the creation of a right to mine for the sole purpose of the construction of an infrastructure facility located with mining (native title holders have the

rights to be consulted and have an objection heard – [see Future Act Fact Sheet](#)), OR

- compulsory purchase of native title by the government for government use, OR
- future acts dealt with by ILUAs that exclude the right to negotiate, OR
- some gold, tin or gem mining, OR
- land within a town or city, OR
- acts subject to the expedited procedure (the future act notice must state that the government thinks that the expedited procedure applies) – see page 3.



## FACT SHEET

### Expedited procedure

A future act notice may include a statement that the government thinks that the act attracts the expedited procedure. If the expedited procedure does apply, the future act can be done without going through the right to negotiate.

A PBC can object, to the inclusion of a statement that the expedited procedure applies. If you are considering an objection it would be good to get a lawyer involved.

If the PBC objects the NNTT makes a decision about whether the expedited procedure applies. To find that the expedited procedure doesn't apply, the NNTT will need to be convinced that the act will be likely to:

(a) interfere directly with the carrying on of the community or social activities of the native title holders; OR

(b) interfere with areas or sites of particular significance to the native title holders; OR

(c) involve major disturbance or create a right to do something which is likely to involve major disturbance to any land or waters concerned.

In making its decision, the NNTT:

- takes into account constraints already imposed on the native title holders, e.g. pastoralists exercising their legal rights, AND
- assumes that those who propose to do the future act (the 'grantee party') will comply with the relevant laws, regulations and conditions, unless there is evidence that they will not.

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# FACT SHEET

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A registered ILUA:

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- legally binds all the native title holders for the area covered by the ILUA (even if they weren't involved in making the ILUA)
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- can provide compensation for future acts, but usually compensation is limited to what is in the ILUA (you can't ask for more in the future)
- can provide other benefits to the native title holders and the PBC (eg freehold grants, cultural heritage protection, positions on committees, employment, training etc).



An ILUA is an agreement between the PBC and those who want to do a future act that has been registered by the National Native Title Tribunal (NNTT).

Last updated 25/09/2012

\* PBCs are Prescribed Bodies Corporate. Once registered with the NNTT, they are also called Registered Native Title Bodies Corporate (RNTBCs).




Australian Government

Department of Families, Housing,  
Community Services and Indigenous Affairs





## FACT SHEET



### Statutory (legal) requirements

The law says that ILUAs must properly describe the future act(s) and the area covered by the ILUA (with a map and description). If the ILUA replaces the right to negotiate, it must say so.

### Consent of the native title holders

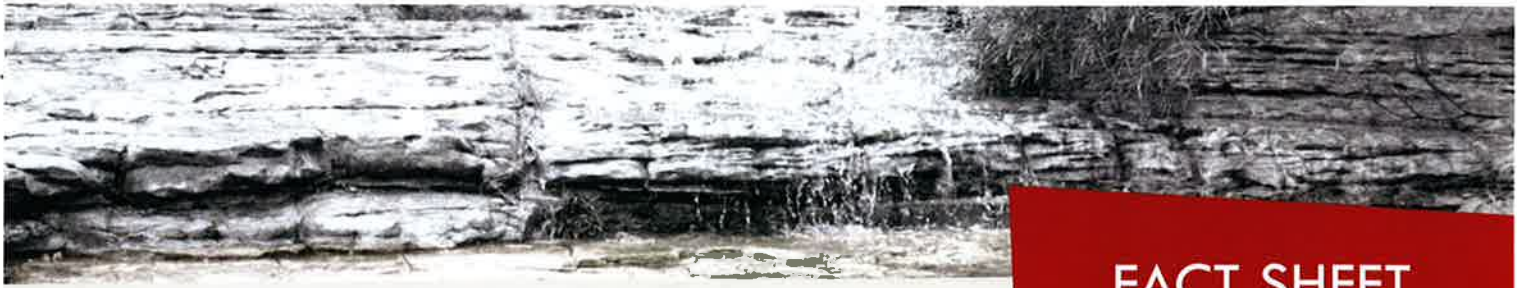
Before a PBC can make an ILUA, it must consult with the native title holders whose native title will be affected by the future act and get their consent (see [PBC Decision Making Factsheet](#)).

### Features of ILUAs

- An ILUA can only be made if the PBC and native title holders want one – they cannot be forced to sign
- Third parties are not involved (unless you want them to be)

- The terms of an ILUA are negotiated, they cannot legally be imposed by government, the NNTT, a court, or by anyone else (though in practice, people's choices might be limited)
- Flexibility – an ILUA can include any benefits the parties agree on
- Relationship building – an ILUA can help build a relationship between the parties which can be useful in the future (eg with government or companies)
- An ILUA binds all the native title holders even if they didn't help make the ILUA
- ILUAs take time to negotiate and register.

This Fact Sheet contains general information only and is not a substitute for getting legal advice. Aurora does not accept liability for any action taken based on this Fact Sheet or for any loss suffered because someone relied on it. We urge native title holders and PBCs to get legal advice on any matter which may impact on their native title rights and interests.



## FACT SHEET

### Types of ILUAs

There are three types of ILUAs: Body Corporate, Area and Alternative Procedure ILUAs.

The different types of ILUAs have different rules about when they can be used and how they must be made. Usually (but not always) PBCs make Body Corporate ILUAs.

Native title holders must be consulted and give their consent before a PBC can make any of these types of ILUA (see **PBC Decision Making Fact Sheet**).

**Body Corporate ILUAs** ('Subdivision B') are used where the whole ILUA area is covered by registered PBCs. All of these PBCs must be parties. They can be registered relatively quickly once the parties have completed the negotiations (although the negotiations can take time).

**Area ILUAs** ('Subdivision C') are used where parts of the ILUA area are not covered by registered PBCs. All the PBCs and registered claimants for the area covered by the future act must be parties to the ILUA. These can take longer to negotiate and register, especially if someone claiming to be a native title holder objects to something about the ILUA.

### Alternative Procedures ILUAs

('Subdivision D') are used where parts of the ILUA area are not covered by registered PBCs. At least one PBC or Native Title Representative Body/ Native Title Service Provider (**NTRB**) for the area must also be a party to the ILUA. No-one has registered an Alternative Procedures ILUA so far.

For all ILUAs the Government must be a party if the ILUA extinguishes native title. Remember, an ILUA can only be made if the PBC and native title holders want one, so native title can only be extinguished in an ILUA if the native title holders choose to surrender it – usually in return for compensation or another benefit.

Other parties to ILUAs can include:

- people who claim to hold native title (but don't have a registered claim or a determination)
- NTRBs
- anyone who wishes to do a future act on native title land or waters.







## FACT SHEET

### Important questions to ask before making an ILUA

- Do you have the advice of a lawyer?
- What type of ILUA should it be?
- Who should be parties to it?
- What do you want to include in it?
- Are the right parties involved?
- Have the statutory (legal) requirements been complied with?
- Has the ILUA been properly notified?
- Have any objections to registration been dealt with?



### Body Corporate ILUAs ('Subdivision B')

#### Registration

1. Any party may apply to the NNTT Registrar to register the ILUA
2. The Registrar must notify the parties, the relevant NTRB, governments, and any other appropriate person of the ILUA
3. Any party to the ILUA may tell the Registrar within one month that it doesn't want the ILUA registered (like a cooling off period)
4. The relevant NTRB may tell the Registrar within one month that it wasn't told about the ILUA before it was made
5. Otherwise, the ILUA must be registered.



## FACT SHEET

### Area ILUAs ('Subdivision C')

#### Authorisation

Before it can be registered, the making of an Area ILUA must be authorised by the native title group. The native title group might include:

- all PBCs and registered claimants for the area;
- anyone claiming to hold native title in the area;
- the NTRB for any other part of the area.

Authorisation must be proved to the NNTT by:

- a certificate issued by the NTRB; OR
- evidence provided by the native title group.

The NNTT Registrar must be satisfied that

1. all reasonable efforts have been made to identify native title holders in the area; AND
2. all of those identified native title holders have authorised the making of the agreement.

This is easy for the part of the area for which there is a PBC that has provided evidence that it has followed the consultation and consent requirements necessary before it can make an ILUA (see **PBC Decision Making Factsheet**).

It can be difficult for any part of the area which has not yet received a native title determination, especially if no native title claim has yet been registered.

#### Registration

1. Any party may apply to the NNTT Registrar for registration, showing evidence of authorisation, that the PBC has consulted the native title holders whose native title is affected by the future act and obtained their consent to making the ILUA
2. The Registrar must notify the parties, the NTRB, governments, any other appropriate person, and the public of the ILUA (using letters and public notices)
3. If no-one objects within three months, the ILUA can be registered.

BUT

1. A person who claims to hold native title has three months to:
  - a. object if the ILUA has been certified by the NTRB and they believe that native title holders were not identified in the process or did not authorise the agreement, OR
  - b. make a native title application that is later registered, if the ILUA hasn't been certified by the NTRB.
2. These issues are resolved by:
  - a. negotiating with the person who made the objection so they withdraw their objection (eg there might be part of the ILUA they want changed), OR
  - b. making sure all registered native title claimants are party to the ILUA.
3. Once all issues are resolved the ILUA can be registered.
4. Registration usually takes six months, but can take longer.





