

**Parliamentary Joint Committee on  
Native Title and the Aboriginal and  
Torres Strait Islander Land Fund**

***OPERATION OF THE NATIVE TITLE ACT***

**Inquiry Into The Effectiveness Of  
The National Native Title Tribunal**

**Submission No:30**

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**Distribution Property Acquisitions**

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**ERGON ENERGY CORPORATION LIMITED**

**Submission to the  
Parliamentary Joint Committee on Native Title and the  
Aboriginal and Torres Strait Islander Land Fund**

**The effectiveness of the National Native Title Tribunal**

**April 2003**

## 1. INTRODUCTION

- 1.1 Ergon Energy Corporation Limited (“Ergon Energy”) was formed on 30 June 1999 as an amalgamation of six Government owned regional electricity distribution corporations.
- 1.2 Ergon Energy’s distribution authority covers all of regional Queensland exclusive of:
  - an area in the south-east corner based around Brisbane, the Gold Coast and the Sunshine Coast which is served by ENERGEX, another Queensland Government owned distribution corporation; and
  - a small area in southern Queensland around Goondiwindi, which is supplied under authority by Country Energy, a New South Wales Government owned distribution corporation.
- 1.3 Whilst most of Ergon Energy’s distribution customers are supplied from the state and national electricity grid, Ergon Energy also operates:
  - an isolated electricity grid in an extensive region in the north-west supplied from a gas fired power station at Mt Isa; and
  - about 30 smaller isolated networks in remote and island communities supplied from small diesel power stations.
- 1.4 The development and operation of Ergon Energy’s urban network generally has little impact on, and is little impacted by, native title considerations. However, these issues have significant implications for Ergon Energy’s infrastructure and activities in non-urban and remote areas.
- 1.5 As a Government owned corporation, Ergon Energy is a state electricity entity under the *Electricity Act 1994*, and in accordance with section 257A of the *Electricity Act* and section 240 of the *Electricity Regulation 1994*, it is declared to be a ‘constructing authority” under the *Acquisition of Land Act 1967*. Constructing authority status under the *Acquisition of Land Act* provides Ergon Energy with powers of compulsory acquisition of land and interests in land for electrical works purposes. This includes the capacity to acquire native title rights and interests in accordance with section 24MD of the *Native Title Act 1993* (Cth) (“NTA”). However, Ergon Energy has only used this provision in limited circumstances where it has been necessary to acquire exclusive tenure over properties.
- 1.6 Ergon Energy is able to avail itself of other future act provisions contained in the NTA, in particular sections 24J and 24K, as it is a

public sector entity developing and providing infrastructure for services to the public.

- 1.7 In accordance with section 26(1)(c)(iii)(b) of the NTA, the right to negotiate provisions do not apply to Ergon Energy's public infrastructure activities.
- 1.8 For substantial infrastructure such as electrical substations, power stations, works depots, administrative centres and communications sites, Ergon Energy generally holds these properties as a freehold owner, lessee of a long term lease of state land or freehold land, or as trustee of a reserve for electrical works purposes over state land.
- 1.9 Most of Ergon Energy's distribution lines are located on road reserves, but in cases where they must cross freehold land, leasehold land, reserves or state land, easements or some other form or right of way/wayleave agreement are obtained to provide Ergon Energy with the right to construct, own and operate the lines on these properties.
- 1.10 Where Ergon Energy requires lines to be constructed across unallocated state land or reserves, it is the current requirement of the Queensland State Government that Ergon Energy survey and register easements for those lines. This is only a recent requirement, and previously lines and infrastructure could be developed on these properties with just the agreement of the State or trustees of the reserves.
- 1.14 Under these various tenures or arrangements, Ergon Energy and its predecessors have validly constructed, operated and owned a vast network of lines and infrastructure throughout regional Queensland.

## **2. NATIVE TITLE DETERMINATIONS**

- 2.1 Since the mid 1990s, native title determination applications have been lodged over vast areas of mainland Queensland, coastal islands and Torres Strait islands. Ergon Energy has substantial infrastructure located within many of the areas and islands under claim.
- 2.2 Although Ergon Energy initially left the mediation of its interests to the State, it now represents its own interests by becoming a party to most determination applications over land where it has existing infrastructure or immediate plans/commitments to develop infrastructure.
- 2.3 Ergon Energy has subsequently been a party to approximately 10 native title determinations in mainland far north Queensland and over

Torres Strait islands, and is a party to several more applications where determinations appear imminent.

- 2.4 Whilst Ergon Energy's initial decision to become a party to native title claims was to protect its interests in existing infrastructure, the mediation process has proven to be a great opportunity to develop relationships with the claimants and to negotiate a range of issues. The mediation process takes place at a time when the parties are focused on land and tenure issues.
- 2.5 For example, during several claims mediations Ergon Energy has been able to finalise lease negotiations for a number of power station sites in communities where negotiations had been ongoing for several years.
- 2.6 In becoming a party to native title claims, Ergon Energy seeks to adopt a co-operative rather than adversarial role. By way of illustration, the company does not become involved in issues of connection which are largely matters to be resolved between the claimants and the State.
- 2.7 Where Ergon Energy has major infrastructure such as power stations located within a claim area, it has sought the agreement of the claimants to exclude the infrastructure from the claim area. Ergon Energy prefers to take this approach rather than become embroiled in an argument about whether native title has been extinguished by the validly constructed public works. If and when Ergon Energy should ever remove its infrastructure, the claimants would then be at liberty to claim those areas without challenge from Ergon Energy.

### **3. INDIGENOUS LAND USE AGREEMENTS**

- 3.1 In relation to Ergon Energy's existing distribution line networks and minor infrastructure within claim areas, the company seeks to negotiate an area or body corporate Indigenous Land Use Agreement ("ILUA") which acknowledges Ergon Energy's rights to own, operate, access and maintain its infrastructure. At the same time, Ergon Energy also seeks to establish arrangements and protocols for future works within the determination area, both in relation to native title and cultural heritage.
- 3.2 For Ergon Energy, the mediation of native title claims presents the company with the best opportunity to negotiate comprehensive arrangements with traditional owners for undertaking future works. These negotiations take place at a time when the traditional owners are well organised and unified in purpose, having pursued their determination application to an advanced stage. Issues of

overlapping claims and conflicting interests of claimants have usually been resolved before the mediations commence. Negotiations between the claimants and the State are usually well advanced. The traditional owners usually have legal representation to assist and advise in developing agreements. The parties are focused on achieving an outcome, without the usual pressures of Ergon Energy, as a developer, trying to pursue an agreement to meet a specific project timeline.

- 3.3 It is Ergon Energy's intention to become a party to all claims in which the company has an interest, to negotiate agreements to protect its existing infrastructure and to specify protocols and arrangements for future works. However, Ergon Energy does not intend to become a party to claims where it does not have an existing interest or immediate proposal for development. In those cases Ergon Energy would continue to rely on the future act provisions of the NTA if and when it should ever require to undertake works within those claim or determination areas.
- 3.4 The region where there have been most determinations of native title in Queensland, and where Ergon Energy has had the most success in negotiating ILUAs as part of the mediation of claims, has been in the Torres Strait between the northern tip of Cape Yorke Peninsular and New Guinea.
- 3.5 In the main part, Ergon Energy's interests in many of the inhabited islands of the Torres Strait commenced in the late 1980s and early 1990s when one of its predecessor organisations, the Far North Queensland Electricity Board (FNQEB), took over ownership and operation of the power generation and distribution infrastructure within these communities.
- 3.6 This infrastructure had previously been operated by the Department of Family Services and Aboriginal and Islander Affairs. Whilst these public works had been legitimately established within the communities with their agreement at the time, in most cases no formal tenure had been provided for the power stations or line networks.
- 3.7 When FNQEB took over responsibility for this infrastructure, and set about substantially upgrading it, it saw the need to secure tenure over the power station sites, and initiated negotiations with the communities to obtain leases over these sites. The negotiations were largely unsuccessful until recent times when they were incorporated into the process of mediation of these communities' native title claims.

- 3.8 The land in most of these communities is held as deed of grant in trust (DOGIT) under the trusteeship of the local community council for the benefit of the traditional owners. In accordance with s. 47A of the NTA, native title is not extinguished on land held in fee simple which is solely for the benefit of the indigenous inhabitants. It is Ergon Energy's position that this provision does not apply to land within these communities on which public works (such as power stations) have been validly constructed, and that on those sites, native title has been extinguished.
- 3.9 In the determinations to which Ergon Energy has been a party to date, Ergon Energy has avoided becoming embroiled in the argument over whether its major public works have extinguished native title, by negotiating with the claimants to have these sites excluded from the determination area. By excluding the sites, the court is not required to make a decision one way or another as to whether native title exists. Ergon Energy's interests in the sites are then protected by way of ILUAs and trustee leases, and if and when Ergon Energy should ever vacate these sites, the traditional owners would still have the opportunity to claim their native title without contest from Ergon Energy.
- 3.11 Most of Ergon Energy's sites have been surveyed to enable preparation and registration of leases. Where Ergon Energy's negotiations have been successful, it has entered into 30 year leases over its sites - the maximum term allowable under the *Land Act 1994* for trustee leases over DOGIT land. In order to register the leases, Ergon Energy requires a statement from the trustee of the land that the purpose of the lease is for the benefit of the indigenous community, and that the traditional owners have been consulted and have agreed to the lease.

#### **4. MAPPING OF CLAIMED LAND**

- 4.1 Ergon Energy believes that it would benefit all interested parties, if the Tribunal was able to offer further assistance to native title claimants with respect to the mapping of claimed land.
- 4.2 In the past, Ergon Energy has experienced difficulties interpreting maps provided by the claimants. If superior mapping was provided at an early stage, this would greatly assist the process.

#### **5. CONCLUSION**

- 5.1 Ergon Energy's use of ILUAs is limited to use of the agreements in mediating and securing the company's interests in negotiated native title determination processes. In this context, it has been Ergon

Energy's experience that the Native Title Tribunal has been effective in facilitating those processes. Ergon Energy is satisfied with the determination process and use of ILUAs, to the limited extent to which the company uses them in the mediation process.

- 5.2 To date, Ergon Energy has been a party to a handful of successful determinations, and the company believes it is worthwhile to maintain this approach. The process has assisted Ergon Energy to develop better relationships with these communities and to establish better communications. This should result in more efficient service to the communities. The time and effort Ergon Energy invests in developing agreements and relationships as part of the claims process appears to benefit all parties. It should save time, effort and arguments in the future when Ergon Energy may need to develop further infrastructure within the determination areas.