

DRAFT TEMPLATE RESPONSE

Consequential issues and funding implications that flow from the draft template.

I Preliminary Negotiation Issues

The Local Government draft template is based on the following premise:-

1. The existence of goodwill and trust between the parties.
2. The relevant claim groups being readily accessible.
3. Adequate funding.

Where claimants are either not now resident in the claim area or not within the particular Local Government area of the claim area there will be additional financial considerations.

1. Travel costs, accommodation, meals etc for negotiation meetings. Who pays?
2. Financial costs for ongoing administration of ILUA? Has the council the "CAPACITY TO PAY".
3. Where a broad regional ILUA negotiation is proposed (covering several local government authorities) and your Council does not take steps to be represented then you could be faced with these issues.

II Implications (including financial) for Councils if draft template adopted.

A summary of what is proposed to be negotiated in the draft template:

- 1) validation of invalid acts
- 2) consent to future acts
- 3) define what lands constitute "sensitive land areas".
- 4) Aboriginal Heritage protocols
- 5) Planning protocols
- 6) Establishment of a liaison committee
- 7) Compensation.

Then the task is to examine in what areas there are cost implications.

1. The draft template is subject to the Aboriginal Heritage Act (AHA) (regardless of the agreed protocols).
 - No immunity from prosecution under the Aboriginal Heritage Act from Aboriginal people deemed "traditional owners" for the purposes of the AHA and who are not native title claimants (should a Council proceed with a development in accordance with the ILUA protocols).
 - Councils forced to take out a s.12 AHA application for a determination whether a site exists in the proposed development area. This has cost implications.
 - The Minister has a discretion pursuant to the AHA whether he/she accedes to your request. Potentially could stifle/thwart development.
 - Should Councils take the risk of assuming the template would provide sufficient protection, it runs the risk of a development being halted.
 - Where overlapping native title claims are resolved by 2 native title claim groups, high risk of potential sites from the claimant group so drawing back their boundaries.

- Dreaming trails can run several hundred of kms outside a claim area, so an aboriginal person/s deemed a “traditional owner/s” for the purposes of the AHA may thwart a proposed development even though the claim area of that group/person is some several hundred kms away.
- If the Minister makes a s.12 AHA determination that a site/s exist within the proposed development area, there is no right of appeal against same. A party however can apply under s.23 AHA to the Minister for permission to proceed with the development and so effectively destroy the site (presumably if it can not be reasonably accommodated within the development). Again the Minister has a discretion whether he/she will grant same.
- The draft template does not provide the protection you might at first think it does. The registration of an ILUA prevents other native title aspirants from lodging a claim over the same area, but it leaves the AHA out there “swinging in the breeze”.
The State really needs to have a major overhaul of the AHA to ensure that the interests of the claimants and the respondent parties are protected.
- Can the Council rely on the decision of *Wooley v Barnes 25904/94 SA* Magistrates Court (to negate the effect of a prosecution under s.12 of the AHA. (That is it would be necessary to establish that the accused knew of the existence of the site and deliberately or wilfully or possibly with reckless indifference disturbed damaged or interfered with same).
In this case the application of S.12 of the AHA was not considered. In the case of a council who proceeded with a development in a claim area even though cleared by the processes of the ILUA could still be met with a prosecution by a person who is not a member of the claim group but who meets the definition of “traditional owner” under the Aboriginal heritage Act. The Council could be held liable as it had not made application pursuant to s. 12 of the AHA and therefore deemed reckless as it should have the knowledge that potentially there may be Aboriginal sites in the area.
- What Local Government needs is a one stop shop (an expression borrowed from The Corporation of the City of Whyalla).

2. Future developments / future acts.

Such acts are defined as a notifiable act process on sensitive land, The definition of “sensitive” land is not defined but is to be negotiated.

- Areas where there are sites but are considered “culturally sensitive” that is, the existence of the site cannot be disclosed according to the claim group law and custom may be managed differently by claim groups. An issue to be flushed out in negotiations.
- Ongoing costs of development compliance (including possible heritage surveys if so requested) with each and every development. (Anthropologists fees, and his/her travel costs, accommodation & claimant members costs, accommodation etc if not in close proximity) must be budgeted for annually) This is an open ended funding commitment.

Claimant clearance of the claim area (or such narrower area as may be agreed) up front would significantly reduce costs & enable Councils to more effectively manage budgets. Future

developments proposals could be then far better strategically managed. There is a resistance by the State and ALRM to fund this exercise up front. Local Government is left to pick up the tab in the template.

3. **Dispute Resolution**

A process is detailed in the template of managing disputes that arise in connection with the ILUA. Ultimately if the processes of the ILUA are exhausted then the President of the Law Society or her/his nominee can appoint an Expert to determine the dispute. He or she may determine that the whole or part of the costs of one dispute party must be paid by the other dispute party. This of course is an open ended funding commitment.

4. **Administration of planning protocols**

These are at the Council's expense or the proponent's expense depending on which entity is the developer.

5. **Establishment of a Liason Committee**

Secondly, the establishment of a liason committee of claimants and the Council. This is a forum which provides opportunity for discussion on a raft of matters and helps to maintain relations between the parties.

Local Government is to provide the secretarial services.

The template is silent on who pays the cost of claimants to attend and their respective travel expense requirements. Costs must be agreed up front, i.e, who pays / or an agreement that each party pays their own costs. There is no commitment by the State or ALRM it will guarantee funds.

6. **Aboriginal Incorporated Body**

Will the native title claim group through its incorporated body have ongoing funds available to administer the ILUA. Local Government authorities should insist on some guarantee in order to have the confidence that there will be ongoing funds available.

7. **Compensation**

The draft template is silent on this issue.

There is no acknowledgment that the State will negotiate terms of compensation with the claimants or that it is a State responsibility.

Conclusion

These areas do need to be addressed before entering into future Local Government ILUA negotiations, in order to ensure ongoing sustainable management of ILUA's by local government.

Some of the AHA implications I have referred to are 'on ground' practical consequences that are occurring in the Local Government sector now. Without effective amendments to or review of the AHA Act, the draft template remains a toothless tiger.

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