

Guide to the Pastoral ILUA template

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Acknowledgements

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Introduction

Pastoral leases cover almost 50 per cent of Queensland and making native title agreements over these areas can often be a long and expensive process. One reason for this is that native title parties and pastoral leaseholders often have very different interests, concerns and expectations, and little experience or guidance in how to resolve these differences.

In 2010, the Queensland Government and representatives of Queensland native title parties and pastoralist groups began collaborating on the development of a pastoral template Indigenous land use agreement (Pastoral ILUA), assisted by the National Native Title Tribunal, in order to facilitate native title agreement-making. This Pastoral ILUA template was finalised in September 2011.

The purpose of the Pastoral ILUA is to:

- negotiate and formalise access to and use of State rural leasehold land
- authorise access to the agreement area by native title parties so that they may carry out traditional activities in a manner that is not inconsistent with the lessee's rights and obligations under the pastoral lease
- establish practical and flexible arrangements for access to and use of the agreement area, during the term of the lease, and to manage any associated risks
- resolve native title in the process.

The Pastoral ILUA template is one of three tools available for making access and use agreements over pastoral leases in Queensland. The other tools are the Delbessie ILUA template and the Delbessie Indigenous Access and Use Agreement (Delbessie IAUA) template which relate primarily to implementation of the access and use initiative under the *Delbessie Agreement (formerly the State Rural Leasehold Land Strategy)*, which is the Queensland Government's land management policy for rural leases on State land. These two templates complement the Pastoral ILUA template and will be made available from the Department of Environment and Resource Management (DERM) website <www.derm.qld.gov.au>.

This guide deals specifically with the Pastoral ILUA template. Information about the other two templates can be obtained from DERM.

The Pastoral ILUA template helps to resolve native title matters over native title claim areas by addressing a range of issues which are often raised by the parties in negotiations. These issues include:

- when and how native title parties can access and use the area, such as for carrying out traditional activities
- how the pastoralist's lease will be protected from certain activities, such as the introduction of weeds or the lighting of fires
- the establishment of nature refuges and the protection of traditional sites and objects
- liability and insurance
- what happens if the area is transferred to another lessee, is sublet or if there are other land dealings which will result in a new lease being issued
- what happens if there is a native title determination over the area
- what happens when the lease expires or is terminated for one reason or another
- how disputes about breaches of the agreement will be resolved
- the pastoralist's future role in the native title party's native title claim.

The Pastoral ILUA template contains clauses dealing with these and other issues, many of which have been drawn from successful native title agreements in Queensland. It acts as a framework for the parties to enter into and engage in native title agreement-making, while also being flexible enough to address specific issues that may arise in individual negotiations. It has been designed for use as a master agreement by the native title party, and can be used by a native title party and a single leaseholder or on a claim-wide basis with multiple leaseholders. This will

allow additional pastoral leaseholders within a native title claim area to easily join in as parties to a Pastoral ILUA which has been registered with the National Native Title Tribunal.

It is expected that the Pastoral ILUA template will help deliver native title agreements over pastoral leases in a more timely and cost-efficient manner. It is also designed to help foster good relations between lessees and the native title parties, provide certainty and deliver practical and enduring benefits to both these groups and the State Government. This guide briefly summarises these benefits, followed by an overview of the terms used in the Pastoral ILUA template.

The Pastoral ILUA template and guide can be downloaded from DERM's website at <www.derm.qld.gov.au>.

For further information on other access and use agreement-making in relation to the Delbessie Agreement templates, contact the following respective areas within the Department of Environment and Resource Management:

- Native Title Parties and their representatives should contact Aboriginal and Torres Strait Islander Land Services on (07) 3225 2621 or the relevant Representative Native Title Representative Body
- Leaseholders and prospective leaseholders should contact either State Land Asset Management on (07) 3330 6148 or AgForce on (07) 3236 3100.

Alternatively, visit DERM's website at <www.derm.qld.gov.au>.

The National Native Title Tribunal has a wide range of detailed information about native title agreement-making and may be able to provide assistance to parties involved in the agreement-making process. Contact the Tribunal on free call 1800 640 501 for more information or to request assistance.

Benefits of the Pastoral ILUA template for pastoralists

While their interests are not always the same, pastoralist leaseholders usually raise certain issues when negotiating agreements with native title parties about the area of their lease. In particular, they often express concerns that:

- access to the lease area by native title parties, and the activities they carry out there, may interfere with the pastoralist's rights, obligations and property
- there may be some parts of the lease area that they do not want the native title party to access
- after the agreement is finalised, the Federal Court might not recognise native title over the area, or might recognise the rights of a different native title party to use the area
- appropriate measures need to be put in place to deal with liability and insurance.

The Pastoral ILUA template has been designed to address these concerns in a sensible and practical way. For example, it includes the following provisions:

- The lessee's rights and interests are protected under a determination even if the lessee has withdrawn as a respondent to the native title claim.
- Native title parties may access or carry out traditional activities on parts of the lease area, but only if they don't interfere with the lessee's rights and obligations. For instance, native title parties are not allowed to interfere with any buildings, dams and equipment, or with the lessee's stock or crops, and must not intentionally introduce any plants or plant seeds onto the lease. If a member of the native title party causes damage they need to give reasonable written notice of the damage and provide steps to rectify it.
- The native title party gives an access notice to the lessee before they intend to come onto the lease so that the lessee knows in advance when and where this will happen.
- The native title party is permanently excluded from certain parts of the lease, such as houses, sheds, airstrips, dams and stock yards. In addition, they are not allowed to construct any dwellings or permanent structures or to bury human remains on the area without prior written consent.
- The native title party can only use motor vehicles on existing roads or tracks, cannot construct any new tracks and must leave all gates open or closed as they find them.

- Restrictions are also placed on their use of firearms, fire, accompanying animals, camps and alcohol.
- Under certain circumstances the lessee may temporarily exclude the native party from parts of the lease or temporarily require that they don't undertake certain activities there, such as when the lessee is mustering or engaged in controlled burning.
- If after the signing of the Pastoral ILUA the Federal Court makes a determination recognising native title rights over the area, the determination will include the lessee's interests, and native title will be extinguished over the areas where, under the agreement, the native title party is permanently excluded. These are typically those areas which the Federal Court has recognised as extinguishment areas under determinations in the past.
- If the native title determination recognises the right of the native title party to use the area, the agreement continues, but if that right is recognised for a different native title party, or if the court rules that native title is extinguished over the area, the agreement ends. This effectively allows an agreement to be made even if the leaseholder is not certain whether native title will later be recognised.
- The native title party accesses and uses the area at their own risk, except if the risks are caused by the negligent or wilful acts or omissions of the lessee. Subject to conditions, both the lessee and native title party maintain a public liability insurance policy.

Agreements made using the Pastoral ILUA template also enable lessees to apply for certain benefits provided by the Delbessie Agreement. These benefits include a lease extension of up to 10 years or a lease term of up to 50 years where all other conditions have been met at lease renewal, or lessees in the Cape York region may be eligible for a lease extension of up to 25 years or a lease term of up to 75 years at lease renewal. There also may be other benefits available to lessees from time to time.

Benefits of the Pastoral ILUA template for native title parties

Like pastoralists, the interests and aspirations of native title parties can vary. Nevertheless, when they are involved in native title negotiations over pastoral leases, traditional owners typically point to certain interests as being particularly important to have acknowledged and recognised. They often say that, under any agreement:

- they should be able to access areas of the lease and carry out certain traditional activities there
- their native title rights and interests, and sacred sites and objects, should be protected
- they should still have rights even if the lease is transferred to another leaseholder, or is sublet
- they should be consulted in relation to nature refuges on the lease
- they should not be required to find and pay for an insurance policy.

The Pastoral ILUA template has been designed to accommodate these interests. It includes the following provisions:

- The agreement does not extinguish native title, and under the agreement the native title party does not surrender any native title rights and interests.
- Once the agreement is registered and entered on the Register of Indigenous Land Use Agreements, the lessee withdraws as a respondent to the native title party's claim, and if the native title party withdraws its claim and replaces it with a new one, the lessee does not become a party to the new claim.
- The recording of the registered Pastoral ILUA in the Land Register and its notation on title means that the native title party's interests in the land are protected.
- If the lessee transfers or otherwise disposes of the lease (or a part of the lease) to a new leaseholder, the new lessee must comply with the agreement. This provides certainty to the native title party that the agreement continues even if the property is sold or sublet.
- The native title party can access parts of the lease area via an access notice to carry out a range of traditional activities, subject to certain exceptions (summarised above), and the lessee respects the native title party's use of the area without supervision or other interference. In other words, under the Pastoral

ILUA template the native title party does not need to wait for the Federal Court to make a determination of native title before they can access the lease. An access notice may cover multiple access events.

- Where their access requires them to travel over the property of third parties (including over the areas of other native title claims), the native title party can negotiate with these third parties and the lessee will assist the native title party to gain access.
- Although lessees may temporarily exclude native title parties from parts of the lease, there are certain limits on this exclusion. For example, under the Pastoral ILUA template the lessee agrees to minimise both the frequency and duration of temporary exclusions and the area affected by those exclusions, and ensures that access for carrying out traditional activities is available to all other parts of the agreement area.
- The lessee consults with the native title party regarding the establishment (or amendment) of conservation agreements and conservation covenants on the area, including consultation on how the rights and interests of the native title party might be affected.
- If the lessee requires the native title party to maintain a public liability insurance policy, the lessee will identify an insurer for the policy and meet the cost of the insurance.
- Members of the native title party can erect a structure to protect sites and objects from harm so long as they give reasonable written notice to the lessee that they intend to do this, and provided that the structure will not impact on the lessee's activities on the lease.

Benefits of the Pastoral ILUA template for the Queensland Government

The Government of Queensland has a strong incentive to see that more native title agreements are made over pastoral leases in Queensland. As mentioned above, native title agreement-making can be a long and drawn-out process and can be very expensive for all parties involved, including the State. Costly litigation can sometimes result when native title agreements are not reached over pastoral lease land. The State also recognises that when native title negotiations between the parties become adversarial there are other negative costs, including the emotional costs for parties who feel that their interests and aspirations are not being met. In addition, the State wishes to advance its Indigenous access and use initiative under the Delbessie Agreement so that traditional owners can carry out activities on State rural leasehold land for traditional purposes.

The Queensland Government therefore has a vested interest in facilitating native title agreement-making over pastoral lease land. It is also motivated to promote agreements that are well-structured, functional and contain benefits for all parties so that these agreements are enduring and do not need to be revisited in the future.

The Queensland Government is confident that the Pastoral ILUA template will achieve these objectives in a number of ways. Firstly, once the ILUA is registered and entered on the Register of Indigenous Land Use Agreements, the lessee withdraws as a respondent to the native title party's claim. If that claim is withdrawn and replaced with a new claim by the same group, the lessee does not become a party to the new claim. This will result in fewer parties involved in the native title claim process in Queensland, leading to a reduction in costs to the parties, the State and the courts.

Another benefit of the Pastoral ILUA template is that it can be used to negotiate multiple agreements over a single claim area. Instead of undertaking separate negotiations with a number of different pastoralists, native title parties can use the Pastoral ILUA template to negotiate with several lessees at the same time. This means that some negotiations may take considerably less time than is currently the case.

The Pastoral ILUA template has the added advantage of being suitable for use as both a master agreement by the native title party and an ILUA that satisfies the lessee's requirements for certain dealings under the *Land Act 1994* (Qld). For example, if a leaseholder was not a party to the agreement when the Pastoral ILUA was registered, or a new lease is issued and the new leaseholder wants to become a party to the Pastoral ILUA, it will be possible for these leaseholders to opt in to the registered ILUA without requiring a new authorisation of the agreement by the native title party. The template also satisfies the requirements of the Delbessie Agreement and sections 155(5), 155(6), 155B and/or 155BA of the Land Act in relation to longer lease terms and lease extensions for State rural leasehold land, and any other benefits issued from time to time.

The structure and terms of the Pastoral ILUA template are designed to ensure that the agreement will provide continuity and ongoing certainty to the State and the parties. Once the agreement is reached and entered on the Register of Indigenous Land Use Agreements, the ILUA is subject to Commonwealth native title legislation, which means that all future native title claimants and all native title parties are bound by the agreement. The native title party's interest will be protected under the Land Act while the leaseholder's interests under the native title claims process is protected even if the lessee has withdrawn as a respondent to the claim. The Pastoral ILUA template also ensures that if the lessee transfers or otherwise disposes of the lease (or a part of the lease), the new lessee must comply with the agreement, which provides certainty that the agreement continues even if the property is sold or sublet. The continuity of the Pastoral ILUA is assured also for dealings such as amalgamations, lease renewals and subdivisions which result in a new lease being issued. Importantly, the agreement contains provisions that any disputes about breaches to the Pastoral ILUA are resolved in good faith.

On a broader level, the State believes that the Pastoral ILUA template will help change negative attitudes towards the native title agreement-making process and build lasting and positive relationships between native title parties and pastoral leaseholders in Queensland. By balancing the differing interests, expectations and aspirations of native title parties and pastoralists, it shows the benefits of mediating mutually-beneficial outcomes. In this way, it is expected that the Pastoral ILUA template can act as a platform for the parties to work collaboratively on a range of other issues, such as promoting caring for country, providing for the effective management of natural resources and creating employment opportunities for members of native title parties.

An overview of the Pastoral ILUA terms

The Pastoral ILUA essentially contains three categories of clauses. The first category is the ‘mandatory specific’ clauses, the second category is the ‘mandatory general’ clauses and the third category is any additional matters as agreed between the parties (‘optional’ clauses).

The Pastoral ILUA will be subject to the registration requirements of the *Native Title Act 1993* (Cwlth) (NTA). In addition, the mandatory specific clauses described below are included to ensure that the Pastoral ILUA satisfies the requirements of the Land Act in relation to the benefits of longer lease terms, extensions of leases and other benefits issued from time to time for leases affected by the Delbessie Agreement and other matters identified in the preparation of the template Pastoral ILUA. Therefore, the relevant mandatory specific clauses in the Pastoral ILUA template should not be modified.

The mandatory general clauses are also required to be included in the Pastoral ILUA. However, the actual wording of the clauses may be modified to best suit the parties. The optional clauses are those which are not identified as either mandatory specific or mandatory general clauses, but have been included to assist the parties.

Any ILUA lodged for registration with the National Native Title Tribunal will need to be accompanied by an application for registration of the ILUA. The Tribunal’s guidelines for ILUA registration are available on the Tribunal’s website at <www.nntt.gov.au>.

The parties

Mandatory specific

The parties to the Pastoral ILUA must be:

- the native title party, as identified in the NTA
- all persons who hold the lease over the subject land. The ILUA is also binding on any persons to whom the lease is transferred or sublet.

Definitions

Agreement area

Mandatory specific

- The area that is the subject of the Pastoral ILUA must be accurately identified with a detailed description and a map (in accordance with the NTA registration requirements).
- The agreement area will be over the whole pastoral lease if it is located fully within the native title claim area or traditional owner’s country. If the lease is partly located within the claim area, the agreement area will be over only that part of the lease which falls within the external boundary of the traditional owner’s claim or country.
- The agreement area will include areas over which native title will be extinguished or extinguished areas.

Commencement date

Mandatory specific

- Insofar as the provisions of the Land Act are concerned, once the Pastoral ILUA is registered with the National Native Title Tribunal it will attach as a condition on the lease, at which time the provisions relating to the Land Act will be enlivened.

Traditional activities

- To ensure consistency with the Delbessie Agreement and the Land Act, the permissible traditional activities are camping, fishing, gathering or hunting; performing rites or other ceremonies and visiting sites of significance. Activities include the taking, using, sharing and exchanging of natural resources for domestic and non-commercial communal purposes.

Mandatory specific

- Burials are specifically excluded except with the prior consent of the lessee and the State (as represented by DERM) and in accordance with all laws of the State and the relevant Local Authority relating to the disposal of human remains. **Mandatory specific**
- The parties can agree to additional activities such as cultural heritage management and nature conservation activities. **Optional**
- There can also be conditions as to the exercise of the traditional activities (within reason). **Optional**

Operative provisions

Future Act

Mandatory specific

- The Pastoral ILUA must not contemplate surrender or extinguishment of native title over the lease.

Registration of agreement

Mandatory specific

- The Pastoral ILUA must be recorded in the Register of Indigenous Land Use Agreements for the purposes of the Delbessie Agreement and the Land Act.
- The registered Pastoral ILUA will also be recorded on the Land Register by notation on title therefore protecting the native title party's interests under the Land Act.
- The lessee must notify the Land Registrar when the Pastoral ILUA terminates as this will have implications for the lease term under the Land Act.

Term of the agreement

Mandatory specific

- The Pastoral ILUA must contain a term provision that is consistent with the lease term in compliance with the provisions of both the Land Act and the NTA.
- The lessee will withdraw from the native title party's native title claim and will not join as a party to a new claim in the event that a claim is withdrawn and replaced with a new claim, by the same claimant group, for technical or procedural reasons, and not affecting the lessee's interests.
- In the event of a determination recognising native title rights in relation to the agreement area, the native title party will ensure that:
 - the determination includes as one of the other interests in the determination area, the lessee's interests under the lease and the Pastoral ILUA; and
 - the permanent exclusion areas incorporating the land or waters on which any permanent improvement listed below have been constructed at the date of the agreement (including any adjacent land the exclusive use of which is reasonably necessary for the enjoyment of the improvement) are treated as if they were extinguishment areas:
 - a house, shed or other outbuilding
 - an airstrip
 - a dam or other stock watering point, bore, turkey nest, squatters' tank or other water storage facility
 - stock yards or trap yards.
- The Pastoral ILUA will not end if the lease has expired but application has been made for renewal or other action has been taken under the Land Act for continuity of the lease; or land dealings on the lease in the form of subdivisions, amalgamations, additional areas or conversion to a perpetual tenure result in a new lease being issued; or the lease or part of the lease is converted to protected area tenure under the *Nature Conservation Act 1992* (Qld). This ensures the continuity of the Pastoral ILUA.

- Where the Pastoral ILUA terminates, the lessee must notify the Land Title Registrar in order for the State to comply with the provisions of the Land Act.

Notices

- Notices issued between the parties must meet certain requirements as set out in the Pastoral ILUA template. **Mandatory general**
- The Native Title Registrar must be notified when a Pastoral ILUA has come to an end so that follow-up actions under the Land Act can be taken. **Mandatory specific**

Access and use of agreement area

Mandatory general

- The parties will determine the most suitable route of access to the agreement area. If this involves traversing the property of third parties, including areas subject to other native title claims, the native title party will need to negotiate with those third parties (with the assistance of the pastoral leaseholder) in order to gain access to the agreement area.
- The Pastoral ILUA addresses other matters such as the conduct of the parties when the native title party is exercising their access and use rights.

Nature refuges

Mandatory specific

- The Pastoral ILUA provides for the possible establishment of a nature refuge, or conservation covenant to which the State is a covenantee, on part of or the entirety of the lease land, including on the agreement area. The agreement will not materially affect the native title party's native title rights and interests except with the consent of the native title party.
- The native title party may be a party to a nature refuge or conservation covenant. Where the native title party chooses not to be a party to the agreement, the lessee will consult with the native title party before entering into such an agreement with the State. The native title party will not unreasonably withhold their consent to such an agreement.

Rights and obligations of the parties

Mandatory specific

The Pastoral ILUA template specifies clearly each party's rights and obligations. Matters addressed include overarching conveyance/conduct of rights of access and use, exclusions and restrictions. The lessee cannot unreasonably restrict access to the agreement area.

Statutory obligations

Mandatory specific

- The parties cannot contract out of the statutory requirements, for example, lease conditions, cultural heritage. This is to ensure that the terms of the Pastoral ILUA are consistent with the terms of the lease as well as the provisions of the Land Act and other relevant legislation.
- The native title party must not do anything which restricts or interferes with the performance of the lessee's statutory obligations.
- The Pastoral ILUA becomes a condition of the lease therefore its contents can be accessed by the public.

Communication and review

Mandatory general

- Communication and review clauses are necessary to assist the parties in identifying and addressing any difficulties or emerging issues. Matters to be addressed include process and responsibility for costs. This is to ensure the effective operation and maintenance of the Pastoral ILUA.

Dispute resolution

Mandatory general

- It is essential that the Pastoral ILUA provides for the resolution of disputes. Matters to be addressed include process and responsibility for costs.

Assignment of lease

Mandatory specific

- The Pastoral ILUA will continue with the land as the agreement will be a lease condition. There are implications for the lease term, such as a reduction, where the ILUA terminates (for whatever reason).
- The transferee must notify the Land Title Registrar and the Native Title Registrar if the lease is transferred.
- The lessee remains responsible for all the lease conditions in the event of the lease, or part thereof, being sublet. However, the lessee must inform the sublessee of the existence of the Pastoral ILUA and ensure that the sublessee complies with the ILUA.

Liability

Mandatory specific

- Access to and use of the agreement area by the native title party will be at their own risk, except to the extent that risks are caused by the negligent or wilful acts or omissions of the lessee. The parties will take reasonable care not to create or contribute to any new or hidden risks on the agreement area.

State's indemnity

Mandatory specific

- The parties must indemnify the State against any actions arising out of the operation of the Pastoral ILUA as the State is not a party to the ILUA.

Insurance

Mandatory general

- The lessee will accept all responsibilities for any payment for any insurance issues where public liability insurance is required.

Costs

Mandatory general

- Each party bears its own costs in relation to the preparation, signing and review of the Pastoral ILUA. The lessee pays any registration fees on the agreement and on any instrument or other document signed to give effect to the agreement.

Governing law

Mandatory specific

- To remove ambiguity, the governing law is the law of the State of Queensland. This recognises that some pastoral leaseholders may be operating in multiple jurisdictions.

Variations

Mandatory specific

- Variations to the Pastoral ILUA must be recorded in the Register of Indigenous Land Use Agreements.
- The State must be notified of any variations to the Pastoral ILUA for recording in the Land Register. Variations may have implications for the lease term under the Land Act.

Schedule 1

Mandatory general

- Description of the lease, details for the parties (including contact details), the Native Title Registrar and the Land Title Registrar must be accurate.

Schedule 2 and 3

Mandatory general

- These schedules record more specific activities, conditions/restrictions/exclusions agreed to in the Pastoral ILUA. The schedules go towards the conduct of the parties when the rights are being exercised, for example, use of motor vehicles, dealing with fences and gates, areas that are permanently excluded, etc.
- Most of these, and any additional conditions/restrictions/exclusions, can be negotiated between the parties.

Schedule 4

Mandatory specific

- In order to avoid ambiguity, the lessee must provide a detailed map of the agreement area and sufficiently identify any area the subject of exclusion, restriction, access, etc.
- This schedule also records areas of the lease with improvements thereon which will be treated as if they were extinguishment areas and over which native title will be extinguished at determination.