Schedule 1

LGAQ
LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

18 October 2012

Attorney General's Department
Central Office
3-5 National Circuit
BARTON ACT 2600

email: native.title@ag.gov.au

Dear Sir

Submission – Native Title Amendment Bill 2012 – Proposed Reform of Historical Extinguishment Provisions

Please find attached a submission on the above Bill.

The Association thanks the Department for the opportunity to comment.

If you have any further queries, please do not hesitate to contact me.

Kind regards,

Greg Hoffman PSM
GENERAL MANAGER - ADVOCACY

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LGAQ Native Title Amendment Bill 2012

LGAQ

LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

Native Title Amendment Bill 2012 – Proposed Reform of Historical Extinguishment Provisions

Submission

Local Government Association of Queensland Ltd
18 October 2012

Native Title Amendment Bill 2012

The Local Government Association of Queensland (LGAQ) is the peak body for local government in Queensland. It is a not-for-profit association setup solely to serve councils and their individuals' needs. The LGAQ has been advising, supporting and representing local governments since 1896, allowing them to improve their operations and strengthen relationships with their communities. The LGAQ does this by connecting councils to people and places that count; supporting their drive to innovate and improve service delivery through smart services and sustainable solutions; and delivering them the means to achieve community, professional and political excellence.

LGAQ Native Title Amendment Bill 2012

1. Summary

The Native Title Amendment Bill 2012 proposes to amend the Native Title Act 1993 (Cth) to, amongst other things, provide for the extinguishment of native title to be disregarded in respect of a park area in certain circumstances and for associated matters. The Bill proposes a new section 47C in that regard.

The proposed new section has significant implications for local governments in Queensland. Some of the implications are adverse to the interests of local governments as they relate to certain park areas. There is also the potential for them to adversely affect public access to some park areas.

This submission does not seek removal of section 47C from the Bill entirely. However it does make important recommendations about necessary changes to certain aspects of section 47C. It is particularly essential that local governments be parties to relevant agreements in respect of park areas which they own or in respect of which they have powers of management and control.

It is further recommended that the provisions relating to the disregarding of extinguishment in respect of public works in such park areas be removed and that further consideration be given to the potential adverse effects of the provision to restrict public access to park areas.

2. Context

His Honour, Chief Justice French, in a speech to the Federal Court Native Title User Group in Adelaide on 9 July 2008, made some suggestions in relation to historical extinguishment requiring statutory reform. They became the basis for the proposed amendments. He put forward the following suggestion:-

> "The second suggestion, by way of modest amendment to the [Native Title Act], would allow extinguishment to be disregarded where an agreement was entered into between the States and the applicants that it should be disregarded. Such agreements might be limited to Crown land or reserves of various kinds. The model for such a provision may be found in ss 47 to 47B. By way of example, arcane argument over long dead town sites might be avoided by resort to such agreements.
>
> Presumably some form of registration or formal public record of the agreement would have to be maintained. Native title so agreed would also be subject to existing interests. If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the NTA or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve."

Some aspects of section 47C, particularly those that are the subject of this submission, go well beyond the suggestion made by His Honour.

Further, it is not clear what the policy objectives of those aspects are. It is stressed that none of the recommendations in this submission would in any material or practical way be adverse to the interests of native title holders.

LGAQ Native Title Amendment Bill 2012

3. General Analysis

Section 47C	Analysis
Where the section applies	
(1) This section applies if: (a) a claimant application or a revised native title determination application is made in relation to an area that: (i) is, or is part of, a park area (see subsection (2)); and (ii) is in an onshore place; and (b) none of sections 47, 47A and 47B applies to the application; and (c) the operation of this section in relation to an area (the ***agreement area***) comprising the whole or a part of the park area is agreed to in writing by: (i) any registered native title body corporate concerned or the applicant for any native title claim group concerned, or, if there is no such body corporate or claim group, all the representative Aboriginal/Torres Strait Islander bodies for the agreement area; and (ii) whichever of the Commonwealth, the State or the Territory by or under whose law the park area was set aside, or the interest in the relevant area was granted or vested, as mentioned in subsection (2). (2) A ***park area*** means an area (such as a national, State or Territory park): (a) that is set aside; or (b) in which an interest is granted or vested; by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, vesting in trustees or otherwise.	1. A native title claim must have been made over a particular area. 2. The native title claim must cover a *park area*. Although the specific example is given of a national, state or territory park, the definition is much broader. It includes any areas which are set aside, granted or vested under law for a purpose which comprises or includes "*preserving the natural environment of the area*". The definition is likely to encompass extensive areas of reserve land in Queensland in respect of which local government owns, is the trustee of or otherwise has powers of management and control. Local government will frequently have extensive infrastructure and improvements within such park areas. Such areas are also often subject to extensive other local government interests. 3. Where 1 and 2 above apply, section 47C is enlivened (i.e. native title extinguishment is disregarded), if in relation to the park area there is a written agreement between any registered native title body corporate, applicant for the native title claim or, if neither of those apply, a representative Aboriginal/Torres Strait Islander body and the Commonwealth, the State or the Territory under whose law the park was established. There is no provision requiring local government to be party to such an agreement. That is despite the fact that for local government owned or managed and controlled park areas, it is local government which has the most substantive interest.
Prior extinguishment to be disregarded	

LGAQ Native Title Amendment Bill 2012

(3) An agreement referred to in paragraph (1)(c) may include a statement by the Commonwealth, or the State or Territory concerned, that it agrees that the extinguishing effect of any relevant public works (see subsection (10)) in the agreement area is to be disregarded. (4) If the agreement area contains a public work or public works, the application may also be the subject of an agreement in writing between: (a) any registered native title body corporate concerned or the applicant for any native title claim group concerned, or if there is no such body corporate or claim group, all the representative Aboriginal/Torres Strait Islander bodies for the agreement area; and (b) whichever of the Commonwealth, the State or the Territory for which any given public work in the agreement area is a relevant public work (see subsection (10)); that any extinguishment of native title by the construction or establishment of that public work is to be disregarded.	4. An agreement of the kind referred to in point 3 above, may provide for the extinguishment of native title to be disregarded not only as to past acts involving the establishment of the park but also the creation of any other prior interest in the park area and the construction or establishment of any public works. 5. Although section 47C(3) and (4) require that any proposed agreement of the kind referred to in point 3 above be the subject of public notification and an opportunity for "*interested persons…to comment on the proposed agreement*", there is no direct agreement-making role for local government. That is despite it being the party most affected in relation to relevant park areas.
Effect of determination	
(8) If the determination on the application is that native title rights and interests exist in the agreement area: (a) the determination does not affect: (i) the validity of the setting aside, granting or vesting; or (ii) the validity of the creation of any other prior interest in relation to the agreement area; or (iii) any interest of the Crown in any capacity, or of any statutory authority, or any other person, in any public works on the land or waters concerned, or access to such public works; or (iv) any existing public access to the agreement area; and (b) the non-extinguishment principle applies to the setting aside, granting or vesting or the creation of any other prior interest in relation to the agreement area.	6. Despite the disregarding of extinguishment where section 47C applies, a determination of native title does not affect the establishment of the park, the valid creation of any other prior interest in the agreement area, any persons interests in or access to any public works or "*any existing public access to the agreement area*". 7. Upon a native title determination being made, the non-extinguishment principle applies to the establishment of the park and the creation of any prior interest in relation to the agreement area. Although in section 47C(8)(a) a distinction is made between the creation of any prior interest and any interest in any public work, the same distinction is not made in respect of application of the non-extinguishment principle.

LGAQ Native Title Amendment Bill 2012

4. Submissions

4.1 LGAQ makes the following submissions:-

(a) There is no good reason why section 47C should make any provision for extinguishment to be disregarded in respect of public works in park areas and that especially should not occur where a relevant local government is not a party to an agreement which enables such extinguishment to be disregarded. The following reasons apply:-

i) The non-extinguishment principle may potentially not apply in respect of interests comprising public works.

ii) In many cases there is complete incompatibility between the existence of public works in a location and native title existing over that location.

iii) There is no benefit to native title parties in having native title co-exist with public works in park areas.

iv) The legislation already provides guidance enabling the location of public works for extinguishment purposes to be separately identified to the balance of a park area (section 251D of the Native Title Act 1993).

v) There are many practical implications associated with the potential co-existence of native title and public works, including in relation to issues of public liability, insurance, indemnities etc.

vi) If extinguishment is to be disregarded in respect of the location of public works, local governments (or other owners/operators) would need to ensure that all future activities on the site are undertaken validly for purposes of Part 2 Division 3 of the Native Title Act 1993. That will involve a substantial additional native title compliance burden on local government.

For these reasons, the provisions enabling extinguishment to be disregarded in respect of public works in park areas should be deleted. However, at a minimum, relevant local governments must be parties to any agreements which provide for extinguishment to be disregarded in respect of their public works.

(b) Where a park area is under the ownership or the management and control of a local government, it is essential that the local government be a party to an applicable agreement. The reasons are as follows:-

i) In Queensland local governments are not the State. They have a separate legal identity.

ii) They hold the most substantive interests in respect of park areas which they own or manage and control, including their interest in the land itself and improvements to the land.

iii) Local governments for such park areas have direct statutory responsibility for the management of the land.

iv) The local government must manage the interests of the whole community in respect of such park areas, including broader public interests in respect of land access and use.

v) The local government has direct responsibility for preserving the natural environment in park areas of that kind.

LGAQ Native Title Amendment Bill 2012

vi) The statutory notification and opportunity for comment provision is completely inadequate in ensuring that local government interests in respect of such park areas are properly addressed. That can only be achieved by the local government being a party to the agreement.

vii) The need for the local government to be a party to the agreement is especially acute if native title extinguishment in respect of local government public works in an agreement area were able to be disregarded.

(c) If native title extinguishment is to be disregarded in respect of park areas, determinations of native title for those areas could recognise native title rights to the exclusive possession, occupation, use and enjoyment of the area. That further heightens the importance of the submissions in paragraphs (a) and (b) above.

It is highly likely that if the amendment is made, current native title claims which assert only non-exclusive native title rights and interests over park areas, will be amended prior to determination to seek the recognition of exclusive native title rights, subject to agreements under section 47C being entered into. Section 47C(8)(b) may not then be sufficient to ensure public access to the agreement area.

Under that provision a "determination does not affect...any existing public access to the agreement area...". However for many park areas there may be no positive legal right of public access. For purposes of section 225(c) where there is no legal right of public access, there may be no such "interest" to be recognised in determinations.

Even if the reference to "existing public access" was construed as a reference to the physical act of access rather than a legal right of access, there will be many parts of park areas at the time of determination in respect of which there is no existing physical access occurring.

The potential effect of section 47C(8)(a)(iv) in these respects needs to be further reviewed and the potentially adverse implications addressed through drafting changes.

Schedule 2

Date

Address

Dear xx

Native Title Respondent Funding Scheme

You may be aware of the Federal Government's changes to the Native Title Respondent Funding Scheme ("the Scheme") that came into effect on 1 January 2013. These changes have effectively eliminated funding to local governments for legal representation costs relating to native title proceedings in the Federal Court.

The Local Government Association of Queensland (LGAQ) has, on a number of occasions expressed grave concerns about these changes to the Commonwealth Attorney-General who is responsible for administering the Scheme. We consider that the funding cuts are a "false economy" that will disrupt recently streamlined native title processes just as they begin to have a positive effect. Similar views have also been expressed on a number of occasions by Federal Court Judges both outside of Court and during hearings of particular proceedings.

Since the commencement of the native title claim system under the *Native Title Act 1993* (Cth), Queensland local governments have participated constructively as both respondent parties in claim resolution and as parties to innovative native title agreements, particularly Indigenous Land Use Agreements (ILUAs). The Australian Human Rights Commission's 2007 Native Title Report to the Commonwealth Parliament (Chapter 11), commended the work being done by local governments, particularly in Queensland, in the development of ILUAs for use in conjunction with the mediated resolution of native title claims. That work has only been possible because of the funding assistance which the Scheme provided.

Local governments have previously qualified for financial assistance in relation to these matters under s213A of the Act. That provision remains in place and gives the Attorney-General a discretion to decide funding applications. Section 213A(5) empowers the Attorney-General to make written guidelines that are to be applied in authorising the provision of assistance. The changes which the Attorney-General has made in respect of local government funding have come about through alterations made by the Attorney-General to existing guidelines, rather than through any legislative change.

An original parliamentary intention behind s213A centred on the fact that the legislation created new impacts and obligations on persons with existing interests in native title claim areas (including responding to claims). The legislation acknowledged that there were new costs involved. Parliament accepted that it should therefore make provision for the Australian Government, through the Attorney-General, to defray those costs by way of the Scheme.

The Scheme has been vital to Queensland local government involvement, particularly as Queensland councils have a much larger range of statutory responsibilities and interests capable of being affected by native title determinations than in other States and Territories.

Even before the Scheme guidelines were changed on 1 January 2013, the Scheme never covered all of the costs incurred by local governments in addressing native title. For example, substantial expenditure of time and resources occurs in-house by way of council officers collecting information, providing instructions, participating in mediation meetings and liaising with council members about local government involvement in

claim resolution. The Scheme did not cover any of these in-house costs. All councils also expend considerable resources of their own in addressing compliance for "future acts" under Part 2 Division 3 of the Act.

The LGAQ believes that Queensland local governments have, as a class of respondents to claims, exceptional circumstances, and thus should be able to continue to access funding under the Scheme irrespective of the changes. The terms of the altered guidelines could allow the Attorney-General to continue funding for local government respondents on an "exceptional circumstances" basis.

Exceptional circumstances include the following:-

- Extent – Determinations of native title are now being made throughout Queensland, including over or in the vicinity of major regional cities and towns such as the Quandamooka claim adjacent to metropolitan Brisbane. Local government interests in this claim included a wide array of proprietary interests, such as reserve land holdings, other trusteeship interests in land, permit, licence and non-extinguishing leasehold interests, substantial untenured infrastructure, extensive operational interests and regulatory interests. Indeed, for most claims, the nature and extent of local government interests is far greater than those of any other respondent, with perhaps the exception of the State itself.

- Broader Advocacy Role – During the claim process, local government respondents frequently advocate for the interests of community groups which do not themselves join as respondents. That may include sporting and recreational groups that have interests in claim areas and grantees of interests, such as trustee leases and permits over local government reserves. This itself generated efficiencies and cost savings in the claim resolution process.

- No State Representation – The Queensland Government has made it clear that it does not represent local government interests in the claims process. There would also be a conflict of interest in the State legally representing its own interests and the often different, and sometimes conflicting, interests of local government.

- Indigenous Local Governments – In Queensland, many local governments have been established specifically for Aboriginal and Torres Strait Islander communities, and determinations thus are being made over the great majority of land within the Indigenous councils' local government area. These councils generally have very little, if any, rateable land from which to generate their own rates revenue, and they are almost entirely dependent on Commonwealth and State grants.

- Tenure Resolution – In Queensland, there is provision for "land swaps" between native title parties and the State in respect of State (non-freehold) land, a process otherwise known as "tenure resolution". Legal representation is vital in ensuring local government land holdings (particularly reserve land) are property protected, as these feature substantially in most tenure resolution dealings.

- Local Government Added Value – The successful use of a template ILUA approach in Queensland, which was developed under the leadership of the LGAQ, has been positively acknowledged by the Australian Human Rights Commission, as an optimum process for enabling native title parties to decide their own priorities for social, cultural and economic development. The continued use of the template ILUA is largely contingent on local governments being able to access appropriate funding under the Scheme.

- Special Interest in Accrued Compensation Liabilities – In Queensland, councils play a vital role in augmentation of the freehold land supply, particularly for regional and remote towns. In addition, resources projects in these areas has led to an exhaustion of existing freehold land supply, which has escalated land prices and caused housing shortages. Local governments regularly apply to the State for the grant of new freehold titles over State land in relevant communities, and in many cases the circumstances are such that this means compulsory acquisition of native title. The local government then incurs a contingent compensation liability to any eventual native title holders if there is a

successful determination of native title. That liability is obviously a vital interest particularly requiring council involvement as a respondent party to a native title claim.

- Financial Capacity – In Queensland, councils must balance their budget each year, unlike other levels of government. Over the past few years, natural disasters combined with State Government policy decisions have placed councils under significant financial pressure which is extremely unlikely to ease. In addition, rural and remote councils have a very small rates base. Without access to legal assistance, most Queensland councils are unable to afford to participate in the native title claim resolution process.

In addition, LGAQ believes that continued financial assistance for claim resolution purposes is essential under the Access to Justice principles contained in the Attorney-General Department's Access to Justice Strategic Framework for the following reasons:

- Native title is a "dispute" of significant public interest.

- Resolution of native title issues is for the "public good". Local government makes no private gain, but protects public interests and ensures there will be in the future a workable relationship between native title rights and local government/public interests.

- The provision of information of itself will not assist local government to effectively engage in the native title jurisdiction without legal assistance.

- Native title requires detailed technical knowledge, and local government officers must rely on lawyers to assist them in both negotiations and Court proceedings. There is no realistic capacity for councils to address native title claims or compliance issues by themselves.

- There are no options to choose cheaper methods of resolving native title disputes, which of themselves are still very new within the law and are also largely non-recurring. There are still approximately 100 native title claims in Queensland which still to be resolved.

The LGAQ and other Queensland councils have repeatedly raised these issues with the Attorney-General, and argued that the exceptional circumstances should mean that they continue to qualify for assistance in respect of *both* costs and disbursements.

The Attorney-General, in a reply letter to the LGAQ of 2 November 2012, stated that legal advice for native title issues should form part of standard operational expenditure for local governments, though funding may still be available on a case-by-case basis where there are new or novel questions of native title law or where the Court requires local government to participate beyond standard procedural process. Of course it is never a matter of the Court "requiring" local government involvement.

The Attorney-General's comments demonstrate a lack of understanding of Queensland local governments' unique situation. With the funding now at an end, most councils involved in these claims will be forced to withdraw from being a respondent party.

Essentially, the LGAQ believes that there has not been due consideration of the impacts of the Attorney-General's decision on Queensland local governments.

Your assistance is sought in securing legal assistance for Queensland local governments to allow them to continue to participate as respondents in native title claims on behalf of their communities.

It would be extremely unfortunate if an unintended consequence of the current decision is that that Queensland local governments are unable to continue their important and constructive participation in the claim resolution process.

Warm regards, CR MARGARET DE WIT, PRESIDENT

dillon LAWYERS

J.M. Dillon, LLB
Associate:
M.A. Evans, BA,LLB

Our Ref:

Your Ref:

Date: 18 January 2013

Cr Margaret de Wit
President
Local Government Association of Queensland
PO Box 2230
Fortitude Valley BC QLD 4006

Dear Cr de Wit

Local Government Respondents to Native Title Claims

I have read with concern media reports about the Commonwealth Attorney-General's decision to change arrangements in respect of assistance for local government respondents to native title claims.

As we move into 2013 those changes are already starting to have a negative effect on the native title claims system.

I say this as a legal representative for a number of native title holders in Queensland. Although my firm is a major supplier of legal services to native title holders (as distinct from respondent parties), it is my experience that local government respondents in particular have played a very important and constructive role in the resolution of native title claims by agreement.

With local government respondents no longer able to access the Commonwealth's Native Title Assistance Scheme, other than in exceptional cases, to resource their legal representation in the process, I am aware that many local governments are now being forced to look at withdrawing from the claim resolution process on affordability grounds. As my firm is a regionally located legal practice, I can understand the additional cost pressures which the Attorney-General's decision places on particularly smaller rural and regional councils.

My practice provides legal services to native title holders throughout Queensland including the Port Curtis Coral Coast People (Southern Queensland), the Barada Barna People (Central Western Queensland), the Jangga People (North Queensland) and the Yirendali People (North Queensland). We also hold instructions from potential new native title claim groups.

In all of the existing native title claims, local government respondents have engaged proactively with my clients in the claim resolution process. The Jangga People successfully obtained a determination of their claim in the Federal Court on 9 October 2012. Using that case as an example, my clients very efficiently and cost effectively negotiated an agreed outcome about local government and broader community interests in the claim area with all

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of the local government respondents (the Charters Towers Regional Council, Isaac Regional Council and Whitsunday Regional Council).

In the Jangga case, the local government respondents initiated the mediation and were by far the first of all of the respondents with whom my clients were able to negotiate comprehensive agreement. That agreement provided a guiding light for the agreements subsequently struck with other respondents and helped generate momentum which propelled the claim to a final successful consent determination.

The local government ILUA in the Jangga case also delivered a number of other value added benefits to the parties. **Enclosed** is a National Native Title Tribunal publication which provides more detail.

Negotiations for similar local government ILUAs commenced in 2012 with the Barada Barna People, the Yirendali People and the Port Curtis Coral Coast People. Those negotiations are only part way through. The negotiations are being efficiently conducted having regard to a template local government ILUA the development of which was auspiced by the Local Government Association of Queensland and commended by the Australian Human Rights Commission.

The Attorney-General's decision in respect of local government assistance threatens the completion of the local government ILUA negotiations already underway.

Give the enormous benefits which local government involvement in the native title claim resolution process brings in equal measure to local governments, native title holders and local communities, the Attorney-General's decision seems to me short sighted and very counterproductive.

Over the last twelve months claim resolution processes in Queensland have really started to gain traction. The decision at this stage threatens to severely undercut the good work which is being done.

I am not sure whether the Attorney-General's decision is open to review or reconsideration. I certainly hope that it is. I am anxious to know the outlook in 2013 for the local government ILUA negotiations already underway and ask that you keep me updated about where the situation is heading.

If you have any queries, please contact me on or email

Yours faithfully
DILLON LAWYERS

J.M. DILLON

National Native Title Tribunal

News and publications
Home > News and publications > Newsletters > Talking Native Title > Jangga local government agreement provides certainty about rights

Jangga local government agreement provides certainty about rights

05/08/2010

The Jangga People have been recognised as traditional custodians of their land in an indigenous land use agreement (ILUA) with three north Queensland regional councils that protects cultural heritage and establishes how development will go ahead.

On 19 July, representatives of the Jangga People, the Charters Towers Regional Council, Isaac Regional Council and Whitsunday Regional Council gathered to celebrate the registration of the ILUA over 20,700sq km of land surrounding Mt Coolon, 120km west of Mackay and 150km south of Townsville.

Whitsunday Regional Council Acting Mayor, Rogin Taylor, said the ILUA would make planning and approvals easier.

"I believe it will streamline the process and the parties involved will benefit from meaningful discussions and negotiations with the workable procedures that have been developed in this agreement," he said.

"This agreement ensures that the title rights of the Jangga People's cultural heritage are considered before council undertakes various works."

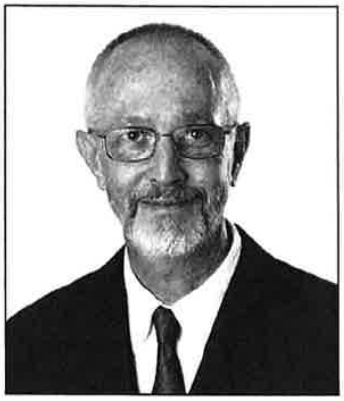
Elder and spokesperson for the Jangga People, Jim Gaston, said the Jangga People had a great working relationship with the councils and the recognition of their traditional custodianship meant a lot to them.

"There was a lot of cooperation on both sides but it [the agreement] didn't happen overnight," Mr Gaston said.

"It's been a long process and a lot of good will was put in on both sides and it has come through with the signing of the ILUA."

The National Native Title Tribunal registered the ILUA on 11 February. Tribunal Member Graham Fletcher, who mediated between the groups, said the ILUA clarified how native title rights and interests would coexist with local government interests.

"The ILUA establishes how future activities by the councils, such as the construction of buildings and roads, will comply with the Native Title Act and the Aboriginal Cultural Heritage Act," he said.



Tribunal Member Graham Fletcher.

Celebrating the ILUA registration were Whitsunday Regional Council acting mayor Rogin Taylor (left); project manager Colin McLennan; Jangga elders Jim Gaston, Marie McLennan and Dorothy Hustler; Isaac Regional Council Mayor Cedric Marshall; and Charters Towers Regional Council Mayor Ben Callcott.

The agreement was based on a template ILUA developed by the Local Government Association of Queensland and representatives of several native title claimant groups.

Mr Taylor said the template was a good starting point that brought the parties together and fostered a good working relationship that was a benefit to all concerned.

"I would recommend this open and transparent agreement that removes the confusion and complexity of planning and developments that existed before this agreement was made."

Nicolette Kormendy 0417 944 809

Was this information useful? Email comments to enquiries@nntt.gov.au