

Town Lands Native Title Policy

Northern Territory Government

Document title	Town Lands Native Title Policy
Contact details	Department of Chief Minister and Cabinet
Approved by	The Northern Territory Government
Date approved	28 July 2020

Version	Date	Author	Changes made
1	28 July 2020	Anthony Shelly	First Version

Acronyms	Full form
ILUA	Indigenous Land Use Agreement
LTA	<i>Land Title Act 2000</i>
NTA	<i>Native Title Act 1993</i>

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1 Background

Exclusive native title has been determined to exist over vacant Crown land in the following Towns: Borroloola, Elliot, Hatches Creek, Kalkarindji, Newcastle Waters, Mataranka, Pine Creek and Timber Creek.

Exclusive native title may also be determined in other towns in the future.

Exclusive native title determinations recognise that the native title rights and interests are rights to the possession, occupation, use and enjoyment of the particular area to the exclusion of all others. Generally, a registered native title body corporate holds the exclusive native title on trust for the native title holders.

Exclusive native title is the equivalent of, but is not, a fee simple estate in land - the exclusive native title holders have similar rights in the land to a person recorded in the Land Register as holding a freehold title under the *Land Title Act 2000* (the LTA). Despite this similarity, exclusive native title rights are not registerable under the LTA. This is because a determination of native title is merely a recognition of the existence of native title rights, and does not provide the native title holders a registerable title.

In the absence of a title registerable under the LTA, native title holders are unable to realise all the benefits of their freehold equivalent rights because:

- the land cannot be sold, only surrendered to the Crown;
- the land cannot be leased; and
- the land cannot be mortgaged to raise finance.

It is also a long-standing policy of the NT Government that Crown land will not be alienated to private interests unless native title rights and interests have first been completely extinguished by the acquisition or surrender of those rights to the Crown.

Not only are these barriers to Indigenous economic development, they also create problems in Territory towns for government, business and town residents. Problems faced by government include:

- vacant crown land cannot be subdivided to meet residential and community land release needs without native title holder consent, except by compulsory acquisition under the *Land Acquisition Act 1978*, and consent is difficult to obtain where it necessarily involves the surrender and extinguishment of hard won native title rights;
- native title holders often oppose the compulsory acquisition of their native title rights, particularly where the acquisition occurs in order to facilitate the grant of interests to private third parties; and
- there is community uncertainty as to ultimate responsibility for statutory compliance on vacant Crown land with respect to weeds, litter, firebreaks and rates.

Problems faced by businesses and town residents include:

- land searches do not readily reveal what vacant Crown land is subject to native title and what is not, and the nature of the native title rights (i.e. exclusive or non-exclusive); and
- limited land availability options means limited opportunities for growth, hindered economic development, delays in the provision of community infrastructure, and uncertainty in business investment, viability and opportunities.

Accordingly, in February 2018, the Aboriginal Land Chief Executive Officer Working Group approved the Department of the Chief Minister, in consultation with the Department of the Attorney-General and Justice and the Department of Infrastructure, Planning and Logistics to develop a policy that would:

- create tenure options in respect of vacant Crown land in towns where exclusive native title is recognised to exist that allow similar dealings to those available to ordinary title holders, without extinguishing (partially or wholly) native title rights and interests; and
- enable determinations of exclusive and non-exclusive native title interests within towns to be recorded against lots or portions of vacant Crown land in the Integrated Land Information System Record of Administrative Interests and Information.

Based on advice from the Solicitor-General, and following extensive consultations within government and with the Northern and Central Land Councils and Registered Native Title Bodies Corporate, the Department of the Chief Minister has developed this Policy (the Policy), which was approved by the NT Government on 28 July 2020.

2 Town Lands Native Title Policy

2.1 Grants of Town Land

Where exclusive native title has been determined to exist within the boundaries of a Town, the NT Government may grant to the native title holders an estate in fee simple registerable under the LTA over surveyed parcels or lots of that land (the Grant), provided the native title holders authorise the Grant by an Indigenous Land Use Agreement (ILUA) in substantially the same form as the *pro forma* ILUA at **Attachment A**.

The following are the key conditions of a Grant under the Policy that must be included in the *pro forma* ILUA:

- the Grant is subject to the non-extinguishment principle at section 238 of the *Native Title Act 1993* (the NTA) (native title remains wholly suppressed in relation to the estate in fee simple, and any successor or derivative titles, until the estate in fee simple is surrendered or acquired);¹
- any compensation payable under the NTA or otherwise is limited to the Grant and any associated fees or costs;²
- the ILUA must be registered on the Register of Indigenous Land Use Agreements.³

The Strategic Aboriginal Policy Unit within the Department of the Chief Minister is responsible for the administration of this aspect of the Policy.

2.2 Recording of native title interests

Vacant Crown land within towns not the subject of a Grant shall have determinations of exclusive and non-exclusive native title rights and interests recorded against the relevant lot or portion in the ILIS Record of Administrative Interests and Information.

The Aboriginal Land Unit within the Department of Infrastructure, Planning and Logistic is responsible for the administration of this aspect of the Policy.

¹ Clause 3.3.

² Clause 5.

³ Clause 6.

3 Benefits of the Policy

Native title holders will benefit because:

- they get a registered freehold title with native title suppressed rather than extinguished;
- their land can be utilised to deliver on their economic and social aspirations; and
- the land can be sold, leased and mortgaged, increasing opportunities for Aboriginal economic development.

Government will benefit because:

- there are more options to enable land to be subdivided to meet residential and community land release needs with native title holder consent that do not necessarily involve the extinguishment of native title for all time;
- consent is easier to obtain when it does not necessarily involve the surrender (or acquisition) and extinguishment of hard won native title rights; and
- there is certainty as to ultimate responsibility for statutory compliance on land with respect to weeds, litter, firebreaks and rates.

Business and town residents will benefit because:

- land can be dealt with on the basis that the land is the subject of an ordinary title under the LTA and native title has no force or effect during the life of the exclusive title;
- land searches readily reveal if vacant Crown land within Towns is subject to a determination of native title; and
- of increased opportunities for growth, economic development, community infrastructure provision, improved business investment, viability and opportunities.

**[INSERT NAME OF TOWN AREA]
TOWN LANDS
INDIGENOUS LAND USE
AGREEMENT
(BODY CORPORATE AGREEMENT)**

**[INSERT NAME] ABORIGINAL CORPORATION Registered Native
Title Body Corporate (RNTBC)**

[INSERT] LAND COUNCIL

NORTHERN TERRITORY OF AUSTRALIA

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DETAILS

PARTIES

The **NORTHERN TERRITORY OF AUSTRALIA** a body politic under the Crown established by the *Northern Territory (Self-Government) Act 1978* (**TERRITORY**)

Address for service of notices: Attention: Chief Executive, Department of Infrastructure, Planning and Logistics
Physical address: Level 5, Energy House, 18-20 Cavenagh Street, Darwin NT 0800
Postal address: GPO Box 1680, Darwin NT 0801
Facsimile: (08) 8924 7044

AND

The **NORTHERN LAND COUNCIL (ABN 56 327 515 336)** a body corporate established under section 21 of the *Aboriginal Land Rights (Northern Territory) Act 1976* and a representative Aboriginal/Torres Strait Islander body pursuant to s203AD of the NTA (**LAND COUNCIL**)

Address for service of notices: Attention: Chairperson
Physical address: 45 Mitchell Street, Darwin NT 0800
Postal address: GPO Box 1222, Darwin NT 0801

AND

The **[insert name] ABORIGINAL CORPORATION RNTBC (RNTBC)**

Address for service of notices: Attention: c/- [insert]
Physical address: [insert]
Postal address: [insert]

BACKGROUND

- A. The Federal Court made the Determination that native title exists in relation to certain land and waters within the town of [insert name] in the Northern Territory.
- B. The Determination recognised the existence of exclusive native title rights and interests over the ILUA Area.
- C. It has generally been a longstanding policy of the NT Government that the complete extinguishment of any native title rights and interests in respect of land by way of acquisition or surrender of those rights to the Crown would be required to permit the grant of freehold title over Crown land to third party interests.
- D. On [insert date] the NT Government released the Town Lands Native Title Policy to provide for an alternative approach to the grant of estates in fee simple over exclusive native title affected land without the need to extinguish native title rights and interests.
- E. The Parties are entering into this Agreement consistent with the Town Lands Native Title Policy to validate the Proposed Acts, including the proposed grant of estate/s in fee simple over the ILUA Area, and any subsequent derivative titles, subject to the non-

extinguishment principle and to provide for the Compensation described in the Agreement.

- F. The Parties acknowledge that the Proposed Acts involve the grant/s of fee simple estates over the ILUA area pursuant to the CLA which will be wholly inconsistent with the determined native title rights and interests.
- G. The Parties further acknowledge that the Proposed Acts constitute Future Acts under the NTA, and this Agreement is to ensure the validity of these acts and the application to them of the non-extinguishment principle.
- H. This Agreement is a body corporate agreement pursuant to Part 2, Division 3, Subdivision B of the NTA and regulation 6 of the Native Title (ILUA) Regulations and is to be registered on the ILUA Register.
- I. If a fee simple estate is granted over any part of the ILUA Area in pursuance of the terms of this Agreement then this Agreement will be noted on the Lands Register.

AGREED TERMS

1. DEFINITIONS AND INTERPRETATION

1.1 Defined Terms

In this Agreement, unless the contrary intention appears:

affect in the context of affecting native title rights or interests has the meaning given in section 227 of the NTA

Additional Acts means, without limitation, any or all of the following acts relating to the ILUA Area, and any associated statutory approvals or consents, including:

- (a) the grant, vesting or transfer of any right, title or interest with respect to the whole or any part of the estate in fee simple areas granted in accordance with clause 3.1(b) to the Nominated Entity, including:
 - (i) any grant or transfer of any successor or derivative title to any third party;
 - (ii) any subdivision and any subsequent grant, vesting or transfer of any interest in or in relation to the subdivided land ;
 - (iii) any excision of any area of land required for roads or provision of essential services including by way of the acquisition of any such land under the LAA or vesting of any such land in the Territory pursuant to Northern Territory legislation;

(b) any and all acts reasonably necessary or incidental to the Additional Acts.

Agreement	means this ILUA and all annexures to it
Business Day	means a day that is not a Saturday, Sunday or public holiday in the Northern Territory
CLA	means the <i>Crown Lands Act 1992</i> (NT) as amended from time to time
Compensation	means the acts set out in Annexure 4.
Dealing	has the same meaning as that term as set out in s4 of the LTA
Determination	means the determination in <i>[insert] v Northern Territory of Australia</i> [insert] made by the Federal Court of Australia on [insert date].
Determination Area	means the land and waters more particularly described in Schedule A of the Determination and depicted on a map comprising Schedule B of the Determination over which the Federal Court determined that native title exists.
Dispute	means a dispute between any of the Parties in relation to this Agreement or any matter arising out of or in connection with this Agreement
Dispute Notice	means a written notice advising as to the terms of the Dispute between the parties including the details of the matter in Dispute and the relevant Parties to the Dispute
essential services	means any services within the meaning of s2(1) of the <i>Essential Goods and Services Act 1981</i> (NT)
Future Act	has the meaning given in s233 of the NTA
Gazette	has the meaning given in s17 of the <i>Interpretation Act 1978</i> (NT)
ILUA	means an Indigenous Land Use Agreement under the NTA
ILUA Area	means the land described in Annexure A and depicted in the map in Annexure B
ILUA Register	means the Register of Indigenous Land Use Agreements referred to in section 199A of the NTA
LAA	means the <i>Lands Acquisition Act 1978</i> (NT) as amended from time to time
LTA	means the <i>Land Titles Act 2000</i> (NT) as amended from time to time
Land Register	has the meaning given in s6 of the LTA
National Native Title Tribunal	has the meaning given in s253 of the NTA
native title	has the meaning given in s223 of the NTA

Native Title Holders	means the persons specified in the Determination that hold the common or group rights comprising the native title in the Determination Area
Native Title (ILUA) Regulations	means the <i>Native Title (Indigenous Land Use Agreements) Regulations 1999</i> (Cth)
Nominated Entity	means the entity nominated in accordance with clause 3.1(a), being a corporation or other form of association that is legally able to contract and hold property and that is majority owned by the Native Title Holders
Non-extinguishment principle	has the meaning given in s238 of the NTA
NTA	means the <i>Native Title Act 1993</i> (Cth) as amended from time to time
Parties	means the [insert name] Aboriginal Corporation RNTBC, the [Insert] Land Council, and the Territory
Proposed Act	is defined in clause 3.1(b)
Right to Negotiate Procedure	means the procedure described in Subdivision P, Division 3, Part 2 of the NTA
RNTBC	means the [insert name] Aboriginal Corporation RNTBC
Stamp Duty Act	means the <i>Stamp Duty Act 1978</i> (NT) as amended from time to time
Town Lands Native Title Policy	means the policy attached at Annexure C

1.2 Interpretation

The following rules apply in interpreting this Agreement, except where the context makes it clear that a rule is not intended to apply.

- (a) Any term that is not expressly defined in this Agreement has the same meaning as in the NTA.
- (b) A reference to:
 - (i) Legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it; and
 - (ii) a party to this Agreement or to any other deed or agreement, is to that deed, agreement or provision as amended, supplemented, replaced or novated; and
 - (iii) an authority, office, body or person includes the authority, office, body or person for the time being performing the functions of such authority, office, body or person at the date of this Agreement; and
 - (iv) a singular word includes the plural and other grammatical forms, and vice versa; and
 - (v) a reference to a person includes a firm, company, corporation, authority or body whether incorporated or not; and

- (vi) a grant of land will include a re-grant of the land.
- (c) The headings in this Agreement are not part of this Agreement and shall not be used in its interpretation or construction.
- (d) This Agreement shall be governed by and construed in accordance with the laws in force (whether of the Commonwealth or of the Northern Territory) in the Northern Territory of Australia.
- (e) No modification, variation or amendment to this Agreement shall be of any force unless agreed in writing and executed by each Party, and in accordance with any relevant provisions of the NTA.
- (f) No rule of construction applies to the disadvantage of a Party on the basis that Party put forward or drafted this Agreement or any part thereof.
- (g) If the day on or by which a person must do something under this Agreement is not a Business Day, the person must do it on or by the next Business Day.
- (h) A reference to a time and dates is to Northern Territory Time, even if the relevant obligation is to be performed elsewhere.
- (i) If a period of time is specified and dates from a given day or the day of an actual event, it is to be calculated exclusive of that date.
- (j) Where an area of land and waters is described as well as shown marked on a map, the written description prevails to the extent of any inconsistency.
- (k) This Agreement shall be binding upon and for the benefit of the Parties and their respective successors and permitted assigns.

2. TERM AND ILUA AREA

- (a) This Agreement commences on the date the last Party executes this Agreement and will continue in perpetuity unless terminated in accordance with clause 6.5.
- (b) This Agreement applies to the ILUA Area.

3. FUTURE ACTS AND STATEMENTS FOR THE PURPOSES OF NTA

3.1 Future Acts

- (a) Upon registration of this Agreement in the ILUA Register, the Land Council will notify the Minister for Infrastructure, Planning and Logistics as to the entity approved by the RNTBC to hold the title to the estate/s in fee simple to be granted over the ILUA Area.
- (b) Upon receipt of notification under clause 3.1(a) the Minister for Infrastructure, Planning and Logistics will grant an estate/s in fee simple over the ILUA Area to the Nominated Entity (the **Proposed Act**).
- (c) To the extent that any or all of the Proposed Act and the Additional Acts are Future Acts, the Parties consent to the doing of any or all of the Proposed Act and the Additional Acts.
- (d) The Parties acknowledge that clause 3.1(c) of this Agreement constitutes the requisite consent to the doing of the Proposed Act and the Additional Acts in

accordance with the terms of this Agreement, for the purposes of section 24EB(1)(b)(i) of the NTA.

3.2 Right to Negotiate does not apply

- (a) The Parties agree that the Right to Negotiate Procedure does not apply to the doing of any or all of the Proposed Act and the Additional Acts.
- (b) The Parties acknowledge that clause 3.2(a) constitutes a statement of the kind referenced in section 24EB(1)(c) of the NTA.

3.3 Non-Extinguishment Principle

- (a) The Parties agree that the non-extinguishment principle as defined in section 238 of the NTA applies to any or all of the Proposed Act and the Additional Acts.
- (b) The Parties agree that the effect of the application of the non-extinguishment principle is to wholly suppress all native title rights and interests over the areas the subject of the Proposed Act and the Additional Acts for the duration of such acts.

4. OTHER MATTERS

The Parties agree that nothing in this Agreement operates to prevent the Northern Territory from acquiring all rights and interests, including native title over all or any part of the ILUA Area by agreement or otherwise in accordance with the LAA.

5. BENEFITS

5.1 Consideration payable

- (a) The Parties agree that the consideration payable to the RNTBC under this Agreement is to comprise:
 - (i) the Proposed Act; and
 - (ii) payment of any costs, fees and stamp duty arising for the registration of the Proposed Act.
- (b) The Parties agree that the benefits provided for in this Agreement constitute “compensation provided for in the agreement” for the purposes of s24EB(4) of the NTA.

5.2 No further compensation

The RNTBC and the Land Council acknowledge that the benefits provided for in this Agreement are in full and final satisfaction of compensation that would be payable under the NTA for the effect of the Proposed Act and the Additional Acts.

6. REGISTRATION WITH THE NATIONAL NATIVE TITLE TRIBUNAL

6.1 Registration of Agreement

The Parties:

- (a) agree that the Territory shall apply to the Registrar for this Agreement to be registered and entered on the ILUA Register as a body corporate agreement under ss24BA to 24BI of the NTA;
- (b) authorise the Territory to make such an application; and

- (c) acknowledge that this clause 6.1 constitutes agreement by the Parties for the purposes of section 24BG(1) of the NTA and regulation 6(2)(b) of *the Native Title (ILUA) Regulations*.

6.2 Co-operation

The Parties must take all reasonable steps to obtain registration of this Agreement on the ILUA Register as soon as possible.

6.3 Land Council Certification

If requested by the Territory, the Land Council must, to the extent permitted by law, certify the application for registration of this Agreement on the ILUA Register pursuant to s203BE(1)(b) of the NTA, and provide:

- (a) a statement to the effect that the Land Council is of the opinion that the requirements of the ss203BE(5)(a) and (b) of the NTA have been met; and
- (b) a brief statement of the Land Council's reasons for being of that opinion.

6.4 Further Actions

In the event of an objection to registration or an application to remove this Agreement from the ILUA Register, the Land Council will, subject to law, do all things reasonably required to respond to the objection or application in order to register this Agreement or preserve the registration of this Agreement (as the case may be).

6.5 Right to termination if not registered

- (a) If the Registrar decides not to register this Agreement on the ILUA Register and such decision is final, the Parties must negotiate in good faith and take any reasonable steps to address any deficiency which would enable the Agreement to be registered.
- (b) If, despite the Parties complying with clause 6.5(a), the Registrar refuses to register this Agreement, then after 30 days from the date of the refusal by the Registrar, the Territory may terminate this Agreement.

7. NOTICE

- (a) A notice, approval, consent or other communication made in connection with this Agreement shall, without prejudice to any other method of service, be duly given or served if delivered or sent by prepaid post or transmitted by facsimile to a Party, in accordance with the details specified on page 3, or such other address or number as may be notified by a Party to the other parties for this purpose from time to time.
- (b) A notice, approval, consent or other communication made in connection with this Agreement takes effect from the time it is received unless a later time is specified in it.
- (c) A letter or facsimile is taken to be received:
 - (i) in the case of a posted letter, on the fifth Business Day after posting; and
 - (ii) in the case of a facsimile, upon production, by the machine from which the facsimile was sent, of a transmission report which indicates that the facsimile was sent in its entirety and in an error free form to the facsimile number of the recipient notified for the purpose of this clause.

8. NO CONFIDENTIALITY

The parties agree that there is nothing in this Agreement which is to be treated as confidential and the terms of this Agreement may therefore become available for inspection by the public and the subject of any information recorded on the Lands Register.

9. DISPUTE RESOLUTION

9.1 Dispute Notice

If there is a Dispute, any Party may serve a Dispute Notice on any other Party or Parties.

9.2 Parties to the Dispute

If not all of the Parties to this Agreement have been issued with the Dispute Notice and identified as necessary Parties to the Dispute, and a Party to the Dispute considers that a Party who was not issued with the Dispute Notice is a necessary Party to the Dispute, that Party may issue the Dispute Notice to the necessary Party and thereby join the necessary Party to the Dispute for the purposes of clauses 9.3 and 9.4.

9.3 Meeting to resolve Dispute

As soon as reasonably practicable, and in any event within 10 Business Days of a Party receiving a Dispute Notice, a senior representative from each Party to the Dispute must meet to attempt to resolve the Dispute and must use all reasonable endeavours acting in good faith to resolve the Dispute by joint discussions.

9.4 Reference to Mediator

- (a) If a Dispute is not resolved within 10 Business Days of a Party receiving a Dispute Notice, any Party to the Dispute may request that the matter be referred to mediation.
- (b) If the Parties to the Dispute agree to participate in a mediation, the Dispute must be referred to a mediator.
- (c) The mediator must be a person agreed upon by the Parties, or failing agreement, appointed by the President of the Law Society Northern Territory.
- (d) The Parties must equally bear the costs of the mediator. Each Party is responsible for their own costs.

9.5 Determination by a Court or Tribunal

If the Dispute is not:

- (a) referred to mediation; or
- (b) resolved;

within 20 Business days of a Party receiving a Dispute Notice, any Party to the Dispute may seek to have the Dispute determined by a court or tribunal of competent jurisdiction.

9.6 No premature legal action

Subject to clause 9.7, no Party may commence any legal action until the dispute resolution procedures outline in this clause have been exhausted.

9.7 Urgent Injunctive Relief

Clause 9.6 does not prevent either Party seeking urgent injunctive or interlocutory relief or from filing an originating motion to prevent a claim becoming barred by the effluxion of time.

10. MISCELLANEOUS

10.1 Entire Agreement

This Agreement terminates and supersedes all previous written and oral agreements between the Parties in respect of the ILUA Area and constitutes the entire agreement between the Parties.

10.2 Severability

If a court determines that a word, phrase, sentence, paragraph or provision in this Agreement is unenforceable, illegal or void then it shall be severed and the other provisions of this Agreement shall remain operative.

10.3 Governing Law

- (a) This Agreement is to be governed by and construed in accordance with the laws in force in the Northern Territory;
- (b) Each party submits to the non-exclusive jurisdiction of the courts of the Northern Territory and the Commonwealth of Australia and any courts competent to hear appeals from those courts. For the avoidance of doubt any proceedings commenced in the Federal Court of Australia must be commenced in the Northern Territory District Registry.

10.4 Variation

No provision in this Agreement can be varied except in writing signed by the Parties.

10.5 Counterparts

This Agreement may be signed in any number of counterparts and all such counterparts when taken together shall constitute one instrument.

10.6 Electronic Exchange

A Party who has executed a counterpart of this Agreement may exchange that counterpart with another Party by sending it electronically or by facsimile and, if that other Party requests it, promptly deliver that executed counterpart by hand or by post to the other Party (noting that the validity of this Agreement is not affected if the Party who has sent the Agreement electronically or by facsimile delays in delivering or does not deliver it by hand or by post).

SIGNING PAGE

EXECUTED by the parties as an Agreement:

SIGNED by the Minister for Infrastructure,)
Planning and Logistics for and on behalf of the)
NORTHERN TERRITORY OF AUSTRALIA in)
the presence of:)

.....
Signature

.....
Signature of Witness

.....
Date

.....
Name of Witness

DRAFT

The **COMMON SEAL** of the [insert name])
LAND COUNCIL was hereto affixed by)
authority of a resolution of the said Land)
Council in the presence of:)

.....
Chairperson (signature)

.....
Date

.....
Chairperson (print name)

.....
Witness (signature)

.....
Witness (print name)

.....
Position

.....
Member (print name)

DRAFT

EXECUTED by [insert name] **ABORIGINAL**)
CORPORATION RNTBC ICN [insert no.])
pursuant to section 99-5 of the *Corporations*)
(*Aboriginal and Torres Strait Islander*) *Act 2006*)
on the)
_____ day of _____ 2018)
in the presence of:

.....
Signature of Director

.....
Signature of Director/ Secretary

.....
Print Name of Director

.....
Print Name of Director/ Secretary

DRAFT

ANNEXURE A – DESCRIPTION OF THE ILUA AREA

[insert description of ILUA Area including survey, plan, lot no, and code for applicable town].

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ANNEXURE B – MAP OF THE ILUA AREA

[INSERT MAP]

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ANNEXURE C – TOWN LANDS NATIVE TITLE POLICY

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